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Department of Human Rights and Rule of Law

Legal System Monitoring Section

KOSOVO

FIRST REVIEW OF THE CIVIL JUSTICE SYSTEM

June 2006

GLOSSARY

DOJ	Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
HPD/HPCC	Housing and Property Directorate and the Housing and Property Claims Commission
KFOR	Kosovo Force
LCP	Law on Contested Procedure
LEP	Law on executive procedure
LSMS	Legal System Monitoring Section
OSCE	Organization for Security and Co-operation in Europe
PISG	Provisional Institutions of Self Government
UNMIK	United Nations Interim Administration Mission in Kosovo

EXECUTIVE SUMMARY

The Legal System Monitoring Section (LSMS), within the OSCE Mission in Kosovo, has been monitoring the judiciary in Kosovo since 1999. This work has produced ten public reports and eight semi-public reports, analysing the criminal justice system from a human rights perspective, identifying the main concerns in criminal cases and issuing recommendations on how to overcome the problems and ensure the system's compliance with international standards. Recognizing also the importance of a functioning civil procedure for the establishment of an effective judicial system in all its aspects, on January 2005 the LSMS extended its mandate to begin monitoring civil law cases pending in the courts. Following the monitoring of several different types of civil cases, this is the first comprehensive OSCE Review on the civil justice system in Kosovo.

The first chapter of the Review addresses a problem that the LSMS came across while monitoring civil procedures, i.e. the huge number of cases pending in the courts, causing undue delays, and therefore a violation of the parties' right to a trial within a reasonable time. While there are many factors contributing to those delays, this Review focuses on the most important ones that can be addressed by the judges in order to solve this backlog. The first concern noted in this regard is the poor management of cases by the judges, who either commit procedural errors by not submitting statements of claim on time to the defendants, resulting in unnecessary postponements of the court sessions, or simply scheduling trial hearings without all the necessary elements to conduct a trial, leading to predictable adjournments. In this context the OSCE is concerned with the excessive number of hearings and postponements in each case, causing undue delays in most civil cases. Moreover, the difficulty in delivering summonses to the parties and to the witnesses also results in consecutive adjournments of trial sessions. Finally, this chapter identifies several shortcomings in the Law on Contested Procedure, whose failure to establish time limits for numerous important procedural acts gives a wide margin of discretion to judges and results in the prolonging of civil cases for too long.

In the second chapter, the Review analyses the problems encountered in the resolution of property disputes before the courts. The first of these problems is the use of false documents by individuals to certify fraudulent purchase contracts before the courts, over properties formerly belonging to Kosovo Serbs that abandoned their houses after the conflict. Another concern refers to property cases against absent persons, usually Kosovo Serb internally displaced persons whose current whereabouts are unknown, where courts appoint a temporary representative to defend the absent party. Although this procedure is foreseen in the law, courts are not respecting its rules, as well as the spirit of the law, resulting in the resolution of those cases to detriment of the absent parties' right to a fair trial, as they do not participate in the proceedings, remain unaware of the court decisions over their former properties and are not effectively defended by the temporary representatives. Finally, the chapter analyses problems in property disputes that result from the legacy of the past in Kosovo, namely the fact that many old property transactions did not fulfill the legal requirements for their validity (including the certification of the contract in the courts and the register of the property in the cadastral books), because of the discriminatory legislation in force at the time prohibiting property sales between Serbs and Albanians in Kosovo. As a result courts today have to decide on property claims solely based on oral or informal contracts, which are not valid under the existing law.

Given that the judiciary in Kosovo is still undergoing its initial stages of development and the executive branches of local and central government are in the process of fully establishing themselves as the hand over of UNMIK to the local authorities takes place, the issues of separation of powers and independence of the judiciary acquire special relevance at this

moment in time. With these concerns in mind, the third chapter of the Review focuses on cases of undue interference by governmental actors with court proceedings that affect the independence of the courts in Kosovo. According to the information gathered by the OSCE monitors, the main forms of interference by municipal authorities on the work of the courts consist in acts of obstruction of the proceedings and pressure on the judges, which displays an apparent contempt of municipal officials for the judicial authorities. On the other hand, letters have been sent by the Department of Justice to the courts instructing the judges not to hear certain categories of cases. These suspended cases consist in more than 17,000 claims for compensation filed by Kosovo Serbs against KFOR, UNMIK, the PISG, the Municipalities and individual persons, for the property damages they suffered during and after the conflict. These instructions sent by the Department of Justice to the courts which stayed these categories of cases, while arguably having certain justification, did not provide a definite time frame or mechanism for eventual resolution of the claims. As a result there are several thousand residents of Kosovo whose claims have remained suspended indefinitely until the present moment.

The fourth and final chapter of the Review examines problems identified by the OSCE with executive proceedings. Bearing in mind that the executive procedure constitutes the legal mechanism to compel a party to abide by a final judgment in case he/she fails to do so voluntarily, its efficiency is fundamental for the judicial system to be capable to enforce the rule of law and ensure the realization of the rights of the parties. Given the importance of the executive procedure to build trust in the justice system by the population in Kosovo, the problems that affect it are all the more grave and urgent to address. One of the concerns is that binding judgments are not executed or if they are, they are executed with excessive delays, infringing upon the right to a fair trial within a reasonable time. This ineffectiveness in the execution of judgments is caused by violations of provisions of the law on executive procedure requiring a prompt action by the courts upon the submission of a proposal for execution. Such violations of the law may be due to the overload of judges and their backlog of cases, or they may be caused by external factors. By holding direct responsibility for the enforcement of final court judgments, executive judges can easily be targeted with external forms of pressure, such as threats, assaults or corruption, that affect their ability to deal with executions in an independent and effective manner. In this regard, intimidation of judges and corruption are serious problems that affect the executive procedures.

The concerns identified in this first Review on the Civil Justice System provide a general overview of the main problems affecting the civil courts in Kosovo in many different types of cases as identified by the OSCE monitors. The variety of issues addressed is due to the fact that this is the first review of its kind, which called for an overarching report on the problems affecting the civil justice system. The recommendations at the end of each chapter intend to tackle those issues in order to ensure the system's compliance with international standards. Given that some of the problems are systematic and result more from the current context in Kosovo than from judicial errors committed by the courts, their solution also involves different actors external to the justice system. However those systemic difficulties shall not be seen as an unsurpassable obstacle to improve the civil justice, but rather as concerns that can be and should be addressed actively by all responsible entities involved in this important period for the future of Kosovo, ensuring an effective judicial system in all its facets.

Chapter 1

DELAYS WITHIN CIVIL PROCEEDINGS

One of the major problems affecting civil proceedings throughout Kosovo is the backlog of cases pending in the civil courts. According to the last statistics provided by the Department of Judicial Administration there are currently 43,760 unresolved civil cases.[1]

The present Chapter addresses three issues which the OSCE considers to play a very important role in increasing the already significant backlog of civil cases pending in the courts. Firstly, the lack of or ineffective case management by judges; secondly, the problems faced by the courts in delivering summonses[2], and finally the Chapter will also focus on certain difficulties arising from deficiencies in the applicable Law on Contested Procedure (hereinafter LCP), a law from 1977 with serious shortcomings that need to be addressed as a matter of priority.

1. Poor management of cases

While acknowledging that the parties hold a more significant responsibility for the progress of the proceedings in civil cases than in criminal cases, the OSCE is of the opinion that judges, as the decision-making authorities directing the proceedings, are also responsible for the timely resolution of civil disputes. This opinion is supported not only by the LCP, which places the court under an obligation to direct the proceedings with due diligence,[3] but also by the jurisprudence of the European Court of Human Rights, according to which in civil cases courts are not exempted from "ensuring compliance with the requirements of Article 6 ECHR concerning reasonable time."[4]

After having monitored civil cases for over a year, the OSCE concludes that the poor management of cases is one of the key-reasons for the existent backlog of civil cases. In a considerable number of civil cases monitored it has been noted that ineffective case management caused undue delays in the proceedings and had a negative impact on the parties' right to trial within a reasonable time.[5]

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[1] See the "*Overview of civil backlogs*" for the period of the 1 - 31 December 2005 from the Department of Judicial Administration.

[2] It should be mentioned that according to the Rule of Law Standards "[t]he backlog of civil cases [should be] steadily reduced," the implementation of automated case management systems in all courts being one of the actions pointed out as necessary to meet this standard (Standard 12, Action 12.3 of the Rule of Law Standards – Kosovo Standards Implementation Plan).

[3] Article 10 of the Law on Contested Procedure (SFRY Official Gazette 4/77, 36/80, 69/82, 58/84, 74/87, 57/89, 20/90, 35/91), hereinafter LCP, provides that "[t]he court shall conduct the procedure without any unnecessary delay, causing as little cost as possible and preventing any abuse of the rights that belong to the parties in the proceedings." See also Articles 311, paragraph 2 and 314, paragraph 1 LCP, respectively establishing that "[i]t shall be the duty of the president of the panel to make sure […] that the proceedings do not take too long […] so that the trial is, if possible, completed in one sitting."; and that "[w]hen the panel decides to postpone the trial sitting, the President of the panel shall make sure that all the evidence the adduction of which was set for that sitting be provided for the next sitting, and that all other preparations be undertaken so that the case can be concluded at that next session."

[4] See *Unión Alimentaria Sanders SA v Spain*, European Court of Human Rights, A 157 paragraph 35 (1989).

[5] For more information on case management, see the publication prepared by the United States Agency for International Development and the National Center for State Courts, titled "*Case flow Management and Delay Reduction. Statistical Studies of Case flow and Pending Caseload in Selected Courts,"* October 2005.

1.1 The lack of and ineffective case management at the pre-trial stage of the proceedings

The lack of case management during the pre-trial stage of the proceedings is a matter of particular concern, since the proper handling of this phase is crucial for a prompt resolution of any civil case. The pre-trial stage of the proceedings starts with the submission of the lawsuit. The main purpose of this phase is the preparation of the case for plenary disposition, through the assessment of any procedural violations, correction of submissions, establishment of the disputable and undisputable facts and, if possible, submission of evidence. In many jurisdictions, the pre-trial stage of the proceedings is also used as an opportunity for procedural dismissal or settlement.

The LCP contains a number of provisions regulating the pre-trial phase of proceedings.[6] According to the law, this preliminary stage should comprise a "preliminary examination of statement of claim, service of the statement of claim upon the defendant for his response, preliminary hearing and setting of date for the trial […]."[7] It is also during the preliminary proceedings that, after a preliminary examination of the statement of claim, the president of the panel shall call the parties for a preliminary hearing,[8] during which the statement of claim and the defendant's answer to it are presented. The LCP further determines that "[a]fter establishing that there are no impediments to continuing the proceedings, the president of the panel shall […] decide which witnesses and expert witnesses to call to the trial and which other evidence is to be obtained. […]."[9]

Despite the provisions in the LCP regulating this important stage of the proceedings, the OSCE has monitored several cases in which the courts merely ignored or misapplied such provisions. The following sub-sections will present the concerns identified by the OSCE in this regard.

1.1.2 Lack of or improper preliminary examination of the statement of claims

The failure of judges to preliminarily examine the statements of claim before scheduling trial sessions has resulted in postponements that, had such examination been performed at an earlier stage could have been avoided. In this context, it is worth recalling that according to the LCP, "[w]hen the president of the panel establishes that the statement of claim is not understandable or is not complete or that there are some faults related to the capacity of the claimant or the defendant to act as parties to the dispute […] he shall undertake necessary measures stipulated by the law."[10]

Notwithstanding the applicable legal framework, the OSCE monitored cases in which the courts failed to apply the mentioned provisions and scheduled trial sessions in cases where the statement of claim was missing essential information.

> The first example involves a property dispute before the Municipal Court in Gjilan/Gnjilane. In this case, the claimant filed a lawsuit on 3 September 2003. Although the lawsuit did not contain the defendant's address, the court only ascertained this fact during the first trial session, held on 18 April 2005. During the session, the presiding judge ordered the claimant to amend the lawsuit by providing

[6] See Chapter 20 of the LCP, Articles 277 to 293.
[7] Article 277(2) LCP.
[8] Article 284 LCP.
[9] Article 289(1) LCP.
[10] Article 281 LCP. See also Article 109 LCP, referred to by Article 281, which states that "[i]f the submission is not understandable, or does not contain all that is necessary for action upon it, the court shall instruct the applicant and assist him in correcting or supplementing the submission, and for that purpose, it can call the applicant to the court, or return the submission for correction."

> the court with the exact address of the defendant within 15 days. After this decision, the trial was postponed *sine die*.
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> In a second example before the same court, also involving a property dispute, a lawsuit was filed on 14 September 2004, omitting the address of the defendant. On 14 March 2005, at the beginning of the first trial session, the presiding judge determined that the defendant had not been summoned because the claimant had not provided the court with his address. Only on this date did the court question the claimant about the whereabouts of the defendant and was informed that they were unknown to the former.

In these cases, the court set the date of the main trial despite the absence of any information about the address of the defendants. As a result, the trial sessions took place only to be adjourned with a view to locate and summon the defendants. It is important to mention that according to the law court submissions shall be understandable, and must contain, in particular, "the name, occupation and place of domicile or residence of the parties […]."[11] Therefore, in both these examples, the court should have asked the claimants to provide this relevant information before scheduling the main trial sessions.

In other instances, the trial sessions had to be adjourned due to the absence of other relevant information.

> In a property case before Municipal Court in Prizren, on 20 June 2005 the claimants filed a statement of claim asking the Prizren Municipality to return a parcel of land claiming to be the heirs of the legitimate owner of the contested real estate. Without carrying out a preliminary hearing,[12] the presiding judge scheduled the main trial session for 11 July 2005 and summoned the parties accordingly. However, the hearing could not take place because the claimants failed to attach to the statement of claim the documents required to establish their active legitimacy, such as the death and birth certificates, proving their family relation with the alleged owner of the land. As a result, the hearing had to be adjourned in order for the claimants to submit the aforementioned documents.
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> A similar example can be found in a case involving a claim for damage compensation pending before the Prishtinë/Priština Municipal Court.[13] Although the claim was filed on 24 April 2002, the court waited until 1 March 2005, the ninth session scheduled in this case, to ask the claimant to submit an essential and basic piece of evidence.[14] Apart from that ruling, nothing else was achieved during the session, and the case was postponed until 23 March 2005.

In these examples the postponement of the trial sessions could have easily been avoided if the presiding judge, after the preliminary examination of the statement of claim as envisaged by the law,[15] had requested that the claimants submit the relevant evidence before setting the dates of the main trial sessions.

[11] Article 106(2) LCP.
[12] Article 284(3) LCP.
[13] The OSCE has reported on this case in the Department of Human Rights and Rule of Law Bi-Weekly Report, February 2005, which addressed the issue of summonses delivery problems.
[14] A document attesting that the plaintiff is the owner of the object.
[15] Articles 281 and 109 LCP.

1.1.3 Failure to deliver the statement of claim to the opposing party before the main trial session

Even though it seems obvious that a defendant would not be able to prepare his/her case until the moment he/she has been informed about the content of the statement of claim, the OSCE has observed that in certain instances courts failed to deliver the claim to the defendant before the main trial session. Although the law does not clearly establish a deadline for the submission of the statement of claim to the defendant,[16] the conclusion that it must be delivered before the preliminary hearing (when it takes place)[17] or prior to the main trial session can easily be drawn from the interpretation of certain provisions in the applicable law as well as from the need to ensure that the defendant is provided with an adequate time to prepare the case, as required by domestic and international standards.[18] It is also worth mentioning that the dispute can only begin when the statement of claim is delivered to the defendant.[19]

According to the LCP, if during the pre-trial phase of the proceedings the president of the panel considers that the case may continue on the basis of the statement of claim "he shall […] order that a copy of [it] is served upon the defendant." The law also states that while setting down the term for the trial, "[a]long with summons for the trial, the statement of claims shall be served on the defendant, unless already served on him before."[20] Therefore, although not establishing a specific deadline, it seems clear and logical that the statement of claim must be submitted before the start of the preliminary hearing and main trial.

