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

Department of Human Rights and Rule of Law

PROPERTY RIGHTS IN KOSOVO
2002-2003

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GLOSSARY

ACTED	Agency d'Aide a la Cooperation Technique et au Developpement
ABA/CEELI	American Bar Association/Central and East European Law Institute
AoK	Assembly of Kosovo
AoR	Area of Responsibility
ARC	American Refugee Committee
ASB	Arbeiter Samariter Bund
CCK	Co-ordination Centre for Kosovo
CEO	Chief Executive Officer
CORDAID	Catholic Organization for Relief and Development
DJA	Department of Judicial Administration
DOJ	Department of Justice
EAR	European Agency for Reconstruction
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FRY	Federal Republic of Yugoslavia
fYROM	Former Yugoslav Republic of Macedonia
HPCC	Housing and Property Claims Commission
HPD	Housing and Property Directorate
IDPs	Internally Displaced Persons
IPWGHR	Inter Pillar Working Group on Human Rights
KCA	Kosovo Cadastral Agency
KCAC	KFOR "Kosovo Claims Appeal Commission"
KCO	KFOR "Kosovo Claims Office"
KEK	Kosovo Electric Company
KFOR	Kosovo Force
KLC	Kosovo Law Centre
KPS	Kosovo Police Service
KTA	Kosovo Trust Agency
LCO	UNMIK Local Community Officer
LWG	Local Working Group
MCO	Municipal Cadastral Office
MESP	Ministry of Environment and Spatial Planing
MPS	Ministry of Public Services
MHC	Municipal Housing Committee
MLO	UNMIK Municipal Legal Officer
MWG	Municipal Working Group
NGO	Non-Governmental Organisation
NRC	Norwegian Refugee Council
ORC	Office of Returns and Communities
OLA	Office of The Legal Adviser
OSCE	Organization for Security and Co-operation in Europe
PISG	Provisional Institutions of Self-Government
PSAP	Pilot Staff Accommodation Policy
RAE	Roma/Ashkalia/Egyptian
RIG	Returns Implementation Group
RRC	Region Review Committee
RWG	Regional Working Group on Returns
SaM	Serbia and Montenegro
SDC	Swiss Development Corporation
SFRY	Socialist Federal Republic of Yugoslavia
SGA	Specific Geographical Areas

SRSG	Special Representative of the Secretary-General
TCN	Troop Contributing Nations
TDTI	Transitional Department of Trade and Industry
TF	Task Forces
THW	Technisches Hilfswerk
UNCHS	United Nations Commission for Human Settlements
UNHCR	United Nations High Commissioner for Refugees
UNMA	UNMIK Municipal Administrator
UNMR	UNMIK Municipal Representative
UNMIK	United Nations Interim Administration Mission in Kosovo
UN SCR	United Nations Security Council Resolution
US BPRM	US Bureau of Population, Refugees and Migration

EXECUTIVE SUMMARY

Four years after the end of the conflict, the recognition of the right to property as a fundamental human right is gaining ground in Kosovo, albeit frustratingly slowly. Property rights affect the daily lives of Kosovo's citizens. Property is a powerful economic asset that is fundamental to the successful transformation and development of Kosovo's economy into a strong market economy. In Kosovo, accountability of government authorities and respect of the rule of law remain problematic. Such is the contextual backdrop to property rights issues in Kosovo; the length of this report is testimony to the magnitude of property-related problems facing Kosovo's government authorities. This report takes a rights-based approach to assess substantive issues in the field of property rights, rather than assess how the legacy of social ownership underlies and complicates the current property rights regime.

In doing so, the report finds various factors lead to inadequate protection of property rights. The constant amendment of UNMIK Regulations and the lack of clarity in how pre-UNMIK laws and UNMIK Regulations interact make the legal framework complicated. This in turn causes confusion and insufficient awareness regarding how to apply and implement property laws. Resources allocated to institutions continue to be insufficient. Frustration with the inefficiencies has exacerbated the insecurity of property rights as well as due process rights. Established institutions, structures, or procedures are circumvented. For example, claimants frustrated by the residual effects of the previously slow movement of the Housing and Property Claims Commission (HPCC) have turned to the courts, though the courts have no competence to act. The inadequacies of one institution or structure negatively affect others, exposing the need to treat property rights protection as an integrated system.

The report assesses the compliance of Kosovo's property legislation and its implementation with international human rights standards, specifically the European Convention of Human Rights (ECHR). In order to make the analysis accessible, the report is divided into five parts, with each part covering a different aspect in the protection of property rights: registration of property rights (the property registration system), protection of residential property rights affected by conflict (the Housing and Property Directorate and Claims Commission (HPD/CC), judicial protection of property rights (the regular courts), administrative protection of property rights (at municipal and central levels), and protection of property rights through specially-established structures (such as reconstruction and returns-related structures). Each part is separated into sections that first evaluate the applicable legal framework and second analyse the implementation of that legal framework by the relevant institutions or structures. Concrete case studies identified in different regions in Kosovo are used illustrate specific issues.

Part I assesses the extent to which the property registration system, i.e., the Cadastre and immovable property rights registry, functions in Kosovo. It concludes that Kosovo's property registry system does not yet function sufficiently to secure and protect property rights throughout the territory or to enable a smooth transition to a market economy. Neither the legal framework, implementation of it, or access to the property registry system is adequate enough to ensure that the property registry system reflects the current or future situation of property rights in Kosovo.

Part II examines the pivotal role of HPD/CC in the protection of residential property rights. The report finds that the importance of its role has not been adequately recognised. The residual effect of the previous slow pace of claims resolution by HPD/CC, as well as a general lack of awareness of its mandate, has led to circumvention of the institution, thereby endangering individuals' property rights. The interaction of this unique structure with Kosovo's courts and municipal level administrative structures is also examined.

Part III addresses the judicial protection of property rights, and looks at the regular courts of Kosovo. The regular courts normally represent individuals' first recourse against violations of property rights.

However, lack of clarity in the law and management of resources, amongst other reasons, have led to delays and problems in the courts adjudicating cases and enforcing decisions. These delays and problems appear to amount to undue interference with property rights, due process and the right to an effective remedy.

Part IV looks at administrative regulation and protection of property rights. Three different administrative procedures, prescribed by law, are examined in separate chapters: expropriation, registration of residential property transfers (UNMIK Regulation 2001/17), and regulation of construction. Overall, the report finds that currently government authorities do not adequately or consistently balance the rights of property holders with the common interest. On the issue of expropriation, the report underscores the need for integrity and impartiality of officials holding public office, so that determinations of common interest in expropriation procedures take into account the property holder's rights appropriately. Concerning regulation of construction, the report identifies inconsistent practices between municipalities in tackling this issue and the overriding need for new legislation to address gaping holes in the current legal framework.

Part V looks at protection of property rights through specially established structures, such as those created in the return and reconstruction process. The report assesses if these structures operate effectively to protect individuals' right to return to their pre-conlfict property. The report finds that mechanisms established in the UNMIK Housing Reconstruction Guidelines 2002 effectively prevented violations of property rights when used. The lack of legal codification of these mechanisms, however, resulted in them not being used consistently in the return and reconstruction process, thereby precipitating violations of property rights.

The recommendations outlined in the report are intended to offer specific, remedial measures to enable Kosovo's government authorities to elaborate the next steps needed to address all the problems that overhauling Kosovo's property rights regime entails.

RECOMMENDATIONS

General

- The Special Representative of the Secretary General (SRSG), in consultation with the Office of the Prime Minister and the Association of Kosovo Municipalities, should further clarify the delineation of the competencies between municipal and central level government authorities, as well as between UNMIK and PISG structures.