Despite the above mentioned rules, in the case described below the defendant was only served with a copy of the claim after the main trial had started. This has resulted in the postponement of the trial session due to the fact that the defendant had not been given time to adequately prepare the case and caused undue delays in the proceedings.

> In a case before Mitrovicë/Mitrovica Municipal Court, involving a dispute over a breach of contract submitted to the court on 3 January 2001, the presiding judge scheduled the main trial session for 18 February 2003. Regardless of the presence of both parties, the trial could not proceed to a consideration of the merits because the defendant had not received the statement of claim together with the summons for the hearing. In order to allow the defendant adequate time to prepare the case, the presiding judge was forced to adjourn the hearing to 24 March 2003.[21]

[16] The only deadline imposed by the law is the one established in Article 286(1) LCP, which states that "[t]he preliminary hearing should be set down in such a way as to leave the parties enough time to prepare themselves, but at least eight days from the receipt of summons," together with which the statement of claim shall be served to the defendant (Article 284(1) LCP). However, these provisions entrust the courts with a discretionary power regarding the date of the preliminary hearing.

[17] According to Article 284(2) LCP, "[t]he preliminary hearing shall not be set where a single judge is in charge of the case."

[18] See Article 286(1) LCP and Articles 14(1) of the International Covenant on Civil and Political Rights and 6(1) of the European Convention on Human Rights. See also the judgment of the European Court of Human Rights, in *Dombo Beheer vs. Netherlands,* where the Court affirmed that "as regards litigation involving opposing private interests, 'equality of arms' implies that each party must be afforded a reasonable opportunity to present his case […] under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent" (see A 274 para 33 (1993), see D.J. Harris, M. O'Boyle, C. Warbrick, *Law of the European Convention on Human Rights*, Butterworths, London, 1995, pp.209 ss.).

[19] See the Commentary on the Civil Procedure Law, Dr. Faik Brestovci, Law Faculty, Prishtinë/Priština, 2002, page 142.

[20] See Articles 284(1) and 293(2) LCP.

[21] It is worth mentioning that on 24 March 2003, following a proposal by the respondent, the court decided to suspend the proceedings. On 2 July 2003, the claimant submitted a request for the court to proceed with the case, pursuant to Article 217(2) LCP. Since then, seven trial sessions were scheduled

The same concern arises in relation to the submission of evidence to the opposing parties, which will be addressed in the following sub-section.

1.1.4 Failure to submit evidence before the main trial session

One important outcome of the preliminary stage of the proceedings should be the presentation of evidence by the parties. While the LCP does not impose a deadline for the submission of evidence, a number of provisions seem to indicate that there is an obligation for the claimant to submit the proposed evidence (particularly documentary evidence) together with the statement of claim[22] or, at least, at the preliminary hearing.[23] Therefore, whenever the parties fail to do so in due time, in order to admit the submission of evidence the court should require that the parties justify the late submission. By accepting an unjustified late submission of evidence during trial sessions and not requesting the parties to do it at an earlier stage of the proceedings, courts are contributing to delays in the proceedings, since a delayed submission of evidence often leads to the adjournment of cases on the grounds that the opposing party did not have sufficient time to assess the evidence.

> In a case before the Municipal Court in Prizren involving a request for annulment of a contract, the court scheduled the main trial session eleven times between October 2002 and June 2005. However, on 20 June 2005, it was still not possible to enter into the merits of the case because the claimants had not submitted some documents proposed as evidence in the statement of claim. In order for the representative of the defendants to be able to evaluate the documents on which the claim was based and prepare the case, the court ordered the claimants to submit the aforementioned evidence within five days and adjourned the hearing.

In this case, it took two years and eight months from the start of the trial for the court to order the claimants to submit the evidence proposed in the statement of claim.[24] In order to comply with the principle of equality of arms and the timely conclusion of the proceedings, the presiding judge should have requested the claimants to submit those documents immediately after the preliminary examination of the statement of claim.

Even if the parties do submit evidence in due time, it often happens that this evidence is not sent to the opposing party by the court. The OSCE has monitored cases in which sessions had to be postponed because the court failed to send the evidence to the opposing party before the trial was due to take place.[25]

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between 4 July 2005 and 19 December 2005, due to the difficulties in summonsing the respondents. On 13 January 2006 the court appointed a temporary representative for the respondents and the last session on this case was held on 9 February 2006.

[22] When such evidence is already in his/her possession at that moment.

[23] Article 286(1) LCP states that "[i]n the summons for the preliminary hearing, the parties shall be ordered to bring with them all documents which they intend to use as evidence, as well as all things that need to be viewed in the court." Moreover, Article 186(1) LCP determines that "[t]he complaint should contain […] evidence proving those facts [on which the plaintiff grounds his claim] and all other information that every application must contain."

[24] It is worth mentioning that the statement of claim was submitted to the court on 11 November 1998.

[25] It is worth mentioning that the law establishes an obligation for the parties to provide the court with sufficient number of copies of any submissions so that these can be sent to the opposing party (Article 107 LCP). Article 109(5) LCP also establishes that "[i]f the submissions or enclosures are not submitted in sufficient number of copies, the court shall invite the applicant to supply the additional copies within a certain period of time. If the applicant does not comply, the court may order that the submissions and enclosures be copied at the expense of the party."

> In one example before the Municipal Court in Prizren, involving a request for eviction filed on 25 August 2005, the fourth trial session had to be adjourned due to the fact that the parties were not provided with a copy of a report until the trial session held on 20 January 2006.[26]

This case is another example of the poor case management affecting the efficiency of the courts. The OSCE considers that these are situations which could easily be addressed and corrected by court administrators and clerks, who should play a more pro-active role in the management of cases and ensure that any relevant document submitted to the court is forwarded to the opposing party in due time.

1.2 Excessive number of hearings and postponements

In addition to the pre-trial stage of the proceedings, the lack of case management is also reflected in other stages of the proceedings. The excessive number of hearings scheduled in civil cases, the lack of appropriate planning of such hearings and the number of postponements are other issues of concern.[27] In this context, the OSCE is of the opinion that a straightforward provision establishing the general criteria for postponements should be inserted in the applicable law and judges should be held accountable for any postponements not expressly allowed by the LCP.[28]

The following is a good example of a case in which the lack of preparation for hearings has caused delays in the proceedings, with the trial sessions having been postponed without the court even entering into the merits of the dispute.

In a case involving a claim for compensation for damage pending before the Prishtinë/Priština Municipal Court since 17 October 2001, although the case has been scheduled six times, almost no progress has been made in the proceedings. The first hearing, scheduled for 20 November 2001, was postponed due to the fact that the defendant had not received a copy of the statement of claim as well as a decision from the Prishtinë/Priština Municipal Court and needed time to prepare the case. The second hearing, scheduled for 13 December 2001, was postponed due to a proposal by the claimant for the appointment of an expert. On 3 December 2003 the case was postponed due to a proposal for a sight view;[29] on 3 February 2005 a brief session was held but adjourned soon after it had commenced because the representative of the defendant claimed he had not been provided with a copy of a decision which he had requested during the first hearing.[30] On 11 May 2005 a session was held but adjourned shortly after it

[26] It should be mentioned that the report had already been submitted to the court on 24 November 2005.

[27] In relation to the excessive number of hearings normally held in civil proceedings, it should be mentioned that within the Council of Europe, it has been the recommendation of the Committee of Ministers that member States reduce the number of hearings in civil cases. In fact, Principle 1 of the Principles of Civil Procedure Designed to Improve the Functioning of Justice, states that "[n]ormally, the proceedings should consist of not more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments and, if possible giving judgment. The court should ensure that all steps necessary for the second hearing are taken in good time and, in principle, no adjournment should be allowed except when new facts appear or in other exceptional and important circumstances." See Appendix to Recommendation No. R (84) 5. The LCP seems to advocate a similar approach as Article 311(2) states that "[i]t shall be the duty of the President of the Panel to make sure that the matter is thoroughly examined but that the proceedings do not take too long […] so that the trial is, if possible, completed in one sitting."

[28] Although the law does not regulate the issue of postponements in a uniform manner and fails to establish general criteria regarding this matter, there are provisions throughout the LCP providing for postponements. See, for example, articles 116(1), 190(6) and (7), 296(2), 318(3), 498 and 499.

[29] The sight view took place on 8 December 2003.

[30] The judge postponed the session without having confirmed whether or not the respondent, in the meantime, had already received the decision. The claimant objected to the postponement of the session

started because one expert had failed to submit his report. On 14 June 2005 a new session had to be postponed because a different expert report had not been submitted.[31] Eventually the expert submitted his opinion some time between 10 November 2005 and February 2006 and a new session was scheduled for 30 March 2006.

In this case, pending since 2001, the court's lack of control over the proceedings is obvious. The excessive number of postponements following any kind of proposal by the parties, and the courts' failure to impose a deadline for the submission of expert opinions are good examples of this lack of control.

In a second example before the Municipal Court in Pejë/Peć, a number of trial sessions were postponed due to poor case management. The second trial session on this case, scheduled for 7 September 2005, was postponed because the presiding judge had not had the chance to prepare himself for the session,[32] as he was busy with other cases. On 7 November 2005, the fourth trial session scheduled on this case had to be adjourned to the afternoon with the justification that the presiding judge was busy with another case. Two other trial sessions were postponed because of the absence of a witness who eventually responded to the court summons on 14 February 2006.[33] Although the court had already fined the witness on 16 January 2006, this decision was revoked after the witness justified his absence with the fact that he had been very busy.

This example illustrates the lack of preparation of trial sessions by judges as well as the poor management of the judges' agendas. Whereas in the first two occasions the court could have informed the parties well in advance that it would not be possible to hold the sessions, it failed to do so. Furthermore, while the postponement of a trial session based on the fact that the judge did not have the opportunity to prepare the case is not foreseen by the applicable law, the fact that the same judge cancelled a decision whereby a witness had been fined is also of questionable legality.

Apart from the excessive number of hearings, the way the hearings are scheduled also demonstrates a lack of effective case management. In the examples described below the court scheduled hearings for official holidays.

> In a case involving a claim for compensation for damage filed with the Rahovec/Orahovac Municipal Court on 30 July 2001, the court scheduled the sixth hearing held in the case for 14 June 2005. However, since this day was an official holiday in Rahovec/Orahovac the hearing could not take place.
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> In a different case also involving a claim for compensation for damage before the Prizren Municipal Court the lawsuit was filed on 22 June 2004. The second hearing in this case was scheduled for 24 October 2005 but had to be postponed due to the fact that that day was an official holiday and the courts were not working.

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by saying that it was unnecessary and that it would delay the proceedings. The judge has later on confirmed that the decision had already been given to the respondent.

[31] It is worth mentioning that the court did not establish any deadline for the expert opinion to be submitted.

[32] The presiding judge in question had been assigned to the case, some time between 2 June 2005 and 7 September 2005, pursuant to the exclusion of the judge originally assigned.

[33] The sessions postponed due to the absence of the witness were scheduled for 12 December 2005 and 16 January 2006. However, the same witness had already failed to appear on 7 December 2005, although duly summoned.

All the examples described above demonstrate the courts' failure to direct the proceedings in an efficient manner.[34] Whether because the judges do not thoroughly prepare and study the cases prior to the hearings, or due to lack of organisation in scheduling the hearings, the truth is that courts are not playing an active role in ensuring the rapid progress of the proceedings. As a consequence, many hearings in civil cases are being systematically postponed, causing undue delays in the proceedings and contributing to increase the backlog of civil cases in Kosovo.

2. Summons delivery problems

Another problem causing undue delays in civil proceedings is the fact that many trial sessions are continuously being postponed due to summons delivery problems.[35] The major problem with the summonsing system appears to be the disorganisation and lack of control of this procedure by most of the courts. At the same time, court messengers and PTK staff appear to lack appropriate training on the legal provisions applicable to the summoning procedure and as a consequence the legal provisions regulating this issue are often disregarded.

According to the LCP, the summonses should normally be served by mail but can also be delivered by a designated member of the court staff (court messenger), through the competent municipality or directly at the court.[36] Furthermore, in certain cases, for example if the person to be summoned happens not to be at his/her address, the summons can be delivered to one of the adult members of the family or some of the persons specified by the law.[37] The LCP further prescribes that a receipt has to be signed by both the recipient and the deliverer.[38]

Notwithstanding these rules, it often happens that the summons receipts are returned to the court bearing no mention of whether the party was regularly summoned or not. Given this lack of information, the court is often left with no other option than to adjourn the session.[39] In other instances the summons receipt cannot even be found in the case file.

[34] In this context, when applicable, courts should make use of article 316 LCP which states that "[…] the court may impose a fine […] to the party, its legal representative, agent or participating third party who has, through procedural acts, heavily abused the rights recognized under this code."

[35] The OSCE has recently been informed about the problems faced by the Municipal Court in Mitrovicë/Mitrovica regarding the delivery of summonses in the northern part of the city. While until 15 June 2005 the police were delivering the summonses in the north, they have ceased to so due to the lack of human resources. On the other hand, the fact that PTK does not operate in the northern part of Mitrovicë/Mitrovica and the lack of Kosovo Serb court messengers constitute additional problems. Since it is not considered safe for Kosovo Albanian court messengers to deliver summonses in the northern part of Mitrovicë/Mitrovica these are not being delivered and sessions have to be postponed.

[36] See Article 133 of the LCP.

[37] Articles 141 and 142 of the LCP. Since Article 142, determining which documents shall be delivered personally to the party, does not list summonses, it may be concluded that these are among the documents that can be submitted to one of the persons mentioned in article 141 LCP. It is also worth mentioning that article 141 establishes that "if nobody happens to be in the apartment, the writ shall be served to the house keeper or to the neighbour, if they agree to accept it."

[38] See Article 149 LCP, which determines that "[i]f the recipient refuses to sign the proof of service, the deliverer shall note that […] and write the date of delivery in letters, and by doing so, the service is considered made. […] When, in accordance with the provision of this Code, the writ has been served to some other person instead the one to whom the writ should have been served, the deliverer shall mark the relation between the two persons on the proof of service."

[39] According to the LCP, in order for a trial *in absentia* to be held the absent party has to be regularly summoned. See Articles 295 and 332(1) of the LCP.

In a case before the Prishtinë/Priština Municipal Court involving a claim for annulment of a contract filed on 3 September 2003 the trial was postponed four times due to the fact that there was no information as to whether the defendant had been regularly summoned.[40]

In a similar example before the Municipal Court in Prizren involving a claim for annulment of a contract filed on 11 November 1998, ten out of the fourteen trial sessions scheduled on this case had to be postponed either because the parties had not been properly summoned or because the court could not establish whether they had been properly summoned.[41] Out of the ten occasions in which the court had to postpone the trial, in four of them the summons receipts could not be found in the case file.

> In a third example before the Municipal Court in Mitrovicë/Mitrovica regarding a property dispute pending since 3 January 2004, the court allegedly tried to summon the defendants for three sessions scheduled for 18 April 2005, 3 May 2005 and 23 May 2005. Whereas there is no evidence in the case file demonstrating that the court indeed tried to summon the defendants for the first session, the trial session scheduled for 3 May 2005 had to be postponed due to the fact that the summonses receipt was returned to the court without any signature. Regarding the summonses for the session scheduled for 23 May 2005, the receipt was returned with the notification that the defendants were no longer living in the mentioned address.
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> In a property dispute before the Mitrovicë/Mitrovica Municipal Court, the trial sessions scheduled for 8 December 2005, 11 January 2006 and 9 February 2006 had to be postponed due to the fact that the defendant was not regularly summoned. Regarding the first two sessions mentioned above, the court tried to summon the defendant through the KPS police station located in the northern part of Mitrovicë/Mitrovica but never received a notification from the police on whether the defendant had been summoned or not. As for the session scheduled for 9 February 2006, since the police could not escort the Kosovo Albanian court messenger to the north, the summons could not be delivered to the defendant and the session had to be postponed.

While the lack of training of PTK officials and court messengers is one of the problems affecting the delivery of summonses, court administrators should also play a more active role in monitoring this procedure and increase supervision over court messengers. Furthermore, the delivery of summonses in the northern part of Mitrovicë/Mitrovica is another problematic issue. While there are security concerns hampering the delivery of summonses by Kosovo Albanian court messengers in the north, the absence of Kosovo Serb court messengers is creating additional difficulties to solve this problem.

3. Shortcomings in the Law on Contested Procedure

A factor which plays a determinant role in the delays of civil proceedings is the fact that the civil procedure law currently in force has become obsolete in many aspects. Furthermore, many provisions in the LCP are too vague or fail to impose time limits for specific procedural acts. The poor quality of the law and lack of pro-activity of the judges in trying to overcome some of the legal constraints play a crucial role in the delays currently affecting civil proceedings. Finally, similar matters are often regulated by different provisions throughout

[40] The trial was scheduled for and postponed on the following dates: 14 April 2005, 17 May 2005, 21 June 2005 and 8 September 2005.
[41] The trial was scheduled and successively postponed on the following dates: 18 October 2002, 15 and 24 September 2003, 7 October 2003, 21 June 2004, 12 July 2004, 16 August 2004, 6 January 2005, 3 February 2005 and 21 October 2005.

the code, creating puzzling situations that could easily be addressed by one single and straightforward provision.

The present section will identify some of the shortcomings in the LCP, particular those mostly affecting the progress of civil cases.

3.1 The Response to the Statement of Claim and Counterclaim

One of the topics that need to be addressed by the LCP is that of the response to the statement of claims (the defence).

The LCP establishes that in certain cases, before setting down a preliminary hearing, the president of the panel may require the defendant to submit a defence. The law also determines that "[t]he defence is to be submitted within the time fixed by the President of the Panel, but this time cannot exceed fifteen days from the date of service of the statement of claims," or in special circumstances thirty days.[42] Given that, according to the law, in situations where a single judge is competent to adjudicate a case a preliminary hearing shall not take place[43], in these cases there is no deadline for the submission of the defence.

The OSCE is of the opinion that these provisions are not adequate and need to be amended. Firstly, the LCP does not establish any consequences for the defendant's failure to submit a defence.[44] Furthermore, the deadline for the response to the statement of claims to be submitted should always be determined for a date before the preliminary hearing. By allowing the submission of the response during the trial session, the law is impairing the swift resolution of the cases since both the court and the parties may be faced with essential facts at a late stage of the proceedings, when these facts could and should have already been addressed during the preparatory stage.

An earlier submission of the response to the statement of claim would allow the court to determine at the preliminary hearing which facts remain in dispute and also identify the ones deemed proved. At the end of the preliminary hearing, the presiding judge should draft a preliminary decision identifying the concrete facts that need to be proved during trial. In this way, both the court and the parties would have been able to prepare the trial session in a much more effective way, focusing on the issues that are really relevant for the resolution of the case. Furthermore, an additional benefit of an earlier submission of the defendant's response might be that it may encourage the pre-trial settlement of cases.

The same remarks can be made in relation to the counterclaim. According to the LCP, "[t]he defendant may, before the conclusion of the trial before the court, file a counterclaim with the same court if the claim of the counterclaim is related to the originating statement of claims […]."[45] Also in this case, the deadline for the submission of a counterclaim should precede the trial. In fact, a counterclaim is a new claim to which the opposing party has the right to respond. Therefore if the defendant presents a counterclaim during the trial, the opposing party must be given time to prepare his/her response, which will necessarily require the adjournment of the session.

[42] Article 285(1) and (2) LCP.
[43] Article 284(2) LCP.
[44] In different legal systems, one of the consequences of such failure is the conclusion by the court that the facts alleged by the claimant have been proved.
[45] Article 189(1) LCP.

3.2 Failure to establish time limits

The lack of clear time limits for certain procedural acts and the level of discretion left to the courts in setting deadlines is another shortcoming of the applicable law on contested procedure.

One important gap in the law in this regard is the absence of a provision establishing a deadline for the courts to schedule the first hearing. By not establishing a maximum period for the scheduling of the first hearing, the law facilitates delays within civil cases, as it is up to the judges to decide when to schedule these hearings and it often happens that they are only scheduled years after the claim has been submitted.

Another area where the lack of time limits in the law is contributing for delays is the one concerning the modification of claims.[46] In this regard, the LCP establishes that "[w]hen the courts adopt the motion for modification statement of claims, it shall leave enough time to the defendant in order that the defendant may prepare for dispute on the grounds of the modified statement of claim […]."[47] The reference to "enough time" in this article is problematic since it gives the judge a wide margin of discretion to decide what shall be considered a reasonable time to prepare the defence, which may result in unjustified delays. Even if the complexity of certain cases may require more time for the preparation of the defendant's response, the law should foresee a general deadline, which could be subject to a pre-established extension for a certain period when necessary (e.g. the general deadline could be eight days, with the possible extension for an additional period of eight days, applicable in complex cases).

The same concern would apply to the provisions regulating the submissions and expert opinions. In the first case, the LCP states that "[i]f the submissions or enclosures are not submitted in sufficient number of copies, the court shall invite the applicant to supply the additional copies within a certain period of time […]."[48] Regarding the expert opinions, the law states that "[…] [t]he court shall fix a deadline for submitting the findings and opinions in writing."[49]

In these cases it is left to the discretionary power of the court to decide the time limit for the party to present the copies, or for the expert witness to submit his/her opinion in writing. In practice, it often happens that the court fails to establish any time limit, creating additional delays in the proceedings.

> In a case before the Prishtinë/Priština Municipal Court involving a claim for damage compensation during the trial session held on 23 March 2005, the court approved a proposal by the representative of the claimant for an expert opinion to be prepared and submitted to the court. The trial was then postponed *sine die*, until the expert opinion was submitted. [50]

In order to avoid such situations, apart from specific deadlines within each provision, the code should contain a general rule regarding the maximum time period permitted for the performance of procedural steps by the parties, expert witness or any other entities participating in the proceedings.

[46] Article 190 LCP.
[47] Article 190(6) LCP.
[48] Article 109 (5) LCP.
[49] Article 260 LCP.
[50] During the eleventh trial session, held on 19 January 2006, the presiding judge informed the parties that the expert was not able to submit the expert opinion because the object of the expertise had disappeared.

3.3 Lack of Provisions Regulating Postponements

As previously mentioned, the unjustified postponements of trial sessions are one of the reasons for the delays in civil cases. In this regard, the absence of a provision in the LCP clearly determining the situations in which postponements shall be allowed is a serious shortcoming in the law. Although there are a number of provisions referring to the adjournment of trial sessions/hearings,[51] these are scattered throughout the LCP and there is no article exhaustively enumerating the grounds for postponements.

Apart from facilitating postponements, this gap in the law allows for a wide margin of appreciation by the judges when deciding to postpone cases. On the other hand, the parties are left with no other option but to accept the courts' decisions to postpone the cases.

In view of the above, the OSCE is of the opinion that the LCP should be amended so that a general criteria for the postponement of trial sessions is established by the law.

4. Recommendations

- Presiding judges should assume a more attentive and active role during the pre-trial stage of the proceedings by carefully implementing the relevant norms of the LCP. In particular, presiding judges should:

  a) Carefully examine the statements of claim before setting the date of the preliminary hearing or the main trial session, in accordance with article 281 LCP.
  b) In the case of shortcomings in the statement of claim, contact the claimant and instruct him/her to correct or supplement it, as foreseen by article 109(1) LCP.
  c) Ensure that the statement of claim is delivered to the defendant together with the summons, or, at least eight days before the preliminary hearing if available, as envisaged by articles 284(1) and 293(2) LCP.
  d) Make effective use of the decision-making powers conferred to them by article 278, by ordering the parties to submit, before the main trial starts, all documents in their possession that they intend to rely on as evidence.

- The Kosovo Judicial Council should organise continuous legal training for court support staff in order to ensure that they are aware of the applicable civil procedure law and increase their effectiveness.

- The Kosovo Judicial Council, the Department of Justice and the Kosovo Judicial Institute should organise training on case management for court administrators, court clerks and civil judges.

- The courts should apply the available legal provisions and fine the parties whenever, through procedural acts, they abuse the rights recognised under the LCP (Article 316 LCP).

- The Kosovo Judicial Council should organise trainings on the summoning procedure addressed to PTK officials and court messengers.

[51] See *supra* footnote 28.

- The Kosovo Judicial Council should hire court messengers belonging to minorities in order to ensure the effective delivery of court summonses in minority areas.

- The Kosovo Judicial Council should recruit more Judges to work in civil cases and assign them according to the case load and necessities of each court.

- The lawyers should be more pro-active in the proceedings by objecting to postponements not duly justified.

- In order to avoid undue delays in the proceedings the following amendments to the LCP should be done:

    a) The LCP should impose a deadline for the submission of the response to the statement of claims in cases in which a preliminary hearing does not take place.
    b) The submission of the defence and counterclaim should always precede the date of the preliminary hearing or the trial session.
    c) The law should establish a consequence for the defendant's failure to submit a response to the statement of claims.
    d) The LCP should establish an obligation for the court to issue a decision at the end of the preliminary hearing, clearly stating which facts remain in dispute and identifying the ones deemed proved.
    e) The LCP should establish clear deadlines for the following procedural acts: scheduling of the first hearing in civil cases, defendant's preparation following the submission of a modified statement of claims, and submission of documents or expert reports by the parties and/or expert witnesses.
    f) The LCP should contain a provision establishing the general criteria for postponement of hearings.

Chapter 2

PROPERTY TRANSACTIONS

As a result of the sensitivity of property issues in the post-conflict context of Kosovo, where communities have been displaced and property was often illegally occupied, the courts have been faced with many complex cases. In fact, even though the Housing and Property Directorate and the Housing and Property Claims Commission (HPD/HPCC) dealt with a significant number of claims involving residential property rights, many property disputes were not covered by the HPD/HPCC mandate and fell under the jurisdiction of the courts.[52]

Due to the large number of Kosovo Serbs displaced in Serbia and Montenegro after the 1999 conflict, the courts in Kosovo have been faced with numerous problems in dealing with subsequent property transactions. Those problems, addressed in the present Chapter, include the use of falsified documents to certify fraudulent property transactions; the fact that a large number of property claims were filed against absent persons, most of them displaced in Serbia and Montenegro; and finally residual problems in property disputes inherited from the past, especially where the transaction at stake was concluded several years ago without respecting the formal requirements, such as the judicial certification of the purchase contract.

It is well a known fact that formal legal requirements for property transactions[53] were seldom respected in Kosovo in the past, due both to the existence of discriminatory laws restricting property transactions between Serbs and Albanians,[54] and to the fact that people chose not to comply with those formalities in order to avoid paying taxes. It is therefore hardly surprising that a series of problems arise when the courts are called to decide on who is the rightful owner and who is entitled to sell a specific piece of property.

This problem has been exacerbated by the use of falsified documents to certify non-existent property transactions before the court, and the frequent absence of one of the parties affected by the proceedings, which makes it very difficult for the courts to determine the truth among the facts presented as it many times only gets evidence from one of the parties. Not least, the situation is aggravated by the lack of cooperation between the institutions operating in Kosovo and the authorities in Serbia and Montenegro, whereby the assessment of the authenticity of documents issued therein, as well as the location of absent parties displaced in that territory, has to be performed through the Department of Justice of UNMIK (DoJ). This is not only a long process that causes severe delays in the proceedings, but it has so far produced very poor results, as it is not always possible to ascertain the validity of these documents with absolute certainty. Moreover, because of this poor cooperation, the courts and the Department of Justice face difficulties in locating absent parties and communicating judicial decisions to them. These problems ultimately result in a failure of the courts to comply with all fair trial requirements when deciding on property disputes.

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[52] The Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) was established by the Special Representative of the Secretary-General (SRSG) with UNMIK Regulation 1999/23, 15 November 1999. See also UNMIK Regulation 2000/60, 31 October 2000, On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission. Following the termination of the mandate of the HPD/HPCC, on 04 March 2006 the SRSG promulgated UNMIK Regulation 2006/10 On the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property, which established the Kosovo Property Agency as the successor of the HPD.

[53] Such as the registration of property rights in the cadastral office and the certification of contracts by the courts.

[54] See the Law on Changes and Supplements on Limitation of Real Estate Transactions, *Official Gazette of Serbia*, No. 30 of 22 July 1989, and also the Law on Changes and Supplements of this Law, *Official Gazette of Serbia*, No. 22 of 18 April 1991.

1. Use of falsified or irregular documents

The use of falsified documents to certify fraudulent property transactions is one of the problems obstructing the courts' ability to assess evidence in property cases. Even though there is a legal framework regulating the formal requirements of property transactions, these provisions are not being applied effectively by the courts. Many individuals are using the current circumstances of displacement and non-communication between the Kosovan and Serbian institutions to commit property fraud by using falsified documents issued in Serbia and Montenegro. These documents are subsequently certified by courts in Kosovo which are unaware of their fraudulent origin.

According to the applicable law "[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."[55] The law further establishes that a contract which does not comply with these formal requirements is not legally binding.[56]

In cases where the party to the property transaction is not the person signing the contract, the signatory must possess written legal authorisation certified by the court to represent the party in the signing and certification of the contract.[57] Consequently, in the certification of a property contract where the vendor is represented by a third person, a court official must verify that the third person signatory is legally authorised by the vendor to represent him or her.[58] Once this procedure has been concluded, the court is required to send the contract to the cadastral office for the transaction to be registered.

In spite of this detailed procedure for property transactions, in many cases monitored by the OSCE these rules have not been respected by the courts.[59] As a result the Kosovan courts enforced fraudulent transactions on the basis of falsified documents.

> In one case before the Municipal Court of Klinë/Klina, the two Kosovo Albanian defendants forged the ID card of the registered owner of the property under dispute, a Kosovo Serb who had been dead for 12 years, and used it to issue an authorisation before a court in Kraguievac, Serbia. This enabled one of the defendants to sell the property to the other defendant on behalf of the deceased owner. Using that falsified authorisation, the defendants concluded and certified the property transaction before the Municipal Court in Klinë/Klina, which had no way of knowing that the authorisation had been issued based on a forged ID card. The claimant in this case, a Kosovo Serb displaced in Serbia after the conflict who in the meantime returned to

[55] Article 4(2) of the Law on Transfer of Real Property, hereinafter LTRP, published in the *Official Gazette of the Republic of Serbia,* No. 43/81 on 01 August 1981.
[56] Article 4(3) of the LTRP. The law also establishes that the court official shall certify the signature of the parties once its authenticity is demonstrated, 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 parties' and that 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 (2) of the Law on the Validation of Signatures and Duplicates). The signatures 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 exhibit 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 of the Law on the Validation of Signatures and Duplicates).
[57] Articles 89(1) and 90 of the Law on Contracts and Torts, published in the Official Gazette of the Socialist Federative Republic of Yugoslavia, No. 29/1978 on 26 May 1978.
[58] Article 9 of the Law on the Validation of Signatures and Duplicates.
[59] Apart from the cases identified by the OSCE monitors, the Criminal Division of the DoJ has initiated criminal investigations of 43 cases of fraudulent transactions, following complaints received by IDPs.