Property Rights Registry System

- The Ministry of Public Services (MPS)—specifically the Kosovo Cadastral Agency (KCA), should promptly provide clarification, and if necessary propose amendments to, Law 2002/5 (UNMIK Regulation 2002/22) On the Establishment of the Immovable Property Rights Register, to make clear the legal ambiguities and uncertainties, such as how to register socially-owned property. The Assembly of Kosovo (AoK) should adopt (and the SRSG should promulgate) such proposed amendments promptly.
- The AoK should adopt (and the SRSG should promulgate) the supplementary legislation required for the establishment of the property rights registry, or the implementation of Law 2002/5.
- In light of the current confusion regarding the structural hierarchy between KCA and Municipal Cadastral Offices (MCOs), the MPS should provide clarification based on relevant law to KCA and MCOs about the overall administrative structure for the registration system. This clarification should include a clear description of mechanisms which create accountability of involved bodies and officials throughout the structures to ensure the integrity of the data.
- KCA, with the overall support of MPS, should take further appropriate measures to improve the completeness, accuracy, and uniformity of the Cadastre and the registry system in general.
- To ensure proper functioning of MCOs, KCA should provide continuous technical and legal training for their staff.
- To counter the issue of illegal manipulation of data, the Department of Justice (DOJ) should step up its current efforts to conduct criminal investigations into reported cases. Appropriate disciplinary action also should be undertaken by the Independent Oversight Board or other relevant bodies.
- KCA, with the overall support of MPS, should assess the reasons leading to the circumvention of the property registration system in order to identify appropriate steps to reverse this trend. In particular, KCA should explore options such as adjusting fees and a public information campaign to explain the functions of the property registration system.
- The SRSG should continue his negotiations with the Republic of Serbia regarding full access to property rights and cadastral information displaced or stored in the Republic of Serbia.
- The SRSG should provide clarification on the legal validity of cadastral records of the MCOs in Zubin Potok, Zvečan/Zveçan, and Leposavić/Leposaviq. The SRSG also should provide clarification on the legal validity of changes or new entries made in these records since 10 June 1999.
- In order to better protect the property rights of the Kosovo Roma/Ashkaelia/Eqyptian (RAE) communities, the issue of protecting unregistered rights should be addressed by the SRSG. In doing so, the options of incorporating informal and longstanding RAE settlements into urban plans and the development of appropriate social housing programmes should be considered.

Housing and Property Directorate and Claims Commission

The OSCE Property Report, January 2002 and the OSCE/UNHCR Tenth Assessment on the Situation of Ethnic Minorities in Kosovo, March 2003 put forward a set of recommendations regarding housing and property rights. The OSCE will not restate those recommendations.

- UNMIK should ensure that the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) activities benefit from appropriate co-ordination with other relevant bodies and institutions so that HPD/CC can effectively fulfill their mandate as part of UNMIK.
- The judiciary and the police (UNMIK Police and Kosovo Police Service) should increase co-operation with the HPD/CC in preventing and prosecuting post-eviction criminal offenses.
- As its mandate directs, the HPD should continue to provide guidance on property laws to the PISG and UNMIK.
- HPD should continue to conduct an information campaign on the 1 July 2003 deadline to file claims and on HPD/CC activities. This public information campaign should target minority communities appropriately.
- The SRSG should promptly promulgate amendments to UNMIK Regulation 1999/23, clarifying the legal consequences of the 1 July HPD/CC deadline including the body competent to register the types of claims registered by HPD/CC before 1 July.
- To better protect property rights, HPD/CC should establish better co-ordination with the courts. A notification system when claims in either institution are filed should be established.
- To avoid arbitrariness in the allocation of abandoned housing, HPD should review its rules of procedures and adopt further internal administrative directives or take other practical measures as appropriate.
- HPD should implement the rental scheme promptly.
- HPD, with the support of the PISG and UNMIK, should widen the delegation of authority to municipalities. Concurrently, MPS, in consultation with HPD, should clarify the competency of HPD to delegate authority to municipalities and provide any required training to appropriate municipal officials. UNMIK Pillar II, in consultation with HPD, should provide any required training to UNMIK Municipal Representatives—formerly UNMIK Municipal Administrators. The municipalities should fully utilise their delegated authority.
- The PISG and UNMIK should improve accountability of municipal officials. Unlawful activities such as illegal occupation and illegal allocation of buildings by municipalities should result in appropriate disciplinary measures. As such the PISG and UNMIK should implement a policy similar to the OSCE's Pilot Staff Accommodation Policy.

Regular Courts in Kosovo

- All relevant chambers of the Supreme Court of Kosovo should be constituted, including the Special Chambers on Kosovo Trust Agency Related Matters and on Constitutional Framework Matters. Administrative Directions providing the Special Chamber of the Supreme Court on Constitutional Framework Matters' Rules of Procedure should be promulgated promptly so that they can commence functioning. The Supreme Court Chamber on Administrative Matters also should begin functioning.
- In light of the suspension of the Federal Court's competencies within Kosovo, the Supreme Court should provide guidance on how claims that would fall under the Federal Court's jurisdiction should be adjudicated.
- The judiciary should acknowledge and respect the applicable law, in particular UNMIK Regulations 1999/23, 2000/60, 2001/17, 2002/12 and 2002/13. DOJ's Judicial Inspection Unit and the Kosovo Judicial and Prosecutorial Service (KJPC) should take appropriate measures to ensure such respect.

- New UNMIK Regulations should be translated and distributed prior to entering into force. Training of judges also should be provided prior to UNMIK Regulations taking effect or closely follow this time. The OSCE encourages the Department of Judicial Administration (DJA) of MPS to commit adequate capacities and resources to ensure timely and appropriate translation and distribution of new UNMIK Regulations. The OSCE also encourages the SRSG's Office of The Legal Advisor (OLA) to require accurate Albanian and Serbian translations exist upon promulgation and if the translations are not finalised to delay the entry into force of the UNMIK Regulation.
- The Official Gazette (UNMIK Pillar II) should work towards broader and timelier distribution of UNMIK Regulations and Administrative Directions. At the same time, it should work towards publishing the current backlog of UNMIK Regulations and Administrative Directions.
- The courts at all levels, in co-operation with DJA should take appropriate measures to ensure the effective management of human and physical resources to alleviate the current backlog. In order to identify the inefficiencies in the system, DJA should implement a mechanism to effectively gather statistical data.
- The courts at all levels, with the continued assistance of DJA, should work to improve the enforcement of judgements, including sanctioning parties who do not comply with court orders.
- The OSCE reiterates its recommendation that, in the future, court cases should not be allotted on grounds of ethnicity. All sensitive cases involving judges and defendants of different ethnicities should be closely monitored by the OSCE. Any judge displaying bias or discrimination should be disciplined through the KJPC. In particular, court proceedings *in absentia* should be monitored.

Expropriation

- The OSCE encourages the SRSG (through the OLA) to issue guidelines reminding both municipalities and central level agencies of the requirements of the expropriation procedure. Central level agencies, such as the Kosovo Trust Agency (KTA) and the Kosovo Electric Company (KEK), should be instructed to ensure that they comply with these procedures when initiating infrastructure or other public projects.
- Presidents of the Municipal Assembly and Municipal Chief Executive Officers (CEOs) should ensure that their municipalities adhere to expropriation procedures when appropriate. Presidents of the Municipal Assembly and CEOs, moreover, should act effectively to remedy circumvention of these procedures.
- To prevent unintentional violation of property rights—including inadequate compensation, each KFOR Troop Contributing Nation (TCN) is encouraged to develop a claims procedure to which the Nation is bound. Within this binding policy should be a scheme, which includes a rental schedule, to reasonably compensate property right holders for permanent and temporary interference with their rights.

Controlling Residential Property Transfers (UNMIK Regulation 2001/17)

- The SRSG should amend UNMIK Regulation 2001/17 to incorporate the following:
- The scope of the Regulation should be expanded to apply to sales of both private agricultural land and land used for commercial purposes where such types of land fall outside the concept of "associated property" and directly impacts the sustainability of minority communities.
- A compensation mechanism to redress the temporary deprivation of individual property rights.
- All relevant actors (UNMIK, including the Office of the SRSG and Pillar II, HPD, the OSCE and UNMIK Police) should work towards uniform and effective implementation of the Regulation. The OSCE recommends the following:

- The SRSG should designate more Specific Geographical Areas (SGAs), after consulting the UNMR. The Regional Review Committees (RRCs) established under UNMIK Regulation 2001/17 should actively support the UNMR.
- The rationale for designating each SGA should be made public.
- The UNMR should provide to the contracting parties a detailed explanation of the grounds upon which s/he refused to register the sales contract. Such explanations should reflect the balancing of individual rights with the common interest of the surrounding community.
- The RRCs should more actively monitor implementation of UNMIK Regulation 2001/17 to ensure that it is not circumvented or used inappropriately. In co-operation with the UNMR, the RRC should also monitor the verification of sales contracts on property within SGAs at the competent courts.
- To be consistent with the on-going transition of powers, UNMIK Regulation 2001/17 should be amended to allow for its implementation by CEOs with the supervision of the UNMR.