Kosovo, is the only son of the registered owner and the sole inheritor of the property. On 27 September 2004 he requested that the court annul the fraudulent property transaction certified by the Klinë/Klina Municipal Court, and to declare him to be the rightful owner, as the property had not been sold. On 20 October 2005 the Court approved the claim as grounded, deciding that the defendants realised the purchase contract based on falsified documents, and attributing the property to the claimant.

In 11 similar cases before the Klinë/Klina Municipal Court, a number of Kosovo Serbs from that municipality who fled to Serbia after KFOR came into Kosovo, filed claims against Kosovo Albanians illegally occupying their houses.[60] They alleged that the defendants acquired their properties without their knowledge by using falsified authorisations issued before courts in Serbia and Montenegro, which enabled third persons to sell property, purportedly on the claimants' behalf. By using those forged authorisations the defendants had the fraudulent property transactions certified before the Klinë/Klina Municipal Court, whose officials ignored the fact that the authorisations issued in Serbia and Montenegro were falsified. As the claimants were displaced in Serbia and had no physical contact with their properties, they only discovered the sale of their houses after the transactions had already been formalised at the Klinë/Klina Municipal Court, when some of them returned to Kosovo.

In a case before the Prizren Municipal Court, a Kosovo Serb currently living in Serbia requested on 10 August 2005 that the court recognise his property rights over a house in Prizren, now occupied by the second defendant, a Kosovo Albanian. According to the claim, the second defendant bought the property without the claimant's knowledge or intervention, through falsified documents used to issue an authorisation at the court in Mitrovicë/Mitrovica, thereby enabling a lawyer from Belgrade to sell the house in the name of the claimant. As that authorisation foresaw the possibility of delegating the power of representation, the authorised person from Belgrade issued another authorisation before the same court, in the name of a Kosovo Turk lawyer from Prizren, also a defendant in this case, enabling the latter to sell the disputed property in purported representation of the claimant. With that second authorisation, the defendants certified the purchase contract before the Prizren Municipal Court. The claimant only discovered this fraudulent transaction afterwards, in the course of the HPD proceedings to evict the second defendant from the house.[61]

As these examples and other reported cases show, the use of forged ID cards to issue official authorisations in Serbia and Montenegro enabling persons in Kosovo to sell property owned by Kosovo Serbs that were displaced to Serbia is a frequent practice before the courts.[62] The verification in Kosovo of the authenticity of these authorisations should be done by the DoJ through the communication with the Ministry of Justice in Serbia and Montenegro.[63] However, this procedure is rarely followed, and when it is it's not always effective, as in many instances the DoJ has no way of verifying the validity of the documents presented because the authorities in Serbia and Montenegro usually do not respond to its requests. When there is a response usually it takes such a long time that it creates unreasonable delays in the

[60] The claims were filed between 18 February 2004 and 9 December 2005.

[61] Furthermore, the identification card of the claimant presented before the Mitrovicë/Mitrovica Municipal Court for the certification of the power of attorney bore a photo and personal information not matching those of the claimant. This fact, verified by the OSCE monitor through the attendance of the trial where the claimant was present, and the consultation of the documents in the archive of the Mitrovicë/Mitrovica Court, was overlooked by the court in Prizren. In spite of the ready accessibility of this evidence that the claimant's identification card had been forged, the court in Prizren failed to gather this information, as it did not communicate with the court in Mitrovicë/Mitrovica.

[62] According to the Department of Justice statistics there are currently 36 complaints of fraudulent transactions pending at the courts in Kosovo.

[63] Justice Circulars DOJ/DIR/344/JH/04 and DOJ/LPD/0371/er/05.

court proceedings in Kosovo.[64] Only through better cooperation with the authorities in Serbia and Montenegro can this procedure be rendered effective.

Besides the use of falsified IDs to forge legal authorisations and certify fraudulent property transactions, the OSCE has noted that other documents have also been forged and presented as evidence before the courts in property disputes.

> In one case before the Municipal Court in Istog/Istok, five Kosovo Roma, currently living in Germany, requested on 24 May 2004 that the court annul a purchase contract by which the defendants, two Kosovo Albanians, had bought the family house of the claimants. According to the claim, the defendants used a forged death certificate of the claimants' father,[65] registered owner of the house, to certify the inheritance of the property by the first claimant. Furthermore, the defendants used a forged ID of the first claimant to have a forged authorisation issued by a court in Montenegro, enabling a lawyer from Serbia to sell the property on behalf of the first claimant, as sole inheritor of the deceased person. Using those forged documents the defendants certified the purchase contract before the Municipal Court in Istog/Istok and registered the property under their names in the cadastral office. According to the claim, the first claimant did not issue any authorisation to sell the property to the defendants.[66]
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> In a second example before the Prishtinë/Priština Municipal Court the claimant, Kosovo Albanian, alleged that on 7 April 1996 she had bought an apartment in Prishtinë/Priština from the defendant, a Kosovo Serb. As the purchase contract presented as evidence by the claimant had not been certified at the court and the presiding judge had suspicions as to its validity, the court requested the Directorate of Criminality of the KPS to examine the signatures of the parties and assess their authenticity. The expertise report submitted by the Police confirmed that the signature of the defendant on the purchase contract over the disputed property had been forged, and based on that evidence the court refused the claim as ungrounded.

If the use of forged official documents, with a particular evidentiary value already raises serious concerns when the documents used constitute the basis upon which property rights are registered, the problem becomes even more troubling. This is the case whenever there is an accepted use of irregular cadastral documents, which theoretically should be the most reliable evidence in proving property rights, as every transaction of immovable property has to be registered in the cadastre.[67] If these documents are also being misused and the court is not

[64] According to the statistics provided by the DoJ, from 25 July 2004 to 26 July 2005 the DoJ requested the verification of the authenticity of authorization documents from the Ministry of Justice of Serbia and Montenegro in 272 cases. At the current moment, more than a year after those requests, the DoJ has not yet received a response in 57 of the cases, which remain indefinitely on hold.

[65] The death certificate used by the respondents was issued in Serbia, whereas the deceased, father of the claimants, died in Germany. The claimants presented as evidence the real death certificate of their father, which was issued in Bremen, Germany, and which bore a date different to that on the document used by the respondents to certify the transaction.

[66] While this civil dispute was pending, the public prosecutor in Pejë/Peć initiated criminal proceedings against the respondents for the crime of legalization of false content, pursuant to Article 334 of the Provisional Criminal Code of Kosovo, which states that "[w]hoever misleads a competent authority into certifying any untrue matter designed to serve as evidence of a legal matter in a public document, register or book shall be punished by imprisonment of three months to five years" and that "[w]hoever uses such a document, register or book even though he or she knows it to be false shall be punished as provided for in paragraph 1 of the present article." The criminal case is still ongoing.

[67] Article 33 of the Law on Basic Property Relations published in the Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 6/80.

able to detect the irregularities, it seriously undermines the credibility of the judiciary in settling property disputes.

In this context the OSCE has identified numerous cases in which the possession lists presented as evidence were irregular. Some of these documents did not contain the number of entry in the municipal register book, the signature of the public official who issued the possession list, the signature of the director of the municipal cadastral office, or the stamp of the municipal cadastral office, all formal requirements for the validity of possession lists.[68]

According to the applicable law, when issued in proper form, a public document proves the veracity of what is stated in it.[69] The law also states that whenever the court has any doubts regarding the authenticity of the document, it can request the agency which has allegedly issued the document to declare itself in this regard.[70]

In spite of this legal framework, in several cases where irregular possession lists should have raised doubts as to their authenticity, the courts not only accepted those documents as valid but even assessed them as evidence in their final verdicts, without first submitting them to the Municipal Cadastral Office that had supposedly issued them to confirm their authenticity. Apart from violating the law, this practice undermines the system of property transactions in Kosovo, allowing fraud and affecting the credibility of cadastral records.

> In a property dispute initiated on 26 February 2004 before the Municipal Court in Gjilan/Gnjilane, the claimants produced as evidence a possession list which lacked the (protocol) number indicating its entry in the municipal registry book,[71] the signature (or name) of the referent, as well as the signature of the director and the stamp of the municipality. The court admitted into evidence this possession list during the main trial session. In its verdict the court acknowledged that it admitted the evidence of reading the possession list in question and concluded that "[f]rom all what was said [and] the admitted evidence, […] the court found that the lawsuit of the claimants is well-founded and decided as in the provision of this verdict."
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> In another property dispute before the Municipal Court in Gjilan/Gnjilane, a similar situation occurred. The claimants filed the claim on 12 October 2004 and produced as

[68] See Article 230 of the LCP. According to the Kosovo Cadastral Agency (KCA), the procedure to obtain a possession list, which can be used for official purposes, consists of the following steps (the sequence of which may differ): a) the interested party submits a request to the municipal cadastral office; b) the interested party pays the taxes for the services of the municipal cadastral office; c) the request is registered in the municipal registry book; d) the possession list is printed out, e) the official of the municipal cadastral office signs the possession list; f) the director of the municipal cadastral office signs and stamps the possession list; and g) the possession list is given to the owner or to the authorised legal person. See also the Administrative Instruction No. 2004/08, issued by the Ministry of Public Services, on the Implementation of the Law on Cadastre, which states in its Article 23 (2) that "[t]he certificates, sketches, copies of plans and other documentation, shall be issued to legal and individual entities according to the standards determined by the KCA."

[69] See also Radoslav Cosic, *Commentary on the Law on Contested Procedure*, Belgrade 1998, page 125, which states that, according to Article 230 LCP "[t]he legal presumption that public documents are authentic can be overturned. The parties can prove that the facts laid out in the document are untrue, that the document is not issued by the competent authority, or that the document is false. When the court doubts the authenticity of the document, it is obliged to undertake measures to clarify the validity of the document […]." (Unofficial translation).

[70] Article 230 (4) LCP. In the case of possession lists the competent agency would be the Municipal Cadastral Office (See Section 3.3, UNMIK Regulation 2000/45 on Self-government of Municipalities in Kosovo, which delegates the responsibility for maintenance of cadastre records on the municipalities).

[71] On 27 July 2005 the OSCE checked the registry book of the relevant cadastral office and did not find this possession list registered under the date mentioned on the document.

evidence two possession lists. One of them was a valid document bearing all the necessary information and stamp. However, the other possession list had neither a (protocol) number indicating its entry in the registry book,[72] nor the signature of the director, nor the stamp of the municipality.[73] Again, the court admitted into evidence both possession lists in the main trial session, and in its verdict, announced on the same date, the court acknowledged that it considered as credible both possession lists among other evidence.

In the aforementioned examples the courts certifying the property transactions did not spot forgeries of authorisations or death certificates issued before the courts in Serbia and Montenegro, or relied on blatantly irregular possession lists. Consequently the courts failed to refer those forged or irregular documents to the DoJ or to the cadastral office in order for their authenticity to be verified.[74] As a result, several fraudulent transactions were certified and the courts made the legalisation of illegal property transactions possible, hindering the process of return of minorities to Kosovo.

2. Property claims against absent persons without their knowledge

Another problem effecting property disputes is the fact that in many cases the claims are filed against absent persons, usually Kosovo Serb owners who are currently displaced and whose whereabouts are unknown. As the court cannot locate the defendants, trials are continuously postponed until it is possible to find out their address through the Department of Justice, to summon them regularly or to appoint a temporary representative to act on their behalf, a process that can take several months. This problem not only affects the swift flow of the court cases related to property causing unreasonable delays,[75] but also creates serious difficulties for the court in ensuring that the defendant's right to a fair trial is fully respected.

In fact, the right to a fair trial requires that everyone has the right of access to court.[76] The effective presence and participation of the defendant in property disputes is not only a requirement of the right to a fair trial *per se*, but also of the principle of equality of arms, according to which the defendant shall be given the same procedural rights as the claimant.[77]

Being a fair trial requirement, the right of access to the court imposes a positive obligation on the public institutions to ensure the presence of the defendant in civil proceedings.[78]

Given the current security situation in Kosovo and the freedom of movement problems affecting the Kosovo Serb community, their right of access to courts has been severely hindered. In order to help solve this problem UNMIK has created a Court Liaison Office in

[72] Also in this case, the OSCE checked the registry book of the cadastral office on 27 July 2005 and did not find this possession list registered as issued under the date mentioned on the document.
[73] Although a signature corresponding to the referent was placed, the name of the latter was not added.
[74] Justice Circulars DOJ/DIR/344/JH/04 and DOJ/LPD/0371/er/05 and Article 230 (4) LCP
[75] See Judgments of Poiss v Austria, A 117, par. 60 (1987), and Hentrich v Spain, ECHR, according to which the right to be tried within a reasonable time and the consequent duty of the courts to be diligent and ensure a speedy process is especially relevant in property cases involving title to land.
[76] Article 6(1) of the European Convention on Human Rights. See also Judgments of Kremzow v. Austria, Judgment of 21.09.1993, Series A, No. 268-B (1994) 17 EHRR 322, and X v. Sweden, 30.06.1959 (1958-9), App. 434/58, 2 Yearbook 354, at 370, according to which whenever it is essential for the fairness of the proceedings that the respondent is present and participates at the trial, due to its importance for the respondent's interests, he/she should be present. Considering the possible results of property disputes against displaced persons, these cases are particularly sensitive, as the ultimate result can be that the absent respondents will not be able to return to their property in Kosovo.
[77] Article 5 of the LCP states that "[t]he court shall give to each of the parties the opportunity to express itself regarding the claims and statements of the opposing party."
[78] See Judgment of Golder v UK, A 18, 1975, ECHR.

several Serbian areas in Kosovo.[79] Although this is a positive development, it does not solve the problem of access to courts whenever the minority member is outside Kosovo and his/her address is unknown, in which case the property dispute usually continues *in absentia* while the absent party remains unaware that there is a claim against his/her property in Kosovo, being defended by a temporary representative appointed by the court.

The OSCE has come across numerous examples of such cases and has already reported on the problems encountered with regard to the appointment of temporary representatives in property disputes involving ethnic minorities.[80] The present Section provides a follow up on the concerns and recommendations since it was previously reported by the OSCE and an overview on how the courts are currently dealing with the issue.

2.1 Recurrent issues in regard to the appointment of temporary representatives in property disputes involving ethnic minorities

The major concerns previously identified by the OSCE in relation to the procedure for the appointment of temporary representatives in property disputes involving minorities were as follows:

a) the fact that after failing to find the defendant at the address provided by the claimant or when this address was unknown to the claimant, the courts did not make a reasonable effort to locate the defendant through other possible means;[81]
b) the courts' failure to demonstrate that the decision to appoint a temporary representative is necessary to prevent detrimental consequences to the parties caused by the delay in locating the defendant and appointing a regular legal representative;[82]
c) the failure to announce the appointment of the temporary representative in an appropriate manner;[83]
d) the inadequate procedure followed for the selection and compensation of temporary representatives, usually Kosovo Albanian lawyers suggested and remunerated by the claimants, thereby raising suspicions about possible bias of the temporary representative in favour of the claimant's position; and
e) the poor performance of the lawyers appointed as temporary representatives, who were relatively passive in the majority of the proceedings monitored by the OSCE, failing to challenge the evidence presented by the claimants or to propose evidence in the defence of the absent defendant, and often failing to attend trial sessions without justification.