Regulation/Prevention of Illegal Construction

- Municipal officials, law enforcement agencies and the courts should take appropriate measures to remedy and prevent illegal construction and illegal use of agricultural and residential land of minority property right holders, including the application and enforcement of appropriate sanctions.
- The PISG (Ministry of Environmental and Spatial Planning [MESP] and MPS) should ensure uniform implementation of applicable law to regulate construction, including UNMIK Regulations 2000/45 and 2000/53, by issuing an Administrative Directive to complement the model municipal instruction already distributed.
- The SRSG (OLA) and the PISG should provide binding clarification regarding the question of the Central Authority and the corresponding administrative review mechanism to all ministries and municipalities.
- The SRSG and the AoK should amend UNMIK Regulation 2000/53, Section 6.3 to reflect the SRSG's interpretation and practice, as well as comply with human rights standards, so that appeals suspend the enforcement of sanctions.
- The MESP should remind all municipalities of the formal legal requirements for administrative decisions and orders relating to the regulation of construction. These requirements have been reaffirmed in recent Supreme Court decisions.

Return-related Reconstruction

The OSCE/UNHCR Tenth Assessment on the Situation of Ethnic Minorities in Kosovo, March 2003, put forward a set of recommendations regarding return-related reconstruction which remain valid. The OSCE will not restate those recommendations.

- The AoK, with the support of MESP, should codify into law mechanisms protecting property and due process rights when allocating return-related reconstruction, such as those stipulated in the UNMIK Housing Reconstruction Guidelines, Kosovo 2002. These mechanisms should be followed by all structures involved in the allocation and utilisation of reconstruction assistance.
- Such legislation should provide for mechanisms to hold actors accountable for the allocation of reconstruction assistance.
- Within these mechanisms, final approval on allocation should rest with the municipal authorities.
- Municipal administrations and the implementing partners should ensure that those who receive reconstruction assistance vacate the properties which they illegally occupy thereby enabling others to return from displacement. The HPD/CC and the courts should be actively involved in

remedying illegal occupation. As stated in the HPD/CC recommendations, the judiciary, the police (UNMIK Police and KPS), and HPD/CC should co-operate in order to protect against and prevent post-eviction damage to illegally occupied properties.

- In view of the need to protect property rights within the returns process, the United Nations High Commissioner for Refugees (UNHCR) and UNMIK (Office of Returns and Communities) should update their joint Manual on Sustainable Return to include mechanisms, such as those in the "UNMIK Housing Reconstruction Guidelines, Kosovo 2002", for the verification and protection of property rights.
- The Office of Returns and Communities and the PISG should encourage greater involvement by relevant municipal officials in Municipal Working Groups or relevant subsidiary structures to improve the protection of property rights throughout the returns process.

INTRODUCTION

The significance of property rights[1] in Kosovo cannot be underestimated. Not only do they give individuals and businesses the ability to control and protect property against interference, they are also fundamental for enabling sustainable return of internally displaced persons (IDPs) and refugees to their homes in Kosovo, as well as to the development of Kosovo's economy. Yet, throughout Kosovo, the OSCE has found that in general individuals and businesses still cannot effectively secure or protect property and hence they cannot fully exercise their property rights.

A. The Problem

It is a well-known phenomenon that houses, apartments, and business premises are illegally occupied, that farmland is cultivated by unauthorised people and that buildings are constructed illegally on other people's land. The government authorities (defined as both the United Nations Interim Administration Mission in Kosovo (UNMIK) and the Provisional Institutions of Self-Government (PISG)) does not appear to be effective at preventing and remedying the current problems. Property issues are not regulated properly. For example, in some cases people cannot buy or use property because it is not clear who controls or owns the property—either because the records are inadequate or the definition of ownership is.

Efforts have been made to reverse the current situation. Significantly, the Special Representative of the Secretary-General (SRSG) established the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) in 1999 to address key problems related to residential property rights,[2] and the Kosovo Trust Agency (KTA) in 2002 to deal with the administration of socially-owned property.[3] The Assembly of Kosovo (AoK) adopted, and the SRSG promulgated legislation on a revised immovable property rights registry.[4] Many municipalities have increasingly regulated illegal constructions by legalizing or demolishing/removing them. Despite these efforts, concerns remain regarding the government's ability to fully protect property rights. Property rights generally remain insecure and restricted. The question then becomes why this situation persists and why the government still struggles to ensure that people can fully exercise their property rights.

B. The Aim of the Report

Using information gathered since January 2002, the OSCE seeks to answer this question in this report in order to provide the responsible government authorities with the tools to ameliorate the situation and to ensure that property rights are secured and protected for all throughout Kosovo. In previous reports, the OSCE has focused on identifying the problems encountered in exercising property rights and categorised them as problems in gaining "access" to property rights, whether through awareness of legally-protect rights, physical access to relevant institutions and structures, or the effectiveness of structures and institutions in protecting these rights. Rather than provide another catalogue of problems already identified and discussed through this "access" approach,[5] this report moves to the next step.

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[1] Throughout the report, the property referred to is immoveable property such as land or constructions.

[2] UNMIK Regulation 1999/23 On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission, 15 November 1999.

[3] UNMIK Regulation 2002/12 On the Establishment of the Kosovo Trust Agency, 13 June 2002.

[4] UNMIK Regulation 2002/22 On the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register, 20 December 2002.

[5] See the joint OSCE/UNHCR Ninth and Tenth Assessments of the Situation of Ethnic Minorities in Kosovo, May 2002 and March 2003 respectively. As well as previous OSCE Reports on the Property Situation in Kosovo, January 2001 and January 2002.

It assumes that access, particularly to effective structures and institutions, is a problem, and that, as the OSCE has found consistently, all government structures and institutions involved in securing and protecting property rights in Kosovo do not function effectively. The report seeks to ascertain why relevant institutions and structures continue to be ineffective. To do so, the report examines the functioning of these structures and institutions in general to determine from where the problems derive. It examines both the legal framework protecting property rights and the implementation of that legal framework, so as to make recommendations for a solution.

Problems exercising property rights impact upon other rights. If government authorities violate the rights of a property rights holder by not informing, compensating, or not providing the opportunity to question—or appeal against—their actions, then the rights of the property rights holder to appeal (due process rights) and to have the interference corrected or remedied (right to an effective remedy) are violated. Discrimination can also prevent legal and natural persons from fully exercising their property rights. Therefore, the conclusions and recommendations made in this report will not only address problems in the protection of property rights as such, but also those preventing the full exercise of these related rights.

This report is designed to serve as an overview of the general problems within the structures and institutions securing and protecting property rights in Kosovo. The report's findings and recommendations then will serve as a tool for follow-up reports in which the OSCE will further focus on specific issues or recommendations. These follow up reports are intended to provide more focused and detailed analysis in order to aid the appropriate government authorities to improve the property situation in Kosovo.

C. The Analytical Foundation of the Report

In order to determine from where the problems in Kosovo's property rights regime derive, the property rights themselves must be defined as well as a set of criteria to evaluate if the protection of these rights is effective. Kosovo's municipal and central government authorities are explicitly obliged to observe the standards set by the European Convention for Human Rights (ECHR), its Protocols and its case law.[6] These standards are therefore used as the evaluative criteria throughout this report.

1. *Defining Property Rights and their Limits*

Under the ECHR and the applicable domestic law, individuals and businesses (legal entities) have the rights to possess, dispose, and use property, among others.[7] This bundle of rights can be acquired over all types of property, including residential, commercial or agricultural land, as well as all types of buildings. A property rights holder can transfer all or one of these rights (for example the right to use) to others. The government can, under certain circumstances, interfere with the above-mentioned bundle of property rights.

If the government authorities in Kosovo want to interfere, deprive or control the use of a person's property rights a three-pronged test must be met. According to Article 1, Protocol 1, ECHR, the interference must

(a) be provided by law, meaning the law must be accessible and sufficiently certain (clear) as well as provide protection against arbitrariness;[8]
(b) be in service of a legitimate aim, or in the common interest;[9]

[6] Chapter 3.2 (b), UNMIK Regulation 2001/9, On a Constitutional Framework for Provisional Self-government in Kosovo (Constitutional Framework), 15 May 2001.
[7] See Article 3, Law on Basic Property Relations, Official Gazette SFRY, No. 6/80, and Article 1, Protocol 1 of the ECHR. See *Sporrong and Lönnroth v. Sweden*, A 52, para. 61 (1982) and *Marckx v Belgium*, A 31, para. 63 (1979), which also enumerate the right to lend, pledge and destroy property. For residential property, see Article 8, ECHR as well.
[8] *Henrich v. France*, A 296-A, para. 42 (1994).
[9] In general, governments are provided a wide margin of appreciation in establishing such aims/interests.

(c) be necessary in a democratic society and the interference must proportionate to the aim sought, i.e. strike a fair balance between the interests of the community and the protection of the individual rights concerned.[10]

This test requires that adequate compensation be given for the interference with or deprivation of property rights. If a particular interference or deprivation by government authorities—whether it be by the law itself or the implementation of it—does not meet the above-mentioned criteria, then the interference or deprivation is unlawful or arbitrary and would need to be remedied.