Since the OSCE reported on these problems some courts have tried to correct their practice with the intention of respecting the legal procedure on the appointment of temporary representatives, sometimes facing unforeseen problems while attempting to follow up the

[79] Court Liaison Offices are responsible for ensuring the right to access to court to all members of the Serbian community, providing them with transport and serving them with court summonses
[80] Spot Report on the Appointment of Temporary Representatives in Property Disputes Involving Minorities as Respondent Parties, published by the OSCE in April 2005.
[81] See Article 148 of the LCP determines that "[i]f the party cannot find out the address of the person to whom the writ is to be served […] the court shall try to obtain the required information from the competent administrative body, or to obtain the necessary information in some other way."
[82] According to Article 84 of the LCP a temporary representative shall only be appointed on the condition that the regular procedure for the appointment of a legal representative would take a long time, thus causing detrimental consequences to one or both parties.
[83] Article 86 of the LCP states that "[…] the court shall make an announcement which shall have been published in the official gazette […] and placed on the notice board of the court, and, if appropriate, made public in some other proper way." In most of the cases monitored by the OSCE the announcement was published in Albanian language newspapers only available in Kosovo, which are unlikely to be read by the Kosovo Serb respondents displaced in Serbia and Montenegro.

recommendations issued by the OSCE. The following are examples of cases monitored in which the courts did try to use the available administrative bodies or other measures in order to locate the absent defendants, before deciding to appoint a temporary representative.

> In a case before the Municipal Court in Pejë/Peć involving a property claim filed on 29 May 2005 the court could not locate the three Kosovo Serb defendants, currently displaced in Serbia and Montenegro. In response to the request of the claimant to have a temporary representative appointed to the defendants, the court decided first to try to locate them through the Department of Justice.[84]
>
> In another property case initiated on 3 March 2003, the Municipal Court in Vushtrri/Vucitrn tried several times to locate the absent defendants through the Court Liaison Office in charge of establishing a link between the court and the Serbian IDPs from the area of Vushtrri/Vucitrn. As these attempts were not successful, the court tried to locate the defendants through the Court Liaison Office in Gracanica, again with no success. Finally, after appointing a temporary representative to represent them, the court tried to notify the defendants of that appointment through a public announcement posted at the Municipal Court in Zubin Potok, where the defendants temporarily resided after the conflict. In spite of these efforts, the court was unable to locate the defendants and proceeded with the case.
>
> In a property case before the Municipal Court in Gjilan/Gnjilane, the claim was filed on 21 May 2003 but the Kosovo Serb defendant was absent and his address in Serbia was unknown. The court sought to locate the defendants through the Department of Justice before proceeding with the appointment of a temporary representative. However, the procedure of requests and response by the Department of Justice did not produce any results and the trial was repeatedly postponed. As a result of this situation the case has been severely delayed. Finally, after the failed efforts of the court to locate the defendant, the proceedings have continued in his absence through the appointment of temporary representatives to represent him.

The courts' efforts to locate absent defendants through the Department of Justice and other existing administrative bodies, before proceeding with the appointment of temporary representatives, constitute a laudable development. However, as the above examples show, such worthy attempts have had no results as the defendants could not be located, remaining absent and unaware of the property cases brought against them.

Another area of improvement since the OSCE reported on these problems is the effort made by some courts to use appropriate means of publicising the announcement of the appointment of temporary representatives. In some cases the courts have tried to announce the appointment in Serbian newspapers distributed in Serbia and Montenegro where the defendants are residing, rather than through Albanian language newspapers as was previously common practice.[85] These attempts have, however, met serious obstacles, according to declarations and complaints of some judges to the OSCE monitors, because the Serbian newspapers contacted by the courts have persistently refused to publish the court announcements, stating that they do not recognise and cannot follow orders from UNMIK courts in Kosovo.

> In a case involving 15 property claims before the Suhareke/Suva Reka Municipal Court against 24 Kosovo Serbs from that municipality who are currently displaced in Serbia, the court decided on 21 June 2004 to appoint three temporary representatives

[84] It is worth mentioning that the requests sent to the Department of Justice had no result and the trial has so far been repeatedly adjourned due to the absence of the respondent.

[85] Several courts however continue to disrespect the announcement procedure, publishing the decision to appoint temporary representatives in Albanian language newspapers only published in Kosovo.

to defend the absent defendants. This decision was taken by the court without making any effort to locate the absent defendants or even announcing that appointment appropriately. However, after the OSCE published its report the court suspended the case in order to attempt to locate the absent defendants and to announce the appointment of their temporary representatives through a publication in Serbian language newspapers. In spite of these efforts, so far the court has not been able to summon the defendants or to publish the announcement in Serbian language newspapers.[86]

In a property case initiated on 06 February 2004 before the Municipal Court in Prishtinë/Priština, the Kosovo Serb defendant was displaced in Serbia and was absent throughout the proceedings. After several failed attempts to locate the defendant the court appointed him a temporary representative, and managed to announce that appointment in the Serbian newspaper "Novosti," distributed throughout Serbia. In spite of such efforts to follow the legal framework and to enable the defendant to participate in the case pending against him, the court proceeded in his absence, finally deciding to attribute the ownership of the disputed property to a third party. The final decision was never communicated to the defendant, who, in spite of all efforts, remained unaware that there was a court case against him.

As these examples show the attempts of some courts to follow the recommendations issued by the OSCE and to respect the legal procedure on the appointment of temporary representatives have not been entirely successful. In fact, in most cases it was not possible to locate the absent defendants through the Department of Justice, and the announcements of the appointment of temporary representatives were rarely able to be published in Serbian newspapers. Nevertheless, as the last example shows, it is possible to publish such an announcement in a Serbian newspaper and therefore those efforts are commendable. Nevertheless, most of the challenges to respect the law and the rights of the absent defendants are still to be overcome.

If these are examples of good practices, in most of the cases the courts continued to not respect the legal procedure on the appointment of temporary representatives. Courts have frequently failed to justify their decisions to appoint a temporary representative based on the need to avoid a long delay in the proceedings, and have not selected temporary representatives through clear and transparent procedures, instead still accepting representatives that are suggested and paid by the claimants. Furthermore, the performance of the temporary representatives continued to be poor and passive to the detriment of the absent defendants. The following examples illustrate these kinds of problems.

In a property case filed on 26 February 2004 before the Municipal Court in Gjilan/Gnjilane, a temporary representative was appointed to defend the absent defendant at the suggestion of the claimant. Following an order of the presiding judge, during the course of the trial session the lawyer of the claimant paid the temporary representative for his services the amount of 101 Euro in cash. The performance of the temporary representative in this case was extremely poor, assuming a rather passive role throughout the proceedings, not challenging a blatantly irregular possession list used as evidence by the claimant, and even confirming the facts of the claim in support of the claimant. The court decided to approve the claim

[86] It is however worth mentioning that three of the Serbian respondents found out about these court cases through other means, and issued proper powers of attorney in the name of the lawyers initially appointed as temporary representatives. Since then the court proceeded with regard to the claims against these three respondents, while the remaining cases remain on hold as the respondents' whereabouts are still unknown and the court is making every effort to locate them.

as substantiated, using the statements of the temporary representative in support of the claim as valid evidence.[87]

In a property case initiated on 23 July 2004 before the Municipal Court in Pejë/Peć, a temporary representative was appointed to defend a Kosovo Serb whose current address in Serbia was unknown to the court. As the purchase contract on which the claim was grounded had been burned during the conflict, the defendant's temporary representative, after verifying through the examination of witnesses that the claimant had occupied the property for more than 30 years, proposed to the court that the claim should be corrected to base the claimant's ownership right on adverse possession rather than on the destroyed purchase contract. Following the proposal of the temporary representative, the presiding judge ordered the claimant to correct the claim accordingly. In this case the temporary representative of the defendant was actually quite proactive, but in favour of the claimant rather than of his absent client.

The examples described above, representative of a widespread pattern of cases in Kosovo, show that in the majority of the cases, the courts still fail to comply with the procedural rules on the appointment of temporary representatives. The fact that the law does not regulate the method of payment of temporary representatives is an additional problem, as courts simply apply the general rule on the costs of legal process and order the claimant to pay the expenses.[88] This practice raises strong suspicions of bias of the temporary representative in favour of the claimant that pays its honoraries, which have been persistently confirmed in the cases monitored by the OSCE where the temporary representative of the absent defendant was either passive or acted in favour of the claimant. This situation results in the disrespect for the rights of the absent defendants, usually property owners of Serbian ethnicity who see no justice done and as a result cannot foresee a return to their former properties in Kosovo.

In fact, even if courts make every effort to follow the legal procedures, a correct and efficient application of the temporary representative mechanism in practice is very complicated, due to systemic problems such as the extreme difficulty in locating absent parties or the lack of cooperation between the authorities and Serbia and Montenegro and the authorities in Kosovo. In this context, it is for the time being very difficult to find a solution to this complex problem which would respect the legal provisions of the LCP and the rights of all the parties to a fair trial within a reasonable time. In order to find a solution to this problem the Kosovo Judicial and Prosecutorial Council requested the Supreme Court of Kosovo to issue a recommendation regarding the proper implementation of the applicable law in cases involving the appointment of temporary representatives in civil proceedings, especially when the defendants are from minority communities. In response to this request, the President of the Supreme Court sent a letter on 13 March 2006 to all courts in Kosovo instructing the Presidents of the courts to stop appointing temporary representatives altogether until the Supreme Court issues an opinion on how to deal with these cases.[89] Even though the issuance of an advisory opinion by the Supreme Court can help harmonise the application of the law on temporary representatives by all courts in Kosovo, possibly contributing to increase the efficiency of the system, the instruction sent to the courts to halt all cases of this kind until such opinion is issued is not based in law and constitutes an undue interference with the independence of the courts. This instruction not only falls outside the power of the Supreme

[87] In the verdict the court stated that "[f]rom all what was said, the administered evidence, admission of the statement of claim by the temporary representative […], the court found that the lawsuit of the plaintiffs is grounded."

[88] Article 152 of the LCP foresees that each party shall cover the costs it has caused by its actions.

[89] As the OSCE monitors verified, after receiving the letter of the Supreme Court, the courts in Kosovo have stopped dealing with cases when there is a proposal to appoint a temporary representative to the absent party. All those cases are therefore on hold until the Supreme Court issues an opinion instructing the courts on how to proceed.

Court, which cannot give orders to the courts to suspend ongoing cases, but it also prevents the parties in those cases from having access to justice without undue delays, for as long as the suspension lasts. Therefore, for the moment there is still no solution in sight to the problematic property cases against absent persons, as the temporary representative mechanism is not effective in practice and the courts are waiting for instructions of the Supreme Court on how to proceed with those cases.

3. Legacy from the past

It is a generally accepted fact that formal legal requirements for property transactions have rarely been respected by the people of Kosovo in the past. This reality can be attributed to several factors, such as a fragile legal culture or the fact that many people opted not to observe those formalities to avoid paying taxes on property transactions. One of the explanations for this state of affairs was the existence of discriminatory laws adopted by the Serbian government restricting transactions between members of the Serbian and Albanian communities in Kosovo.[90] These laws subjected every property contract between members of different Kosovan ethnic communities to the approval of the Directorate of Property Rights,[91] ensuring that such transaction could not take place in case they caused an alteration of the ethnic composition of the population or the emigration of members of a particular community, or when the transaction would provoke commotion, insecurity or inequality towards members of another ethnic group in Kosovo.[92]

Although UNMIK revoked these discriminatory laws in 1999,[93] prior to that date the legislation had led many Kosovo Serbs and Kosovo Albanians to conclude purchase contracts that did not comply with the legal requirements for their validity. This legacy renders the work of the courts in deciding on property disputes extremely difficult, given the frequent absence of formal records to prove old property transactions. Following the conflict in Kosovo the problem was aggravated by the displacement of peoples, the breakdown of institutions and the physical destruction or disappearance of contracts and cadastral records on property rights, creating a situation where the evidence in property cases is generally very weak, with few written and official documents to prove property rights. As a result of all these factors, the courts generally have to reach a judgment on property disputes solely on the basis of witness testimony. These testimonies are usually proposed by the only party participating in the case, as the absent party cannot contribute to the evidentiary proceedings and assist the courts in finding the truth.

Finally, the legal framework regulating property rights is so confusing and disperse, that it creates an extra difficulty for the courts in applying the law. The property laws currently in force [94] are numerous and scattered through several legal texts, regulating all different aspects of property rights and often making reference to institutions which no longer exist. To complicate the situation further, since 1999 several UNMIK Regulations have consecutively been adopted on property matters that were previously regulated by the Yugoslav laws,

[90] Law on Changes and Supplements on Limitation of Real Estate Transactions published in the *Official Gazette of Serbia*, No. 30 of 22 July 1989; Law on Changes and Supplements of this Law published in *Official Gazette of Serbia*, No. 42 of 28 September 1989, and in the *Official Gazette of Serbia,* No. 22 of 18 April 1991, hereinafter LCSLRET.

[91] A department of the Ministry of Finance of the Serbian Government.

[92] Article 3 (1) of the LCSLRET. In practice, the discretion that the law allowed and the vague grounds for its application resulted in a discriminatory application which prevented all property transactions between members of the Albanian and Serbian communities of Kosovo.

[93] UNMIK Regulation n. 1999/10 on the Repeal of Discriminatory Legislation Affecting Housing Rights and Property, promulgated by the SRSG on 13 October 1999.

[94] Pursuant to UNMIK Regulation n. 1999/24 and UNMIK Regulation n. 2000/59, besides the UNMIK Regulations approved by the SRSG, the applicable law in Kosovo is the law which was in force on 22 March 1989, plus certain laws that were in effect after that date which are not discriminatory.

resulting in tremendous legislative confusion, with no clarity as to the interaction between the many pre-UNMIK laws on property rights and the successive amendments to the system by new UNMIK Regulations. This prolific and unsystematic legislative production has created an extremely complicated legal framework difficult to understand and to apply by the courts dealing with property transactions (let alone by the individuals who are supposed to follow the legal requirements in property contracts), thus affecting the resolution of property disputes. Thus, a legal harmonisation would be beneficial to the property rights system.

3.1. Informal Contracts

One of the most common problems affecting property disputes arises from the widespread existence of property claims based on informal or oral contracts, that is, property transactions that fail to meet the legal requirements for validity but are nevertheless accepted as evidence by the courts.

According to the law, "[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" (unofficial translation).[95] Besides the judicial certification, property transactions over real estate are also subject to the registration in the cadastral books, a mandatory formal requirement, particularly whenever the transfer is done through judicial actions.[96] Many other laws refer to the importance of cadastral registration for the system of property protection, as a fundamental evidentiary basis on which the work of the courts in respect of property transactions shall be based.[97]

In spite of this legal framework the OSCE has identified several court cases where the claim was based on purchase contracts which failed to meet those requirements, but still were admitted as valid evidence by the courts, in contravention to the mentioned laws.