2. *Protection of Property Rights*

While property rights can be legally restricted, they can also be violated by individuals or government authorities and, therefore, in line with ECHR standards, government authorities must ensure they provide protection and effective and accessible remedies. Under the ECHR, all government authorities have a positive obligation to respect and protect property rights. This means that government authorities must not arbitrarily interfere with property rights, but, in the event of interference, also must take measures to prevent or correct such interference.[11] Such an obligation would extend to the courts, but if the courts are unable or unwilling to correct such interference, then the government has not met its obligation under the ECHR. This obligation also includes that government authorities take positive actions to remedy any violations of rights, such as evicting illegal occupants.[12]

The right to an effective remedy is enshrined in Article 13, ECHR. Other rights under the Convention can also afford protection to property rights holders disputes. For example, the right to appeal a decision interfering with property rights (derived from Article 6(1)), the right to non-discrimination (Article 14) and the protection of the integrity of one's home (Article 8). In practical terms, compliance with the ECHR means that the government authorities of Kosovo have to provide an effective protection of property rights, including functioning administrative and judicial remedies and enforcement mechanisms that operate without undue delays. It also means that the laws themselves shall provide such protection.

3. *Some Peculiarities of the Property Rights Regime in Kosovo*

When applying ECHR standards to the situation in Kosovo, some underlying elements need to be considered. First, full ownership rights do not exist in Kosovo. As it currently stands, the property registration system throughout Kosovo is incomplete and only lends legal security to the right of possession. According to applicable law, the property rights registry should have an additional page for every record, noting the owner of the property. Currently, though, most authorities treat the right of possession as akin to ownership. Second, the definition of 'social-ownership', the primary ownership category used throughout the former Socialist Federal Republic of Yugoslavia (SFRY), remains unclear. For example, it is unclear what rights the municipalities have in relation to socially-owned property. Third, the legal framework governing property rights is comprised of pre-UNMIK laws which were valid prior to 24 March 1989 and regulations promulgated by UNMIK since 25 July 1999.[13] In addition, provisions of laws that fill gaps in the applicable law just described and that are non-discriminatory, compliant with international human rights standards, and in force after 24 March

[10] *Sporrong and Lönnroth* case, footnote 7, para. 69.

[11] *Marckx* case, footnote 7, para. 31 and *X & Y v. Netherlands*, A 91 para 23 *et seq*. (1985), among others. For the particular obligation to protect one's home (Article 8, ECHR), see *Airey v. Ireland*, 6289/73, 10 September 1979, para. 32-33.

[12] *Whiteside v. UK*, 76/A DR 80 (1994), *Plattform Arzte fur das Leben v. Austria*, A 139, para. 30-34 (1988). The Human Rights Chamber of Bosnia-Herzegovina, which directly applies the ECHR, has held that the failure to take actions to remedy interference with property rights, may itself constitute unlawful interference by the government (*Blentic v. Republic* Srpska, CH/96/17, 5 November 1997, para. 25).

[13] Section 1.1, UNMIK Regulation 1999/24 On the Law Applicable in Kosovo as amended by UNMIK Regulation 2000/59.

1989 also are part of the legal framework.[14] Any provision of a pre-UNMIK law which conflicts with an UNMIK Regulation is not valid. These peculiarities must be taken into account when analysing the legal framework and its implementation.

In order to discover whether the problems encountered by the institutions and structures protecting property rights come from the content of the legal framework, or from its implementation (or both), several factors have to be taken into account. Firstly, it must be established whether or not the legal framework includes important elements like effective remedies and adequate compensation mechanisms. Secondly, it must be established whether or not the legal framework is being implemented correctly, i.e. that effective remedies and compensation mechanisms prescribed by law are being put into practice.

D. The Staff Accommodation Policy

In order to ensure that OSCE staff does not illegally occupy residential property in Kosovo, the Human Rights and Rule of Law Department has developed a Pilot Project called the "Staff Accommodation Policy." More information regarding this policy can be found in Part II of the report, under the HPD/CC chapter.[15]

E. The Structure of the Report

In order to make the analysis of property issues contained in this report more accessible, the report is separated into five parts, with each part covering a particular aspect of protection provided by an institution or structure: registration of property rights (the property registration system), protection of property rights affected by conflict (HPD/CC), judicial protection (the regular courts), administrative protection (at municipal and central levels), and protection provided through specially-established structures (the reconstruction and returns-related structures). Within each part, each chapter is separated into sections evaluating the relevant legal framework and analysing implementation of the legal framework by the relevant institution or structure.

[14] Section 1.2, UNMIK Regulation 1999/24. Yet it remains unclear precise what constitutes a gap in the law and what body is competent to determine both if a gap exists and if the provision in question is acceptable.
[15] See Chapter 2, Section D, page 23.

PART I: REGISTERING PROPERTY RIGHTS

This first part examines the functioning of the property registration system, including the Cadastre and immovable property rights registry. This system is presented first in the report because the documentation of property rights it provides serves as the basis for the protection and promotion of property rights through the various institutions and mechanisms discussed later.

Chapter 1: The Property Registration System

Synposis

- A fully functional Cadastre and land/immovable property registry serves as the linchpin for the effective protection of property rights.
- Currently, public and full access to complete and comprehensive property registration records is not available in Kosovo.
- This incomplete status of property records derives not merely from the lack of physical access to records, but primarily and more systemically from the inadequacies of the current legal framework.
- The lack of a fully functional immovable property rights register impedes security of tenure for individuals, business entities and government authorities.
- This situation prevents the smooth transfer and transformation of property rights, especially related social owned property, in Kosovo.

A. Introduction

Fundamental to securing and protecting individuals' right to property is publicly documenting it. Usually a property registration system, including a Cadastre and the immovable property rights registry, provides such documentation. Throughout the former Yugoslavia, most property rights transfers had to be recorded in the registry, with the technical data recorded in the Cadastre.[16] Without a coherent Cadastre or immovable property rights registry, people cannot efficiently buy and sell property or seek remedies against illegal occupation of their land, municipalities cannot initiate necessary infrastructure projects, and the economy cannot legally and sustainably be transformed into a market economy. This chapter evaluates the state of Kosovo's Cadastre and developing property rights registry by examining, first, the effectiveness of the legal framework, second, the ability of relevant institutions to maintain such a system, and third, the level of access for property right holders to the system.

B. Legal Framework

Currently, the legal framework regulating the Cadastre and property rights registry is undergoing a process of revision in order to make it compatible with the property rights regime required for Kosovo's transformation into a market economy. Aside from this recognised incompatibility, the legal framework regulating the Cadastre and property rights registry is problematic and has led to property rights remaining insecure.

First, the legal framework does not adequately provide for the registering of the transfer of all property rights.[17] For instance, applicable law does not require that transfers of rights of use for socially-owned apartments be recorded in a public registry. This gap also impedes any transformation of rights connected to social ownership. Second, the current revision of the legal framework has not addressed deficiencies in the system, as illustrated by the most recent change undertaken. Despite its promulgation, Law 2002/5 On the Establishment of the Immovable Property Rights Registry[18] cannot be implemented. According to its preamble, it will not become effective nor can the registry be

[16] Article 33, Law on Basic Property Relations. Granting of right to use of socially-owned property did not always have to be recorded in the registry.

[17] Transfer refers to the sale, inheritance, or other type of transfer of these rights provided by applicable law.

[18] The Assembly of Kosovo (AoK) adopted the law on 17 October 2002, and, as required by UNMIK Regulation 2001/9 Constitutional Framework, was promulgated by the SRSG's signature through UNMIK Regulation 2002/22 On the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register.

established until all supplementary legislation is adopted and promulgated. This action has not occurred to date, thereby creating a new gap within the legal framework and confusion amongst those maintaining the registry system. Yet, when implemented, problems may still occur. As promulgated, the Law does not provide for the registration of rights of use of socially-owned property. Without such a provision, existing residential rights of use or occupancy rights, such as those confirmed by the HPCC, cannot be recorded. Existing non-residential rights of use or possession over socially-owned property that has not been privatised cannot be recorded either. Section 5 of the Law, furthermore, enables any person to insert a file note and challenge the registration of a holder's property right in the registry. By not restricting such notes to those who have filed claims with an appropriate authority, the Law engenders legal ambiguity and uncertainty around not only the veracity of the registry itself, but also the specific right being challenged. Thus, as it currently stands, the legal framework governing the property rights registry system remains inadequate to secure property rights.

C. Implementation of the Framework: Institutional Structure and the Registry

Apart from the concerns regarding the legal framework, the property rights registration system, specifically the Cadastre, does not function properly due to unclear administrative structures, inadequate access to and maintenance of records, as well as indications of manipulation of the records.