> In two similar property cases before the Municipal Court in Gjilan/Gnjilane, the same claimant, a Kosovo Albanian, requested on 01 July 2004 that the court recognise his ownership rights over the properties he had allegedly bought from two Kosovo Serbs currently displaced in Serbia, whose whereabouts are unknown. In both cases the claim was based on oral purchase contracts, never certified at the court or registered in the cadastre, concluded between the parties many years ago in the presence of witnesses. Since the defendants had fled to Serbia after the conflict, the claimant could not regularise the situation and so asked the court to recognise his property rights in order to have them registered in the cadastral office. Even though there were no official documents presented as evidence and the absent defendants had no participation in the proceedings, the court approved the claims solely based on the testimonies of the claimants' witnesses.[98] The court further deemed the oral contracts as a valid basis on which the claimant could acquire property over the disputed real estate, considering that they came into effect as soon as the parties fulfilled all their

[95] Article 4(2) of the Law on Transfer of Real Property, herein after LTRP.
[96] Including the certification of contracts through the non-contested procedure and court verdicts in property disputes, which is the usual means of acquiring ownership rights through transfers. See Articles 33 and 20(1) of the Law on Basic Property Relations, hereinafter LPR, published in the *Official Gazette of the Socialist Federal Republic of Yugoslavia, No. 6/80,* on 1st September 1980.
[97] See for instance Article 3 (2) of the Law on Measurement and Land Cadastre, published in the *Official Gazette of the Socialist Autonomous Province of Kosovo*, No.12/80, according to which "[t]he land cadastre is the main evidence for the land and the objects in it." See also Article 2.1 of UNMIK Regulation N. 2002/22, on the promulgation of Law N. 2002/05 on the Establishment of an Immovable Property Rights Register, published on 20 December 2002, which states that "[i]mmovable property rights […] pertaining to land, buildings and apartments shall be recorded in the Register."
[98] It should be noted that the temporary representatives of the respondents remained passive, not proposing any evidence in defence of their absent clients, and always supporting the claims.

obligations (to pay the price and deliver up possession). The absence of any formal requirements for real estate transactions was not even considered by the court.[99]

In another property case before the Gjilan/Gnjilane Municipal Court, a Kosovo Albanian filed a claim on 26 February 2004 against a Kosovo Serb, based on an oral contract allegedly concluded on 2 February 2000. Since at that time the courts in Kosovo were not functioning properly, the parties could not formalise the contract in writing and have it certified in court, so they agreed to formalise the transaction at a later date.[100] As the defendant subsequently fled Kosovo, the claimant lost track of his whereabouts and it became impossible to formalise the purchase contract as agreed. Therefore, the claimant requested that the court certify the alleged transaction based on the testimonies of witnesses who were present during the conclusion of the oral contract. Based on those witnesses, proposed only by the claimant as the defendant was absent and his temporary representative proposed no evidence, the court approved the claim, admitting the oral contract as a suitable means by which the disputed property could be transferred, considering that it was demonstrated by the witnesses' testimonies that both contracting parties had fulfilled their obligations.[101]

Whereas in the first example described above the parties' failure to respect legal requirements for property transactions resulted from the socio-political context in Kosovo at the time the purchase was supposedly done, in the second example the lack of a valid contract was due to the breakdown of the judicial system in Kosovo immediately after the conflict, when it was simply not possible to follow legal procedures. If the context behind each of these situations is important to understand the problem of disregard for the most basic formal requirements for property transactions, the manner in which the courts dealt with the matter cannot be immune from criticism. In each case the court failed to observe basic rules on property rights, which foresee that contracts for the purchase of real property must be done in writing, certified in court, and registered in the cadastral books, otherwise they are not legally binding.[102] By acknowledging oral contracts as a valid means by which property may be transferred, and approving property claims based on witnesses' testimonies rather than on official documents, the court flagrantly violated the law.

While the reliance on oral contracts as a basis for property claims has been identified by the OSCE in a few cases, a very large number of property cases monitored were based on informal purchase contracts, done in writing but never certified in court or registered in the cadastral books. This kind of cases constitutes a very worrying pattern, given that one of the parties in the dispute is generally absent from the proceedings and as a result the court only relies on evidence proposed by the claimant.

In a case before the Municipal Court in Pejë/Peć, the claimant, a Kosovo Albanian filed a claim on 17 November 2003 alleging that he had acquired the disputed property pursuant to a contract concluded many years ago with the defendants, five Kosovo Serbs currently displaced in Serbia. Due to the discriminatory laws in force at the time of the conclusion of the contract the parties were not able to certify it in the

[99] The Court invoked article 73 of the Law on Contracts and Torts (Official Gazette SFRY, N. 29/1978) to conclude that the lack of a written form did not affect the validity of these property transactions, as long as the contracting parties have performed their respective contractual obligations. However, this argument cannot apply, as the property transactions at stake require not only the written form, but also their certification at the court (Article 4 (2) of the LTRP), plus their registration in the cadastral books (Article 33 of the LBPR). These are all essential formal requirements, without which the transaction shall not be considered as legally binding (see Article 4 (3) of the LTRP).

[100] First through a certification of the contract in the Municipal Court of Vranje, Serbia, then using that official verification to certify the contract before the Gjilan/Gnjilane Municipal Court.

[101] See remarks on footnote 75.

[102] Article 4 of the LTRP.

court or to register the property transfer in the cadastre. As a result, the only evidence presented to the court was an uncertified written contract and the testimony of the witnesses on behalf of the claimant. The defendants, whose addresses in Serbia are unknown, were all absent from the proceedings, being represented by a temporary representative who did not propose any evidence. In spite of the lack of any suitable evidence to prove the property acquisition, the court approved the claim based on the witnesses' testimonies and considering the written contract allegedly concluded by the parties, as a valid form for the property transaction invoked in the claim.

In another case before the Municipal Court in Pejë/Peć, on 21 November 2003 a Kosovo Albanian claimant requested the judicial recognition of his property rights, alleging that he had acquired the disputed property through a written contract concluded with the Kosovo Serb defendant who was absent from the proceedings and currently displaced in Serbia. This contract was never certified before the court or registered in the cadastre, but nevertheless the court admitted it as a valid ground for the property acquisition, approving the claim solely based on the written contract and the claimant's statements. Thus, without even gathering evidence on behalf of the defendant, whose temporary representative remained passive, the court ordered the judicial recognition of the claimant's property rights and their registration in the cadastral office.

As these examples demonstrate, in spite of the detailed legal requirements established for the transfer of real property, the courts constantly disregard those requirements when deciding on property disputes. Even though the law is quite clear in this regard, stating that property transactions which fail to meet the formal requisites are not legally binding, the courts still decided to attribute legal value to those transactions which were done either orally or through written contracts with signatures uncertified at the court and not registered in the cadastral office. There is however a legal alternative to solve these cases without relying on invalid purchase contracts, which consists in proving the adverse possession of the property by the claimant for the periods of time prescribed in article 28 of the Law on Basic Property Relations. Nevertheless the claimants did not base their request on adverse possession and the courts did not consider it in their final verdicts.[103] Moreover the fact that these decisions are only based on witnesses proposed by the claimant, as the absent defendant is usually unaware of the court case, raises additional concerns, not only due to the disrespect for the rule of law, but also for the lack of protection the courts offer to the absent parties in these lawsuits.

3.2. Inherited property problems

Considering the institutional turmoil that has taken place in Kosovo as a result of the events in the 1990's and the conflict in 1998-99, it is only natural that several issues that the courts are faced with today have their origins in past facts and circumstances. Many ongoing court cases were initiated in the 1990's, before courts composed entirely by Serbian Judges, and were suspended for several years due to the conflict. Furthermore, as a consequence of the conflict, many properties have been destroyed and official documents (like cadastral records of immovable property or the civil registers of individuals) have disappeared. In other cases, one of the parties has passed away or been displaced, and the dispute persists against an undetermined subject. These situations, aggravated by the long stay of the proceedings, the age of the facts and the outdated evidence, make it very difficult for the courts in the present day to deal with these old property disputes, as in many cases they do not possess all the elements required to resolve the case in an appropriate manner.

[103] In case a property claim is based on adverse possession pursuant to article 28 of the Law on Basic Property Relations, the threshold of proof shall be high enough not to permit the approval of the claim solely based on the testimony of witnesses proposed by the claimant, requiring other means of evidence to ground the court's decision.

In one case before the Municipal Court in Pejë/Peć a property claim was filed on 23 September 1997 against the Pejë/Peć Municipality, which was intending to expropriate the house of the claimant. As a result of the conflict in Kosovo this case was not concluded, remaining in suspension until 2005, when it was re-initiated by the lawyer of the claimant. In the meantime the disputed property was destroyed, the claimant passed away and the representatives of the Municipality changed. Instead of filing a new claim, the lawyer of the claimant transformed the previous property claim into a claim for compensation, with no written submission presented. In spite of all these changes, the court agreed to proceed with the case, even though it involved a claimant that had passed away, an object that no longer existed and a request for different relief (for compensation rather than for property protection). The only factor in common of the present case with the case initiated in 1997 is the presence of the lawyer of the claimant, whose powers to represent a deceased claimant, with no intervention from the heirs, are questionable.

In three similar cases before the Pejë/Peć Municipal Court the claimant, a socially owned enterprise, requested the judicial recognition of its property rights over three shop buildings in the center of Pejë/Peć, and the eviction of the defendants currently occupying them. These stores were destroyed during the conflict, rebuilt by the Pejë/Peć Municipality and given to the defendants, who already owned part of the buildings. According to the defendants, these are new immovable properties, as the property demanded by the claimant does not exist anymore, so the claim should be refused as its object no longer exists. To complicate this already difficult case, even though the reconstruction has taken place over a building that was destroyed inside but whose walls were still standing, the cadastral office attributed to it a new record. Therefore, currently there are two distinct cadastral parcels that refer to the same property, each in the name of one of the parties in this complex property dispute.

In two similar cases before the Municipal Court in Pejë/Peć, the property claims, filed respectively on 1 December 2004 and 29 May 2005, were based on written contracts that were destroyed during the conflict. As the Kosovo Serb defendants were absent from the proceedings they could not directly contradict the facts alleged by the claimants or present evidence in their defense. Consequently the court was faced with disputes for which it had no official documents on which to base its decision, having to rely exclusively on witnesses proposed by the claimants. In this instance the events of the conflict affected evidentiary procedures hindering the work of the courts in assessing the truth.

In all these cases, events which are external to the work of the judiciary affected the performance of the courts in reaching an adequate decision. These problems are mainly linked to the effects that the conflict in Kosovo had on the functioning of the institutions and the rule of law, causing an interruption of the institutional life and the destruction of evidence and objects essential for the work of the courts. Therefore, due to those external circumstances the courts were not able to handle these cases in a satisfactory way, as their capacity to assess the evidence and the facts alleged was severely limited as a result of the events directly attributable to the conflict.

4. Recommendations:

- Every official document issued in Serbia and Montenegro and submitted before the courts in Kosovo as evidence in property disputes or in the procedure for certification of property transactions shall be referred to the Department of Justice, for the verification of that document's authenticity;

- The court shall only proceed with the property dispute or the certification procedure after the document referred to above has been verified and considered by the Department of Justice as being authentic, through the contact with the institutions in Serbia and Montenegro that issued it, attributing to it official value;

- If the Department of Justice or a court suspects that a document presented as evidence in a property case is forged, it shall refer the matter *ex officio* to the prosecutorial authorities to initiate investigations for the crime of falsification of documents, pursuant to article 197(1) of the Provisional Criminal Procedure Code of Kosovo;[104]

- All cadastral records in Kosovo shall be regularized and updated;

- When irregular cadastral documents are presented as evidence in property disputes, courts should refer them to the cadastral office that supposedly issued the document to assess their authenticity, before admitting them as evidence;

- In case judges do not spot alleged irregularities of cadastral documents presented as evidence of property rights, the lawyer of the opposing party shall challenge the admission of those documents as evidence;

- Whenever the defendant in a property dispute is thought to be outside of Kosovo, and the Court does not know his/her location, the Court shall submit the summons to the Department of Justice in order to locate the defendant through the official links with the authorities of the territory in which the defendant is currently residing;

- The Department of Justice should improve the mechanism of locating absent parties currently residing in Serbia and Montenegro, as well as the procedure for the verification of the authenticity of official documents issued therein and presented before the courts in Kosovo, through enhanced cooperation with the authorities in Belgrade and in Podgorica;

- The Presidents of the courts should ensure that all civil judges are aware of the exceptional character of the appointment of temporary representatives and of the need to utilise the relevant competent administrative body or, when necessary, reasonable alternative means in order to locate absent parties before resorting to this measure;

- To this end, the court Presidents should ensure that all judges are aware of the possibility under UNMIK Administrative Direction No. 2002/16 for UNMIK judicial authorities to request the disclosure of personal data from the Central Civil Registry. Judges should be required to use the services the Central Civil Registry in their attempt to locate the defendants;

- In accordance with the requirements outlined in the law, judges issuing a decision to appoint a temporary representative should state what steps have been taken to locate

[104] Approved by the UNMIK Regulation 2003/26

the defendants, and demonstrate the detriment that would ensue from any delays if the regular procedure for appointing a legal representative were to be followed;

- When appointing a temporary representative for defendants belonging to minority communities, the judges should make every effort to publish those announcements properly. In particular, if the absent defendants are Kosovo Serbs, the appointment of a temporary representative shall be announced in Serbian language newspapers, preferably also published in Serbia and Montenegro, in order to strengthen the courts' outreach efforts;

- The Judicial Inspection Unit should investigate cases in which temporary representatives have been appointed prematurely or without proper justification;

- In view of the non-uniform practices in the selection of temporary representatives, the Kosovo Supreme Court should issue a legal opinion clarifying the relevant procedure for this appointment;[105]

- The Kosovo Supreme Court should refrain from giving instructions to the courts to suspend ongoing cases, limiting its action in this regard to the issuance of advisory opinions according to its powers under the law;

- The courts in Kosovo should not abide by any instruction from the Kosovo Supreme Court ordering them to suspend cases involving temporary representatives;

- A new law should be approved clearly regulating the method of payment of temporary representatives, who should not be paid by the claimant in order to avoid conflicts of interest of the lawyer acting as temporary representative of the absent defendant;

- The Kosovo Chamber of Advocates should take disciplinary action against its members who fail to fulfil their duties when appointed as temporary representatives;

- In property claims grounded on purchase contracts, courts shall not decide solely based on oral and informal purchase contracts, not certified before the court nor registered in the cadastral books, without any other evidence to prove property rights;

- A new law should be approved harmonizing the property rights system in all its facets, from the formal requirements of property transactions to adverse possession, from the registration of property rights in cadastral records to the right to servitude, thus replacing the scattered laws regulating these matters. The new property rights law shall be up to date and adapted to the current situation in Kosovo, without reference to institutions from the Yugoslavian system that no longer exist.

[105] See Article 31(7) of the Law on Regular Courts (Official Gazette of the SAP Kosovo 21/78).

Chapter 3

INTERFERENCE WITH COURT PROCEEDINGS AND THE JUDICIARY

One of the most important principles governing a democratic society is that of the separation of powers. The legislative, executive and judicial powers should be separated and the officials operating within each of these branches should refrain from interfering in areas outside their competencies. In Kosovo, the principle of the separation of powers is part of the Constitutional Framework, which states that "[t]he Provisional Institutions of Self-Government and their officials shall […] [p]romote and respect the principle of the division of powers between the legislature, the executive and the judiciary."[106]

In regard to the judiciary, the principle of separation of powers constitutes a very important guarantee of its independence, as established in international standards.[107] According to the United Nations Basic Principles on the Independence of the Judiciary, "[i]t is the duty of all governmental and other institutions to respect and observe the independence of the judiciary," which shall decide matters before them without any "restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason."[108] At a regional level, the right to an independent and impartial tribunal is a primary requirement of the right to a fair trial as protected by the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights.[109]

The OSCE has identified several instances in which local and central authorities attempted to or indeed did interfere with court proceedings. These actions were taken either by local authorities interfering with the work of the courts through their influence on other subjects who thus refused to obey judicial orders in cases against the municipalities, or by the Department of Justice (DoJ) through direct instructions sent to the courts ordering judges not to proceed with certain categories of cases. Even though there may be some reasons for this interference of the DoJ, the way it was carried out, with no defined deadline and without presenting an alternative solution for the suspended cases, infringes upon the independence of the courts. The present Chapter will address these issues and provide concrete examples of cases where official authorities have improperly interfered in court cases.