1. *Unclear Administrative Structures*

Inconsistencies and confusion are present within the overall implementing administrative structure of the Cadastre/registry system. No standardization exists regarding the structure through which municipal cadastral services are provided. In most cases these services are provided through a municipal Directorate of Cadastre and Geodesy. Yet, the location of these services within this Directorate is not uniform. In approximately half of Kosovo's municipalities, the services are provided through a Municipal Cadastre Office (MCO) which has the status of a separate division, while in the other half, the MCO has no unique status. In Lipjan/Lipljan, the Cadastre is located within the Directorate of Urbanism.

Confusion also exists over which body is responsible for the administrative oversight of the Cadastre and the property rights registry. At the municipal level, MCOs responsibilities as the primary maintainer of data are clearly defined and delegated.[19] To whom the MCOs are responsible, however, is confused in practice. As part of the municipal administration, MCOs, whether an independent directorate or subsumed into a directorate, are under the supervision of the Municipal Assembly and the Chief Executive Officer (CEO).[20] At the central level, MCOs also interact with the Kosovo Cadastral Agency. Prior to the conflict MCOs were under the supervision of a central authority. Under the current legal framework, however, the KCA now is supposed to function only as an advisory body to MCOs, providing technical support, harmonizing practices and procedures, and training MCOs' staff.[21] Once the Law on the Immovable Property Rights Registry takes effect, however, the KCA will gain authority to exercise overall administrative functions over MCOs activities, including remedies, related to the registry.[22] While the OSCE has observed that many MCOs implement changes following the instruction of the CEO, the OSCE also has observed that MCOs maintain good relations with the KCA and, at times, appeared confused if the KCA possesses supervisory functions. In the three northern municipalities of Zubin Potok, Zvečan/Zveçan, Leposavić/Leposaviq, however, the Cadastre officials refuse to recognise municipal or central UNMIK structures, issuing possession

[19] Section 3.3, UNMIK Regulation 2000/45 On Self-Government of Municipalities in Kosovo, 11 August 2000, delegates responsibility for maintenance of cadastre records to municipalities.
[20] Section 30, 31, 35, UNMIK Regulation 2000/45.
[21] Administrative Direction 2000/14 Implementing UNMIK Regulation 2000/12 On the Establishment of the Administrative Department of Public Services, 7 June 2000.
[22] See Section 1.2 and 6, UNMIK Regulation 2002/22.

lists on paper headed 'Republic of Serbia Geodetic Administration'.[23] The OSCE is concerned that such inconsistencies and confusion may affect the ability of claimants to protect their property rights and effectively seek remedies for potential violations.

2. *Inadequate Availability and Maintenance of Records*

As is widely acknowledged, Kosovo's Cadastre and property rights register is incomplete and inaccurate. It is incomplete and inaccurate due to a number of factors, including the removal of records to Serbia proper, the destruction of records during the conflict, the systematic circumvention of the property registration system due to discriminatory practices, prohibitive fees for registration, and lack of awareness, as well as gaps in the legal framework such as those noted above.

More specifically, most municipalities are missing records from substantial time periods, for specific ethnic groups, and for specific types of property. Due to the removal of records to Serbia proper, the MCO in Mitrovicë/Mitrovica only has records from 1955 to 1975 and then from 1986 to 1989. For Shtime/Štimlje, original cadastral records are available only up to 1985. The MCO in Suharekë/Suva Reka has original records only from the period prior to 1959. After the conflict, more than 70% of the Prizren records were removed to Serbia proper. At present the Gjilan/Gnjilane MCO records are complete only up to 1958, while the MCO in Viti/Vitina is working on the basis of data from before 1988.[24]

Yet, even when records have not been removed or are recovered, the registry remains incomplete and inaccurate largely because discriminatory legislation was in effect between 1989 and 1999, which made property transactions between and to Kosovo Albanians illegal. The result was that such transactions were done informally and not registered either with the courts or in the property rights registry system. While such transactions can now be legalised by the HPD/CC,[25] a gap remains in the registry. For instance, the registry reflects possession rights for only six (6) out of 170 households in the Kosovo Albanian village of Cabrë/Cabra, in Zubin Potok. In addition, a significant portion of Roma/Ashkalia/Egyptian (RAE) property right holders have not registered or legally secured their rights in the registry because they either were not fully cognisant of its value or felt the fees had been too burdensome.[26] Most municipalities also lack or are in possession of incomplete records from socially-owned enterprises on their allocation of socially-owned apartments.

In addition, the majority of records related to agricultural land are outdated. During the 1990s, the courts issued decisions nullifying contracts between agricultural socially-owned enterprises and private entities as the contracts were made under duress.[27] The vast majority of changes ordered by these court decisions, however, have not been registered in the system. The transfer of the right over property, even if decided by the court, only becomes effective once the transfer is registered. Yet, many people did not come to the registry, as the cost of the cadastre measurements required to undertake the changes was prohibitive for many (approximately 70 Euro). As a result, the majority of data related to agricultural land has not been updated.

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[23] The OSCE has an example of a possession list issued by cadastral officials in Zubin Potok, dated 21 February 2002 that has been stamped by UNMIK.

[24] Another reason that records or incomplete is that property transfers are also being undertaken in Serbia proper and recorded in the records which have been removed there. Such parallel or double records further prevent the establishment of complete and accurate records for Kosovo.

[25] This legalisation would be done by filing a so-called "category B" claim with the HPCC through HPD. See Part II, Chapter 2 to understand the procedure.

[26] See OSCE/UNHCR Ninth Assessment of the Situation of Ethnic Minorities in Kosovo (September 2001-April 2002), 22 May 2002, paragraphs 105-106, page 33 and OSCE/UNHCR Tenth Assessment of the Situation of Ethnic Minorities in Kosovo, 10 March 2003, Section 4(II), page 47-8.

[27] An example of such a decision is Decision 232/94 of the Lipian/Lipljan Municipal Court, dated 22 July 1994. The decision nullifies such contracts upon finding that the transaction was made under threat of violence from the government representatives and the co-operative against the parties, and which also resulted in an unrealistically low sale price.

Backlogs at municipal courts are another reason that data are outdated or incomplete.[28] Not only do backlogs exist in performing the required verification of the transaction contract and then ordering enforcement by the MCO, but backlogs also exist in adjudicating claims regarding property transactions. The OSCE is aware of instances where courts do not relay or cannot locate verified contracts of sale. The result is that these property rights are not recorded in the register and therefore are not legally secured as only once a verified transaction is recorded in the appropriate registry accurately does it have full legal effect.

It should be noted that many MCOs cite a lack of physical and human resources as a key hindrance to their effective maintenance of the registration system. Many MCOs indeed lack equipment such as computers required for geodetic work and vehicles to appropriately maintain records and provide services for courts disputes or other needs.[29] Other MCOs require more staff.[30] On the other hand, the OSCE notes that efforts are being made to reconstruct cadastral data and property rights information. By the end of 2002, the KCA had managed to update approximately 75% of the technical cadastre data. Negotiations to retrieve more data and establish technical co-operation to reconstruct the Cadastre in Kosovo are ongoing between UNMIK, the Co-ordination Centre for Kosovo and Metohija (CCK), the federal government of Serbia and Montenegro (SaM), and the government of the Republic of Serbia.[31] These negotiations include those between UNMIK, the Geodetic Administration of the Republic of Serbia, the CCK, and KCA on how to transfer cadastral data for the territory of Kosovo. The HPCC's work, which will be discussed in the following chapter, to confirm property rights gained through informal transactions and those interfered with through illegal occupation or lost through discriminatory practices also contributes to improving the accuracy of the property rights registry system.

3. *Manipulation of Records*

The integrity of officials administering the property registration system also has affected its functioning by bringing into question the veracity of the records themselves. The most widely known example of this problem is the October 2002 arrest of two senior officials of the Prishtinë/Priština MCO for allegedly illegally recording property transactions. These arrests raised concerns regarding the reliability of records and the authenticity of subsidiary documents and led to remedial action of the UNMIK Municipal Administrator (UNMA).[32] After consultation with the Department of Justice (DOJ) and the KCA, on 8 October 2002 the UNMA issued an order freezing the registration of property transactions undertaken during the previous three years until an Audit Commission established by KCA verifies their legality. In another instance, despite not being provided with the required court verified contracts of sale or registration in the registry itself, the MCO in Fushë Kosovë/Kosovo Polje municipality issued documents[33] confirming property rights of three Ashkalia in order to establish their eligibility for a reconstruction programme. The MCO issued the documents on the basis of the unverified contracts of sale and the testimonies of two witnesses (mainly persons living in the neighbouring houses).