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[106] Chapter II of UNMIK Regulation 2001/9, of 15 May 2001 on *A Constitutional Framework For Provisional Self – Government in Kosovo*.

[107] See Article 10 of the Universal Declaration of Human Rights, which states that "[e]veryone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him." The same principle is also enshrined in the International Covenant on Civil and Political Rights, which expressly refers to "[…] a competent, independent and impartial tribunal established by the law […]." More specifically, the Human Rights Committee has stressed the importance of ensuring the independence of the judiciary from the executive and legislative branches (Human Rights Committee, General Comment No. 13, *Equality before the courts and the right to a fair and public hearing by an independent court established by law*, Article 14(3).

[108] United Nations Basic Principles on the Independence of the Judiciary, paragraphs 1 and 2, adopted by the Seventh UN Congress on the Prevention of Crime and Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by UN General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. The document further establishes that "there shall not be any inappropriate or unwarranted interference with the judicial process" and that the mentioned principle "entitles and requires the judiciary to ensure that judicial proceedings are conducted fairly and that the rights of the parties are respected" (paragraphs 4 and 6, respectively).

[109] Article 6(1) of the European Convention on Human Rights. In the case of *Campbell and Fell v UK*, A 80 par. 33, 81 (1984), the European Court has stated that in assessing the independence of a court, regard must be paid "to the manner of appointment of its members and the duration of their terms of office, the existence of guarantees against outside pressure and the question whether the body presents an appearance of independence."

1. Undue interference by Municipal Authorities

One of the problems identified by the OSCE was the interference of local authorities in court proceedings. In some instances municipal authorities plainly obstructed court proceedings, in other cases they put undue pressure on judges in connection with disputes in which they were a party, while in a number of cases they used their power to influence third parties and hence prevent the court from exercising its authority. Such forms of interference with the judiciary violate the principle of separation of powers and jeopardize the independence of the judiciary.

> In a case before the Municipal Court in Prizren one claimant filed a lawsuit against the Municipality on 2 April 2005, requesting the enforcement of a judicial agreement.[110] During the course of the proceedings the judge in charge of the case was prevented from carrying out the site inspection on three different occasions. This standstill was caused by the refusal of the geodesy expert (an employee of the Municipality) to attend the site inspection and carry out his duties as ordered by the court. During the session held on 20 June 2005, the expert justified his conduct by stating that he had received instructions from the Municipal Directorate for Geodesy and Cadastre not to perform the requested expertise. As a result the proceedings were obstructed for a while, to the benefit of the Municipality who was the defendant in the case.

Although no written order by the Municipality was presented by the expert to justify his allegations in the above cases, the OSCE deems his statement as trustworthy. In fact, the alleged order of the Directorate in question fits with the refusal of the Municipality to abide by the judicial agreement and with its further attempts to prevent the execution of that agreement by filing a new statement of claim challenging the validity of the judicial agreement before the Municipal Court. The aforementioned order of the Directorate amounts to an illegitimate interference with the court proceedings and the due course of justice. As all licensed geodesy experts are Municipal employees, the conduct of the municipal authorities successfully prevented the site inspection from taking place. It should be mentioned that according to the applicable law, an expert is obliged to perform the activities requested by the judicial authority.[111] Furthermore, the law also determines that "state organs are obliged to offer help to courts so as to execute their function."[112] Thus the conduct of the Municipality of Prizren constitutes an undue interference with the court proceedings, obstructing the work of the court and violating procedural laws.[113]

Besides interfering with contested procedures, the OSCE has also identified instances where the municipalities successfully interfered with execution procedures. That interference mainly consisted in the obstruction of executions, through the exercise of the municipalities' influence on other subjects preventing them from obeying court orders.

> In relation to a number of executions pending before the Vushtrri/Vučitrn Municipal Court, the President of the court told the OSCE about a written notification by the Director of the "KSB" Bank informing the court that on 10 December 2004 he had received instructions by the President of the Municipal Assembly not to execute court decisions against that Municipality or the latter would close all its accounts in that bank. According to the information collected at the Vushtrri/Vučitrn Municipal Court,

[110] The judicial agreement had established the transfer of ownership of a property from the Municipality to the claimant.
[111] Article 253 (1) of the LCP.
[112] Article 18 of the Law on Regular Court, *Official Gazette of the SAP Kosovo*, No. 21/78.
[113] In these cases the courts should refer to the Office of the Public Prosecutor any attempts of undue interference coming from members of the Municipalities which would lead to criminal liability prosecuted *ex officio*, pursuant to their duty under article 197 of the Provisional Criminal Procedure Code of Kosovo, promulgated through UNMIK Regulation 2003/26 of 6 July 2003.

as of April 2005, there were more than forty cases in which the "KSB" bank had failed to comply with court orders taken in execution proceedings.

All the aforementioned examples show cases where the municipal authorities interfered with or tried to interfere with the work of the courts in breach of the applicable law, resulting in the hindrance of the swift administration of justice by the courts. These examples show contempt of the municipal authorities for the courts' authority that is not only in violation of the public institutions' obligation to assist the courts in the execution of their function,114 but is also a worrying practice as it displays a tendency of the municipalities to infringe the principle of separation of powers upon which democratic systems are based.

2. Undue interference by the Department of Justice

On a different level, the OSCE is aware that a vast number of claims filed by Kosovo Serbs against KFOR, UNMIK, the Municipalities and individual persons for the compensation for property damages caused after NATO entered Kosovo in 1999 were put on hold following a letter from the DoJ sent to the Presidents of the Supreme, District and Municipal courts of Kosovo in August 2004.[115] The OSCE has interviewed a number of civil judges about this matter and ascertained that after having received this letter the courts have not dealt with any of the claims falling into this category. One of the justifications given by the DoJ for keeping those cases on hold was the fact that such a huge influx of claims would require significant support in terms of logistics, as otherwise it would severely hinder the work of the courts, increasing their already large backlog of cases. The other reason invoked for that instruction was the fact that most of the Kosovo Serbian claimants would need escorts to travel to courts due to security concerns, which would also require special planning and coordination to provide transport arrangements to such a large number of claimants.

In light of the legal framework in Kosovo[116] and the international human rights standards set by the European Court of Human Rights (ECtHR), the OSCE is of the opinion that the above mentioned letter constitutes undue interference by the executive in the functioning of the judiciary, since courts should not receive instructions from external actors on which cases to hear first or which cases to place on hold. Case management is a function of the judiciary, so it is up to the judges to decide on how to manage their backlog of cases, independently from the executive powers. Furthermore, the instructions given by the DoJ have seriously compromised the right of access to court by the Kosovo Serbs claimants and risks violating their right to have a case adjudicated within a reasonable time.[117]

The ECtHR has pointed out on several occasions that the right of access to court is part of the right to a fair trial and shall be rendered effective.[118] Although under certain circumstances the authorities may impose restrictions in regard to the exercise of this right, the 'margin of appreciation' at their disposal shall not lead to limitations which would impair the very essence of the right.[119] Besides, any restrictions must have a "legitimate aim" and comply with the principle of proportionality, meaning that there shall be "a reasonable relationship of

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[114] Article 18 of the Law on Regular Court, *Official Gazette of the SAP Kosovo*, No. 21/78.
[115] According to the statistics of the Department of Judicial Administration, over 17.000 claims have been lodged by Kosovo Serbs with regard to property damages that have taken place after 1999.
[116] Chapter II of UNMIK Regulation 2001/9, of 15 May 2001 on *A Constitutional Framework For Provisional Self – Government in Kosovo*.
[117] This issue also raised concerns within the Ombudsperson Institution in Kosovo, which addressed the matter to the Department of Justice on several occasions. See Ombudsperson Institution in Kosovo, *Fifth Annual Report 2004-2005 addressed to the Special Representative of the Secretary-General of the United Nations*, 11 July 2005, available at http://www.ombudspersonkosovo.org.
[118] See the judgments of the Court in *Golder v. UK*, A 18, 1975 and *Airey v. Ireland*, A32, 1979.
[119] See *Ashingdane v. UK*, A 93, *European Court of Human Rights*, paragraph 57 (1985).

proportionality between the means employed and the aim sought to be achieved."[120] Bearing in mind these requirements, the reasons for the suspension are debatable.[121]

The main problem is not the justification invoked by the DoJ for its intervention in these cases, but the way that such intervention was carried out, in violation of the international human rights standards as set by the ECtHR. In some situations the European Court has allowed government interference in court proceedings, through the temporary suspension of a large number of cases corresponding to the same pattern, that constitute a systemic problem in post-conflict environments, thus restricting the parties' right to access to justice in pursuance of a legitimate aim.[122] However, according to the European Court such suspension must be temporary (with an indication of a time limit), it must be done in accordance with the law, and new measures or legislation to rectify the problem must be introduced in the meantime.[123] These requirements for the restriction of the parties' right to access to court were not fulfilled in the present situation. First, because the request for suspension of these cases contained in the letter lacked any lawful basis and fell outside the DoJ's competencies.[124] Secondly, the suspension created legal uncertainty as no defined period was set down for its duration. Finally, the intervention did not fulfill the requirements set up by the ECHR because ever since the letter was issued on 2004, the DoJ has not produced any measure or legislation to solve the problem, leaving all these cases unresolved until the present.[125] Consequently the intervention by the DoJ has not only affected the independence of the judiciary, but it also limited the right to access to court of more than 17.000 Kosovo Serb claimants with no legal grounds, thus preventing the persons whose properties have been damaged since 1999 from being compensated through the enjoyment of the right to a fair trial within a reasonable time.

> In a case before the Gjakovë/Đakovica Municipal Court, the Serbian Orthodox Church filed a claim on 12 August 2004 against the Gjakovë/Đakovica Municipality, the Provisional Institutions of Self Government of Kosovo, UNMIK and KFOR, for compensation for the destruction of three orthodox churches in that town after 1999, the ruins of which were totally removed during the riots of March 2004. The claimant does not know which individuals destroyed the churches, but as the defendants bore the responsibility of preventing those acts of violence, it is claimed that they are obliged to compensate the claimant for the damage suffered. Soon after the claim, on 26 August 2004, the court received instructions from the DoJ requesting that courts refrain from proceeding with claims of this kind. The Gjakovë/Đakovica Municipal Court followed those instructions, keeping the case on hold for several months, until the claimant decided to withdraw the claim on 02 February 2005.[126]

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[120] *Ibidem.* See also *Lithgow v. UK*, A 102, par. 194 (1985).

[121] As there are many other civil cases initiated by Kosovo Serbs currently displaced that have not been suspended in order to provide claimants with an escort to the court. In fact, in most of those cases the Kosovo Serb parties are actually coming to the courts on their own to defend their claims.

[122] See *Kutic v Croatia*, no. 48778/99, ECHR 2002-II.

[123] See *Acimovic v Croatia*, no. 61237/00, ECHR 2003-XI, and *Multiplex v Croatia,* No. 58112/00.

[124] The DoJ can and has often issued Justice Circulars, nonbinding directives that intend to clarify and harmonise the application of the existing law by the courts. But the present letter does not refer to the application of any existing law; on the contrary, it is a request, interpreted by the courts as an instruction, that tells the courts not to apply the law by not hearing a considerable number of cases that fall under their jurisdiction.

[125] On March 2006 UNMIK created the Kosovo Property Agency (KPA), through UNMIK Regulation 2006/10, in order to address claims relating to immovable property, including residential, agricultural and commercial property disputes that resulted from the displacement of communities after the conflict. But the KPA does not have the jurisdiction to solve the thousands of compensation claims for damages suffered during and after the conflict, which still remain on hold indefinitely.

[126] In the meantime the Gjakovë/Đakovica Municipality, with the acquiescence of UNMIK officials, authorized the construction of a memorial monument to the "War Martyrs of the KLA" in the land where the church used to stand, which was erected on December 2005. This led to the intervention of

At this point it is important to distinguish between claims filed against UNMIK or KFOR, whose personnel benefit from the immunities provided by UNMIK Regulation 2000/47, and which can be considered as falling outside the courts' mandate, and the claims filed against the Kosovo Municipalities or individual persons. While there may be valid legal reasons for keeping cases on hold against UNMIK or KFOR[127], the same reasons do not exist with regard to claims for compensation filed against the Municipalities or individual persons who do not enjoy the same immunities from legal process. Therefore, regarding claims filed by Kosovo Serbs against the Municipalities and individuals for the compensation for property damages caused after 1999, the interference of the DoJ has no legal basis, as both Municipalities and individual persons should be held accountable for their actions before the courts in Kosovo. Perhaps having this distinction in mind, the DoJ issued a new letter on 15 November 2005 requesting the courts to process those cases related to claims for compensation for damages committed by identified natural persons after October 2000.[128]

Even if the second letter intends to produce a positive development, with the purpose of ensuring the access to justice by some of the claimants, it is not the appropriate way to address the problem. Firstly, to send out an instruction to the courts explaining what cases fall under their jurisdiction and shall be processed, and what cases shall remain on hold, amounts to undue interference with the judiciary as described above. Courts shall be independent to decide on which cases to proceed based on their competence. Secondly, even if the intentions behind the second instruction are good, in practice it does not solve the problem because the majority of claims were filed against Municipalities, UNMIK and KFOR, and all these cases continue to remain on hold pursuant to the first letter of the DoJ. Besides, even when compensation claims were filed against individuals, they were usually also filed against Municipalities, KFOR and UNMIK, so courts are invoking the letters of the DoJ not to hear the cases. In fact, since Municipalities, KFOR and UNMIK are usually also defendants, courts decide not to proceed with the cases against only individual defendants, as that would require a modification of the claim.[129] Therefore, as a result of the letters of the DoJ, and the way they are interpreted by the courts, more than 17.000 cases of this type remain on hold for an unforeseeable period.

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the SRSG setting aside the decision of the Municipality that had attributed the land to the War Veterans Association.

[127] According to Sections 2, 3 and 6 of UNMIK Regulation n. 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo, both those institutions and their respective personnel are immune from legal process in Kosovo, unless such immunity is waived by the SRSG or by the respective KFOR Commander. Pursuant to Section 7 of that Regulation, in case there are claims filed by individuals against those institutions for the damage of property which did not arise from operational necessity, UNMIK or KFOR shall establish a Claims Commission to settle those claims. In any case, the competence to settle those disputes falls outside the jurisdiction of the courts.

[128] It is worth noting that the reasoning in the two letters is contradictory. The motives invoked to put on hold claims against Municipalities, KFOR and UNMIK are the same motives that exist with relation to claims against individual persons (the security of the Kosovo Serb plaintiffs). So, there is no reason why the former claims should be kept on stand by while the latter claims should be processed by the courts. The second letter of the DoJ disregards the fact that the security difficulties in bringing many Kosovo Serb plaintiffs to the courts, which seems to justify the suspension of the cases against the Municipalities, UNMIK and KFOR, also exist when the claim is filed against a natural person. Therefore, under the same logic, there would be no reason to proceed with claims against individual persons but not with claims against Municipalities, KFOR and UNMIK.