The OSCE also is aware of cases in which officials in MCOs have arbitrarily denied entities of their property rights by refusing to record a property right. For example, in the Gjakovë/Đakovica

[28] See Part III, Chapter 1, Section C(1)(d-e), page 29-32.
[29] E.g. the Klinë/Klina Director of Cadastre explained that the Directorate still lacks a computer to maintain and update its records. He also complained that the Municipality has largely failed to respond to the staffing and material needs of the Directorate.
[30] E.g. in Lipjan/Lipljan, due to the lack of geodesists, the field work cannot be done and the cadastre office has to face a significant backlog.
[31] These consultations based on the United Nations Security Council Resolution (UN SCR) 1244(1999) and the Joint Document of UNMIK and the Federal Republic of Yugoslavia from 5 November 2001 ('Common Document') which lists property rights as specific areas of engagement and common interest.
[32] As of 1 April, the title of UNMAs changed to UNMIK Municipal Representatives (UNMRs). Throughout this report, the title UNMA will be used when referring either to actions of these officials prior to this date, or if a UNMIK Regulation refers to a UNMA.
[33] Official documents from the MCO dated 9 October 2002.

municipality, a Kosovo Albanian claimant was unlawfully deprived of his legal right to property when the MCO refused to register the transfer of a socially-owned property to a privately-owned property. This refusal was despite confirmation by the Transitional Department for Trade and Industry (TDTI) (then competent over socially-owned property transfers) that the transfer was valid and a Pejë/Peć District Court decision ordering the MCO to record the right. The CEO and the Director of Cadastre claimed that a third party had purchased the property previously and thus the third party's rights should be protected. No evidence of this prior transaction was ever produced.[34]

Such cases bring the veracity of the property rights registry into doubt, which may in turn negatively affect the ability of courts to accurately adjudicate property disputes, municipalities to fairly expropriate property, and the integrity of property transfers in general.

5. *Issue of Access*

The efficiency and integrity of the property rights registry system and Cadastre also depends upon the level of physical access that property right holders have to it. As pointed out in the recent OSCE/UNHCR Tenth Assessment of the Situation of Ethnic Minorities in Kosovo (Tenth Minority Assessment), such access for minority communities throughout Kosovo has generally improved.[35] Incidents, however, do continue to occur in which minorities have problems accessing either physically the MCO or the information stored in it. Until all communities enjoy full access to the property registration system it will not accurately reflect the property rights situation within Kosovo.

D. Conclusion

As has been seen, Kosovo's property registration system does not yet function sufficiently to secure and protect property rights throughout the territory or to enable a smooth transition to a market economy. Neither the legal framework, implementation of it, or access to the property registration system is adequate enough to ensure that it reflects the current or future situation of property rights in Kosovo. The full and effective functioning of the property registration system depends not only on the improvement of these three elements, but also on the efficiency and co-operation of institutions such as the HPCC, the courts, and the municipal administration.

[34] The CEO also failed to respond to an appeal lodged by the claimant within the one-month period established by Section 35, UNMIK Regulation 2000/45, thereby denying the claimants due process rights as well.
[35] Section 4, page 47, OSCE/UNHCR Tenth Assessment of the Situation of Ethnic Minorities in Kosovo, issued 10 March 2003. Website: www.osce.org/kosovo/documents/reports/minorities.

PART II: PROTECTION OF RESIDENTIAL PROPERTY RIGHTS AFFECTED BY CONFLICT

This second part deals with mechanisms for protection of residential property rights, and examines the role and effectiveness of the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC). The effective functioning of HPD and the HPCC is key to the protection of residential property rights in Kosovo.

Chapter 2: Housing and Property Directorate and Claims Commission

Synopsis

- The effective functioning of HPD and HPCC (HPD/CC) is key to the protection of residential property rights in Kosovo.
- The fundamental role of HPD/CC in the protection of residential property rights has not been adequately recognised by the relevant authorities.
- This lack of recognition has resulted in HPD/CC suffering from insufficient support from law enforcement authorities in certain areas and insufficient co-ordination with the regular courts.
- During 2002 and 2003, significant improvements in claim intake and processing, as well as enforcement of decisions, were made.
- HPD has begun delegating responsibility to municipal authorities to deal with abandoned property, which is a vital step in the hand-over process.
- A lack of awareness about and physical access to HPD continues, especially for minorities, throughout most regions of Kosovo.
- The slow pace of HPD/CC's overall operations in the past, as well as the lack of awareness about the mechanism in some regions, has led to residual frustration and the circumvention of it, thereby endangering individuals' property rights.

A. Introduction

Due to the scale of problems with residential property in Kosovo in 1999, there was clearly a need for an internationally supervised body to address the issue and to adjudicate disputes by establishing mass claims processing system. The establishment of HPD/CC was regarded as vital to establishing a stable, democratic society and restoring the rule of law. Besides the destruction of thousands of properties during the conflict, the critical issue was the illegal occupation of residential property that was vacated when people sought refuge in neighbouring towns or abroad. In this context, HPD and HPCC were established by UNMIK Regulations, which also stipulate their major functions of claims collection, claims processing and adjudication and enforcing final and binding decisions. This chapter examines these institutions' effectiveness at restoring and protecting pre-conflict residential property rights.

The OSCE finds that the fundamental role of HPD and HPCC in the protection of property rights still has not been adequately recognised by all relevant authorities; and that this lack of recognition continues to result in the HPD/CC not enjoying sufficient co-ordination with the regular courts in particular. However, the OSCE also finds improvements concerning claim intake and processing, as well as enforcement of HPCC decisions made during late 2002 and the beginning of 2003; the latter is partially a result of increasing co-operation with law enforcement authorities.

B. Legal Framework

In 1999, the Special Representative of the Secretary-General (SRSG) established HPD and HPCC with UNMIK Regulation 1999/23.[36] In October 2000, as a consequence of concerted action from various stakeholders, including the OSCE, the SRSG promulgated UNMIK Regulation 2000/60.[37]

[36] On the Establishment of the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), 15 November 1999.

[37] UNMIK Regulation 2000/60 On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission; 31 October 2000. See

HPCC has been given exclusive jurisdiction to adjudicate three distinct categories of non-commercial property claims:

(a) Claims by individuals who lost property rights as a result of discriminatory laws after 23 March 1989 (category A claims, intended to remedy the lost property rights in the period after the autonomous status of Kosovo was withdrawn);
(b) Claims by individuals who entered into informal transactions after 23 March 1989 (category B claims, intended to legalise informal property transfers; is also a step to restore the property registration system);
(c) Claims by individuals who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and have been deprived of their right to enjoy possession and have not voluntarily transferred the property right (category C claims, intended to remedy the interference in refugees' and IDPs' property rights by illegal occupancy)

The decisions of HPCC are binding and enforceable and may not be subject to judicial review. Cases that do not meet the requirements in category A, B and C fall under the jurisdiction of the regular courts. The issue of jurisdiction, however, causes problems. Both claimants and the courts seem to be confused about the fact that claims filed by legal entities and claims of a non-residential nature fall under the jurisdiction of the regular courts. To date, there is no formal co-operation between the courts and HPCC. The situation might lead to violations of due process rights as the determination of individual's property rights might suffer unnecessary delays.[38]

The deadline for submission of claims to HPCC through HPD has recently been extended by the SRSG to 1 July.[39] The OSCE, though, is concerned that individuals' property and due process rights risk being infringed after the 1 July deadline passes due to uncertainty about the legal consequences of the expiry of this deadline for claims submission to HPD and HPCC. [40] The OSCE is concerned that ambiguity will be created because HPD/CC will no longer have authority to register new claims but, at the same time, courts will not be competent to register these claims (residential property claims that could be submitted to HPCC through HPD before 1 July). The OSCE has already identified confusion at some municipal courts over their competency to register such claims after the 1 July deadline.[41]

OSCE Background Report, "The Impending Property Crisis in Kosovo", September 2000, for detailed information.

[38] For a comprehensive analysis of the conflicting jurisdictions, please refer to the OSCE's report "Property Rights in Kosovo", page 38-45.

[39] The OSCE has not been able to obtain a copy of the Executive Decision extending the deadline to 1 July. Previously, the deadline was extended to 1 June by UNMIK Executive Decision 2002/14. Section 3.2, UNMIK Regulation 2000/60 allows the deadline for claim submission to be extended by announcement of the SRSG who may decline to extend the deadline for a category of claims or for purposes of section 5.2; and provide different deadlines for different categories of claims or for purposes of section 5.2."

[40] Article 1 of Protocol 1 and Article 6, European Convention on Human Rights (ECHR). The European Court of Human Rights has held that Article 6(1) embodies the principle of the "right to a court" and this principle includes the right to initiate court proceedings in civil matters, such as property disputes. *Holy Monastries v Greece* (1994) 20 EHHR 1.

[41] Section 3.2 of UNMIK Regulation 2000/60, *On Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Directorate and the Housing and Property Claims Commission* stipulates that "[a] claim under section 1.2 (a), (b) or (c) of UNMIK Regulation 1999/23 On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission must be submitted to the Directorate before 1 December 2001. The deadline for submission of claims may be extended by announcement of the Special Representative of the Secretary-General, who may:

(a) decline to extend the deadline for a category of claims or for purposes of section 5.2; and
(b) provide different deadlines for different categories of claims or for purposes of section 5.2."

In November 2001, the SRSG extended the deadline for claims submission from 1 December 2001 until 1 December 2002, in accordance with Section 3.2. This deadline was subsequently extended by the Special Representative of the Secretary-General (SRSG) to 1 June 2003 by UNMIK/ED/2002/14 On Extension of the deadline for the Submission of claims to the Housing and Property Directorate Pursuant to UNMIK Regulation No. 2000/60, dated 14 November 2002. The 1 June deadline is also publicised on the HPD and the HPCC's

A failure to clarify the body competent to register residential property claims after 1 July will create unnecessary delays in the administration of justice and consequently infringe individuals' property and due process rights. The OSCE expects that courts will proceed to register residential property claims after 1 July, notwithstanding their lack of jurisdiction.[42]

UNMIK Regulation 1999/23 provides that HPCC has exclusive jurisdiction over residential property claims[43] until such time as the SRSG determines that the local courts are able to carry out its functions.[44] After 1 July, HPCC remain competent to determine claims submitted before 1 July.[45] However, until the SRSG issues an official determination, no body will be competent after 1 July to register new claims currently falling under HPCC's competencies.[46]

C. Implementation of the Framework: Operations and Institutions

1. *Developments with Regard to Claims Collection Activities*

Before proceeding further, the changes to HPD/CC's institutional framework should be acknowledged. Initially, HPD/CC was managed by the United Nations Centre for Human Settlements (UN-HABITAT), under the auspices of UNMIK. After 4 November 2002 UNMIK took over the responsibility for HPD/CC operations in Kosovo, giving HPD/CC the necessary capacity to carry out its basic administrative functions independently. Concerning its ongoing operations in Serbia proper, UN-HABITAT drafted a Memorandum of Understanding with the government of the Federal Republic of Yugoslavia and offered its good offices to maintain HPD/CC's regional outreach.

Since the OSCE issued its last property report[47], HPD has continued to improve its claim intake operations throughout Kosovo and today it has five permanent offices in Kosovo. The headquarters is situated in Prishtinë/Priština and the regional offices are located in Prishtinë/Priština, Gjilan/Gnjilane, Mitrovicë/Mitrovica and Pejë/Peć and a small office in Prizren (sub-office to the Gjilan/Gnjilane regional office). In addition, the HPD has a permanent office in Belgrade, Serbia proper, to which the office in Podgorica, Montenegro reports. The office in Skopje, FYROM is a sub-office to the HPD in

website (www.hpdkosovo.org) and the HPD/CC has undertaken public awareness campaigns to publicise the 1 June deadline. The OSCE has not yet been able to obtain the Executive Decision extending the deadline to 1 July.

[42] The OSCE has already reported that municipal courts have registered residential property claims, regardless of the fact that a claim for the same property was pending at the HPD and the HPCC. On the basis of this approach previously taken by the courts, the OSCE foresees that the courts will proceed to register new claims after 1 July. The President of the Viti/Vitina Municipal Court informed the OSCE on 19 May that he is unsure whether to register a residential property dispute after 1 July. The President of the Gjilan/Gnjilane Municipal Court on 20 May informed the OSCE that jurisdiction reverts to the courts after 1 July. See also Part III, Chapter 3, Section C(2)(a)(i) for further discussion.

[43] Section 1.2 of UNMIK Regulation 1999/23 specifies three categories of residential property claims over which the HPD/CC has jurisdiction.

[44] Section 1.1 of UNMIK Regulation 1999/23 states that "[t]he Housing and Property Directorate ('the Directorate') shall provide overall direction on property rights in Kosovo until the Special Representative of the Secretary-General determines that local governmental institutions are able to carry out the functions entrusted to the Directorate.

[45] The HPD also may still take qualifying properties under its administration. HPD administration, however, is a temporary measure which does not provide legally-binding confirmation of property rights and thus does not provide effective protection of property rights.

[46] Under former Socialist Federal Republic of Yugoslavia (SFRY) laws, the courts had jurisdiction over residential real property claims (both private property and socially-owned apartments). See the OSCE's report "Property Rights in Kosovo" (January 2002), page 37, for a detailed outline of the legal basis for courts' jurisdiction over residential property matters. Currently, the courts are competent to register residential property claims that do not fall into the categories specified under Section 1.2 of UNMIK Regulation 1999/23.

[47] See OSCE, "Property Rights in Kosovo", January 2002.

Gjilan/Gnjilane. HPD also used to have field offices in Nĭs, Kraljevo and Vranje, in Serbia proper but they closed down in 2002. The HPD is staffed with approximately 25 internationals and over 180 national staff.

With its reorganisation, the pace of HPD's operations has improved significantly. HPD has stated that it will resolve 50% of its claims by the end of 2003. As of 6 March 2003, a total of 24,672 claims have been filed. This is almost three times more than at the end of January 2002. 94,6 % of all claims are category C claims, 1,9 % are category B and 3,5 % or 859 claims have been filed as category A.

16,153 or 65,5 % of claims have been filed *outside* Kosovo, in particular through its offices in Serbia proper. All except for eight (8) are category C claims. This represents a significant increase since the last report (March 2002: 8,479).

A total of 8,519 or 34,5 % of the claims have been filed *in* Kosovo. Over 4,095 claims or 16,6 % of the total intake have been registered in the Prishtinë/Priština region, the highest intake in Kosovo. The vast majority of the claims intaked in Kosovo – over 7,201 (85 %) of claims - are category C claims. This represents an increase of 14 % since the OSCE's last report. It is believed that most category C claims are filed by IDPs. A total of 854 claims (10 %) are category A claims[48] and 464 claims (5.4 %) are category B claims (see Table A below).

[48] In the beginning of 2003, the HPCC took its first positive decision on a category A claim, i.e. on discrimination. The authorities in Belgrade may perceive this decision as recognition of the institutionalised discrimination that Kosovo Albanians faced during the 1990s.

Table A: Breakdown of total HPCC claims by category and region

Claims filed with HPCC by category and region	**Total**		**A**	**B**	**C**
Total Mitrovicë/Mitrovica	**8,477**	**34.4 %**	**135**	**41**	**8,301**
Kosovo operations	3,328	13.5 %	134	40	3,154
Serbia operations	5,149	20.9 %	1	1	5,147
Total East (Prishtinë/Priština)	**7,504**	**30.4 %**	**556**	**378**	**6,570**
Kosovo operations	4,095	16.6 %	556	378	3,161
Serbia operations	3,409	13.8 %	0	0	3,409
Total North (Belgrade)	**5,494**	**22.3 %**	**4**	**2**	**5,488**
Serbia proper operations	5,494	22.3 %	4	2	5,488
Total South (Gjilan/Gnjilane)	**1,168**	**4.7 %**	**52**	**14**	**1,098**
Kosovo operations	773	3.1 %	55	16	702
Serbia operations	383	1.6 %	0	0	383
Total West (Pejë/Peć)	**2,041**	**8.3 %**	**109**	**30**	**1,902**
Pejë/Peć operations	193	0.8 %	61	25	107
Prizren operations	130	0.5 %	48	5	77
Montenegro operations	1,718	7.0 %	0	0	1,718
Total Kosovo operation	**8,519**	**34.5 %**	**854**	**464**	**7,201**
Total outside Kosovo	**16,153**	**65.5 %**	**5**	**3**	**16,145**
Grand Total	**24,672**	**100.0 %**	**859**	**467**	**23,346**
Percentage			**3.5 %**	**1.9 %**	**94.6 %**

2. *Impediments to the HPD/CC Mechanisms*

Despite remarkable improvements, HPD/CC still face a number of residual obstacles to fulfil their mandates, primarily due to structural problems and institutional impediments. This situation has led to delays in the full realisation of their mandates. A continued lack of administrative support from the United Nations Commission for Human Settlements (UNCHS-Habitat) and inadequate support from UNMIK and the PISG prevents individuals, particularly individuals of minority communities, from effectively realising their property rights. In the past, this situation has impeded physical access, led to insufficient awareness of the system and encouraged the circumvention of the mechanism.