[129] The continuation of the case would require a modification of the claim in order to exclude from the list of respondents the Municipalities, UNMIK and KFOR (regarding whom the cases are put on hold following the first instruction of the DoJ) and refer only to identified natural persons. According to Article 190 of the LCP the modification of the claim can only be made by the claimant, and then it is up to the court to approve it or not. Since the courts were instructed not to deal with these cases at all, it is unlikely that they will approve any motions for the modification of claims pursuant to Article 190 (6). Consequently all these cases remain on hold in spite of the latest letter of the DoJ urging the courts to proceed with regard to individual persons.

It should be added that the letters referred to above have been also interpreted by most judges dealing with civil cases as also applicable to the claims for compensation filed against the Municipalities and UNMIK as a result of damages to property occurred during the March 2004 riots. Indeed, a number of judges have told the OSCE that they decided not to schedule any hearings in relation to such cases due to the instructions received from the DoJ, and as a result hardly any civil claims have been processed with regard to the compensation for the property damage caused during the March 2004 riots.

Consequently, even though many persons have been convicted for the crime of damage of property committed in respect of acts committed during the March 2004 riots, the OSCE has not identified any civil case for compensation arising from those convictions. On the other hand there are some compensation claims for the damages suffered by Kosovo Serbs during the March riots filed against the Municipalities, the Provisional Institutions of Self-Government and UNMIK,[130] but they all remain on hold until the present date, pursuant to the instructions of the DoJ.

> In four similar claims filed on 23 March 2005 before the Municipal Court in Gjilan/Gnjilane by a number of Kosovo Serb relatives and neighbors from that town against the Municipality, the Provisional Institutions of Self-Government of Kosovo and UNMIK, the claimants requested to be compensated for the damages they suffered during the March riots when their houses were destroyed and they had to flee to Serbia. Following the letters of the DoJ, the court has not dealt with these cases, keeping them on hold indefinitely.

When considering the issue of the indeterminate suspension of these categories of cases, we should be mindful of the role of courts in terms of judicial independence. The courts should realise that they have a role in preserving their independence in the assessment of which cases fall under their jurisdiction and which cases should be processed. While extraordinary circumstances may come into play, as described above, they are exceptions and are allowed only within certain parameters; as a general principle the judicial sector should be free from interference from other branches of government..

It is important to add that the problem of suspended court cases does not only exist with regard to damages suffered by Kosovo Serbs since 1999, as there are currently more than 2.700 claims pending before the courts, filed by Kosovo Albanians against Serbia and Kosovo Serb individuals for damages suffered during the conflict, that also remain on hold.[131] Although there is no instruction by the DoJ regarding these cases, they are all suspended given the incapacity of the courts to deal with indemnity claims against absent persons (most Kosovo Serb defendants' current location is unknown) and the lack of jurisdiction of the Kosovo Courts to try cases against the Serbian State. Considering the dimension of this problem, whereby huge property damages were suffered by all parties in the conflict, and which raises issues of state responsibility for injuries caused to individual citizens, the solution to these cases should be found through the involvement of a special claims commission established to deal only with damage compensation claims resulting from the conflict in Kosovo.

[130] Most of these claims invoke that the respondents were responsible to impose public order and prevent the damages suffered by the claimants during the riots, and therefore are liable to compensate the claimants for those damages, according to Article 180 of the Law on Contracts and Torts.
[131] According to the statistics provided by the Department of Judicial Administration.

3. Recommendations

- Municipal authorities and their organs should refrain from any interference or attempted interference in the work of the courts.

- Municipal officials should cooperate with the judiciary, assisting the courts in performing their duties and performing the activities requested by the courts.

- During the course of their duties, courts should refer to the Office of the Public Prosecutor any attempts of undue interference coming from members of the Municipalities or from any other authority in Kosovo, in order to ascertain the existence of acts which would lead to criminal liability prosecuted *ex officio,* pursuant to their duty under article 197 of the Provisional Criminal Procedure Code of Kosovo.[132]

- Courts should comply with the principle of independence of the Judiciary and resist external interferences and pressures during the performance of their duties.

- In keeping with international standards on judicial independence, courts in Kosovo should assess their own competence to deal with any claim submitted to them and decide on whether to proceed or not with the cases based on the limits of their jurisdiction.

- In this regard courts should declare themselves competent and proceed with all claims filed against identified natural persons, for the damage of property that occurred since 1999, including damage compensation claims related to the March 2004 riots.

- In light of the above mentioned reasoning, the Department of Justice should consider amending or revoking its instructions issued on August 2004 and November 2005 asking the courts not to proceed with the cases filed by Kosovo Serbs for compensation for damage arising from events that occurred since 1999. This should be done in conjunction with the adoption of an alternate solution addressing these cases in a timely manner.

- As a possible solution for the claims which fall outside the jurisdiction of the courts in Kosovo, the Ministry of Justice and UNMIK should consider the creation of a special claims commission for the resolution of compensation claims arising from the property damages suffered both by Kosovo Serbs and Kosovo Albanians, that occurred in Kosovo since 1999, and which may involve the responsibility of KFOR, UNMIK, Serbia and Montenegro or the PISG.

[132] Such criminal acts can include, for instance, the obstruction of evidence, a crime under Article 309 of the Provisional Criminal Code of Kosovo, promulgated through UNMIK Regulation 2003/25 of 6 July 2003, or the crime of corruption in the form of giving bribes, under Article 344 of the same code.

Chapter 4

ISSUES IN RELATION TO EXECUTIVE PROCEDURES

One of the main features of a fair justice system is the existence of an effective structure for the enforcement of judgments. In fact, until a final court decision is enforced the right to a fair trial has not been fully respected.[133]

The executive procedure is the usual legal avenue available to compel a party to abide by a final judgment or any other obligation sufficiently determined through a valid executive document, if he/she fails to voluntarily do so. Therefore, there is a clear distinction between a contested procedure and an executive procedure: while the contested procedure ascertains the existence of a right claimed by one of the parties in a legal dispute, the executive procedure is directed at the effective realization of the right asserted by the creditor.

In Kosovo, executive procedures are regulated by the Law on Executive Procedures.[134] The law determines the documents that are to be considered executive documents,[135] and which can be the basis for a proposal for execution.[136]

The present Chapter addresses the concerns identified by the OSCE in regards to executive procedures. The major concern identified is the fact that in several cases binding judgments were either not being executed or executed with excessive delays, thus seriously hampering the right to a fair trial within a reasonable time. According to the information collected by the OSCE this ineffectiveness is both caused by violation of provisions of the law on executive procedure, and by external factors such as threats or assaults against judges dealing with executive cases, or the corruption in executive procedures.

1. Failure by the Courts to proceed instantly in executive procedures

According to the applicable law after a creditor submits a proposal for execution the court is obliged to proceed instantly and "take subjects in the order in which it received them, unless the nature of the demand or special circumstances request it is proceeded differently".[137] The law also regulates how the decision on execution has to be delivered to the creditor and the debtor.[138] These provisions intend to ensure the swift flow of the executive procedure, according to the order of receipt of each proposal for execution by the court.

Despite the rules requiring prompt action by the courts upon the submission of a proposal for an execution, the OSCE has monitored cases in which the court did not react promptly on the creditor's proposal, thus affecting the parties' right to justice within a reasonable time.

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[133] The right to have a claim relating to civil rights and obligations brought before a court would be illusory if a final judicial decision could remain inoperative to the detriment of one party. See the judgment of the European Court of Human Rights in the case of Hornsby v. Greece, where the Court stated that *"[i]t would be inconceivable that Article 6(1) [of the European Convention] should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions."* ECtHR, 19 March 1997, paragraph 40.

[134] See Article 1(1) of the Law on Executive Procedure, Official Gazette of SFRY, No. 29/78, hereinafter LEP.

[135] See Section I, Chapter I of LEP, Articles 16 *ff.* An executive document can be defined as a document that proves the existence of a right/obligation and that, if fulfilling the requirements established by the law, constitutes sufficient requirement for the executive procedure to begin.

[136] Articles 34 *ff.* LEP.

[137] Articles 2(1) and 10(1) LEP.

[138] Article 39 LEP.

> In a labor case before the Municipal Court in Gjilan/Gnjilane, on 15 June 2004 the court rendered a judgment declaring the dismissal of the claimant by the Municipality as unlawful.[139] This judgment was confirmed upon appeal by the Gjilan/Gnjilane District Court on 8 November 2004.[140] On 7 March 2005, the creditor filed a proposal for execution for "reinstatement in the previous job position and reimbursement of personal income." No decision was taken by the judicial authorities on this request of execution. The case was then sent to the Supreme Court of Kosovo for review[141] but in the meantime, the creditor died.

In this case, the OSCE ascertained that the court did not proceed at all with the proposal for execution filed by the creditor. Contrary to what is established by the law, a decision on the proposal for the execution was never taken.[142] It is worth mentioning that according to the law, a request for review shall not delay the execution of a final judgment.[143]

> In a second example from the Municipal Court in Prizren, there was a final decision in which the court held that the defendant had interfered in the claimant's right to possession of a piece of real estate and ordered the former to refrain from doing so.[144] Since the defendant failed to comply with that order, the creditor filed a request for execution of the judgment and asked the court to fine the debtor.[145] In this case, the hearing scheduled for the executive procedure was adjourned three times (on 8 and 12 July 2005 and on 9 August 2005) without a proper justification.[146]

In both the examples described above the courts failed to proceed diligently upon the submission of a proposal for execution by the creditors. This failure violated the creditors' right to have final court judgments enforced within a reasonable time.

2. External factors effecting executive proceedings: intimidation of judges and corruption

By holding direct responsibility for the enforcement of final court judgments, executive judges may easily be targeted with external forms of pressure (such as threats, assaults or bribes), that compromise their ability to deal with executions in an independent and effective manner. These judges are most vulnerable to intimidation and corruption attempts.

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[139] Although the first instance court verdict recognized that the dismissal of the claimant was ungrounded, the court did not rule on the obligation for the Municipality to restore him to his previous position. *De facto*, this omission would impede the execution of the judgment since the creditor's request in the executive procedure could not be grounded on the content of the executive document. However, this should not prevent the court from proceeding instantly according to the LEP.

[140] It is worth mentioning that one of the problems which could be having a negative impact on the execution of judgments against the municipalities is the fact that municipalities created pursuant to UNMIK Regulation 2000/45 seek to argue that they should not be treated as successors to the rights and liabilities of the former municipal authorities. According to this interpretation, the "new" municipalities shall not be held responsible for acts committed under the former municipal administration. In the present case, however the second instance court disagreed with such interpretation: "[…] The appellate claims of the respondent that the current Municipality does not carry any responsibility in relation to municipal organs of the previous authority as it is not its inheritor, but it is a new municipality governed by a new authority […] are evaluated by the Court as unfounded".

[141] Articles 382 *ff.* LCP.

[142] Article 10(1) LEP.

[143] Article 384 LCP.

[144] Upon appeal, this decision was upheld by the Prizren District Court.

[145] Articles 225 and 226 LEP.

[146] On the first two dates, the court justified the postponement due to the failure to summon the debtor. On the third date, the postponement was justified on the basis of a written request submitted by the lawyer of the debtor, who requested the postponement of the case until he returned from summer holidays. According to Article 26(5) LEP these could not have been considered as admissible grounds for the postponements.

During the reporting period the OSCE has come across cases in which judges responsible for executive proceedings have been threatened or even assaulted while trying to carry out executions.[147] This is a matter of serious concern as such threats and attacks towards the members of the judiciary may jeopardize their independence.

> In a case before the Municipal Court in Prishtinë/Priština involving a request for the execution of a temporary measure, on 6 June 2005 the court decided to grant the temporary measure and ordered the debtor to stop any construction in the property allegedly owned by the creditor. Since the debtor did not comply with the court order, on 19 July 2005 the executive judge tried to enforce the decision. However, while the court was at the scene, the debtor attacked the judge and the creditor. The debtor was eventually detained by the police.

The fact that individuals make use of force or threats in order to stop judges from performing their duties, apart from being a criminal offence, shows a lack of respect of the population for the courts, a reality that is worrying as it potentially undermines the rule of law. In order to fight these practices, it is very important that judges who experience them disclose any relevant information to the competent authorities so that alleged offenders are prosecuted. Furthermore, the OSCE is also of the opinion that, as it is foreseen for criminal proceedings,[148] the possible assignment of international judges to civil cases (in particular those involving difficult executive procedures) should be considered.

Another external factor possibly affecting executive proceedings is corruption. Although the OSCE has only come across two cases in which such practices are connected to executive proceedings,[149] this could very well be a concern affecting other executive cases. The United Nations Office for Drug Control and Crime Prevention has considered that delays in execution of court orders, lack of public access to records of court proceedings and delays in delivery of judgments are objective indicators of judicial corruption.[150] These factors have all been identified by the OSCE as problems affecting the Kosovo Judicial System, and their mere existence lays the ground for the spread of corruption within the judiciary. Moreover the low salaries of Judges creates conditions in which parties can easily influence judges to speed up their executive cases by offering bribes, while judges are easy targets of these corruption attempts given their power over the management flow of executive cases. Even though there are few reported cases of corruption in the judiciary, it is considered by the population of Kosovo as a major problem affecting the judicial system.[151] Recognizing the importance of this problem, UNMIK created on December 2004 a special prosecutor office to investigate financial crimes and corruption. However, so far there have been no palpable results of the work of this unit, as there are very few corruption cases pending in the courts, and as a result corruption is still perceived as a general and unpunished practice within the judicial system. In order to produce results in this regard, a more emphatic fight against corruption is required.

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[147] The OSCE has also been informed by one judge dealing with executive proceedings that there were many executions that she/he could perform properly due to threats or even attacks.

[148] See UNMIK Regulation 2000/64 on the Assignment of International Judges/Prosecutors and/or Change of Venue.

[149] In one of the cases an executive judge was convicted for the crime of extortion, punished under article 267 (1) of the Provisional Criminal Code of Kosovo, for having delayed an execution and requested money from the creditor in order to proceed with the case. Another case is undergoing investigations against a Lawyer suspected of giving bribes to judges.

[150] See United Nations Office for Drug Control and Crime Prevention report "Strengthening Judicial Integrity Against Corruption" issued on March 2001 after the conferences held in Vienna for the Global Programme Against Corruption, convened by the Centre for International Crime Prevention.

[151] According to the USAID report about Corruption in Kosovo from July 2003, from all professionals in Kosovo lawyers are the third most corrupt, immediately followed by judges in fourth place. This conclusion was based on a survey, in which the persons were asked which professionals have asked them for unofficial cash, gifts or favors to solve problems.

3. Recommendations:

- Executive judges shall proceed instantly upon the creditor's proposal for an execution, according to the LEP.

- The Kosovo Judicial Institute should continue to provide training to civil judges on executive proceedings, in particular on the management of cases, so that executions are conducted in respect of the timeframes established by the law.

- The Special Representative of the Secretary-General should issue a Regulation allowing the assignment of international judges to civil cases, in particular those involving the execution of sensitive decisions, where judges can be vulnerable to intimidation by the parties not to carry out the executions.

- UNMIK, with the assistance of donor countries and organizations, should strengthen the capacity of the Special Prosecutors' Office to investigate and prosecute crimes of corruption in a more effective manner, thus contributing to send out a clear message to all the judiciary of Kosovo on the condemnation of corruption.

- The Judicial Inspection Unit shall investigate any misconduct by Judges handling executive procedures, which may raise the suspicion of corruption or that the Judge is being subject to external threats or other forms of pressure.