3. *Limited Access to the Claims Procedure*

Although resource constraints have a significant impact everywhere, the Belgrade office appears to provide reasonable access to displaced Kosovo minorities. The effects of the scarce resources are most apparent in the Prizren and Pejë/Peć regions.

a) *Prizren Region*[49]

It was only on 3 February this year that a field office was opened in Prizren region. Previously, the HPD representative in Pejë/Peć covered the region. In August 2002, it was reported that approximately 12,000 properties were illegally occupied and no evictions had taken place.[50] No inventory of abandoned property, as foreseen by UNMIK Regulation 1999/23, had been conducted. Resources from the Prishtinë/Priština region had to be allocated to Prizren, and subsequently the Gllogovc/Glogovac municipality that previously came under HPD Prishtinë/Priština's area of responsibility (AoR) had to be covered by HPD in Mitrovicë/Mitrovica region. This *ad hoc* arrangement caused a general hold up in the HPD's activities in three regions. However, efforts by the HPD, the OSCE and the Norwegian Refugee Council led to HPD shifting the Prizren region from the jurisdiction of Pejë/Peć HPD regional office to that of the Gjilan/Gnjilane HPD regional office when the field office opened in February.

Once transferred, the new field office in Prizren started to notify occupants that the residential property they were occupying was being placed under HPD administration, as well as its other work. However, as of 11 March 2003, the office had collected only 130 claims and only 30 properties of a Kosovo-wide total of 2,325 are under HPD administration in the region.

b) *Pejë/Peć Region*

Until late 2002, HPD in Pejë/Peć region was barely functional and acutely understaffed to effectively cover its unusually large AoR of Pejë/Peć region, Montenegro. and Prizren region. During 2002, the head of office has changed three times and the staff has reduced by more than half. The effects of this flux was seen in the small number of claims collected—193 for the Pejë/Peć region as of 11 March. The functioning of the HPD office in Pejë/Peć the vastly improved since responsibility for operations in Montenegro was transferred to UN-HABITAT in late 2002 and responsibility for Prizren region was transferred in February. The office now resolves a significant number of claims per week.

1,718 claims have been filed with mobile teams in Montenegro between the office's opening and 11 March. Such intake is promising as it is estimated that approximately 70% of an estimated 29,000 IDPs in Montenegro are originally from the Pejë/Peć region. However, this promising result may not

[49] The Prizren region consists of five municipalities, Prizren, Rahovec/Orahovac, Malishevë/Mališevo, Dragash/Dragaš and Suharekë/Suva Reka.

[50] On 26 August 2002, the HPD scheduled two evictions in Dragash/Dragaš. However, according to the Pejë/Peć HPD representative, the evictions could not be implemented due to lack of personnel.

last for long, as the HPD presence in Montenegro is reduced to only one stationary office and two (2) staff members. Within Montenegro, potentially 6,000 more claims remain.[51]

5. *Lack of Awareness*

The lack of knowledge and awareness of the HPD/CC mechanism had been largely connected to the resources available to offices and difficulty in informing the public though information campaigns. Naturally, public awareness is higher in regions where a well-established and well-resourced HPD/CC presence existed consistently, such as Gjilan/Gnjilane, Prishtinë/Priština and Mitrovicë/Mitrovica. HPD has continued its public awareness programme through TV-spots in Kosovo, Serbia proper and Montenegro and has launched an extensive campaign to inform the public of the upcoming deadline to file the claims. As previously reported by the OSCE, the level of awareness of the HPD/CC mechanism amongst minority communities varies, but remains generally inadequate inside as well as outside Kosovo. This is particularly true with regard to RAE and Bosniak communities.[52]

A Kosovo wide OSCE awareness raising campaign was undertaken between 20 and 26 November 2002. The campaign targeted 175 representatives of the RAE, Kosovo Serb and Kosovo Bosniak communities in 15 locations throughout Kosovo.[53] The representatives were briefed on the mandate and function of the HPD/CC as well as the residential property rights of their community members. While an extensive HPD public information campaign on the extension of the deadline to file claims has proven to be successful, community representatives expressed their confusion concerning who could file a HPCC claim with the HPD and where claims could be filed. The RAE community leaders currently residing in collective centres in Leposavić/Leposaviq and Zitkovac (Zvečan/Zveçan) showed a lack of interest in the HPD/CC claims process as the overwhelming majority of their houses—situated in the so-called "Roma Mahala" of Mitrovicë/Mitrovica city—had been destroyed.[54] Even though the Mitrovicë/Mitrovica region is well resourced, the briefings exposed the lack of access to HPD for the RAE community. The HPD Head of Office in Mitrovicë/Mitrovica agreed to implement a mobile team operation covering all RAE community sites in his region.[55]

6. *Circumventing the HPD/CC Mechanism*

Insufficient co-ordination between the courts and HPD/CC as well as a misunderstanding of the legal framework by the courts continues to lead to the circumvention of the HPD/CC mechanism. Under UNMIK Regulation 2000/60, if someone bought an apartment from an occupancy right holder under the Law on Housing Relations[56] after 23 March 1989, then they or members of their family are restricted from disposing of the apartment until the deadline for filing claims to HPD/CC has expired, or until any claim for the apartment has been adjudicated (whichever date is later).[57] The HPD

[51] The HPD "Quarterly Report April – June 2002, PejëPeć, Prizren, and Montenegro" estimates that there are 7,500 potential claimants in Montenegro.

[52] See Tenth Minority Assessment, footnote 35, pages 45-47, and OSCE/UNHCR Ninth Assessment of the Situation of Ethnic Minorities in Kosovo (September 2001-April 2002), paragraphs 93-99, pages 30-32.

[53] This was a joint project of the OSCE Department of Human Rights and Rule of Law (HRRoL) and Department of Democratization. Representatives and leaders were briefed in Gjakovë/Đakovica, Rahovec/Orahovac, Gjilan/Gnjilane, Kamenicë/Kamenica, Mitrovicë/Mitrovica, Vushtrri/Vučitrn, Leposavić/Leposaviq, Zvečan/Zveçan, Prizren, Ferizaj/Uroševac, Gracanica/Graçanicë (Prishtinë/Priština), Štrpce/Shtërpcë, Fushë Kosovë/Kosovo Polje, Plementina (Obiliq/Obilić).

[54] On the advice of HPD Head of office Mitrovicë/Mitrovica, the OSCE advocated that affected individuals should file claims with the HPD notwithstanding the fact that their properties are destroyed in order to obtain evidence of their property rights to help prevent, *inter alia*, illegal construction on the land in question. For more information on the destruction of the "Roma Mahala", see OSCE/ODIHR, "Kosovo/Kosova: As Seen, As Told", Part II, page 102. For more information on return issues in the "Roma Mahala", see Part IV, Chapter 7, Section D(2)(a), pages 69-72.

[55] The HPD teams visited the RAE sites during the month of February 2003 and several individuals lodged their claims. Many of them were presumably former residents of the "Roma Mahala".

[56] Official Gazette SAPK, Nos. 11/83, 29/86, 42/86.

[57] Section 5, UNMIK Regulation 2000/60. These apartments could potential be subject to either category A, B, or C claims.

reported that despite this restriction on the transfer of apartments, such apartments are continually being sold. Since 2000, the OSCE has noted 10,966 cases where the Prishtinë/Priština Municipal Court has verified sale contracts for properties, most of which relate to apartments subject to this restriction. These sale contracts contravene UNMIK Regulation 2000/60.

HPD/CC continues to be circumvented also by claimants themselves, and with the encouragement of middlemen using the HPD procedures for personal profit. Under the current legal framework, as long as a property is under the administration of HPD, the right of the owner or occupancy right holder to repossess the property is suspended in the public interest, but the right to dispose of the property is not suspended.[58] Using this loophole, HPD in Mitrovicë/Mitrovica reported the phenomenon of individuals who take advantage of the process and act as middlemen in sales of residential property under HPD's administration. The middleman (usually a lawyer) follows the activities of the HPD and contacts the former right holder of the property that has been placed under HPD's administration. The middleman then offers the right holder the opportunity to sell the property and contacts possible buyers in the area. When an agreement is reached, the contract is verified in a municipal court and the property transfer is arranged. The middleman then requests HPD to withdraw the property from its administration.[59] When this occurs, HPD has told the OSCE that it strictly adheres to the mandated deadlines so as not to encourage such circumvention. While this types of transaction is more frequently seen with properties placed under administration through the inventory process (i.e. no claim has been submitted), it also happens when there is a claim and the claimant has requested the property to be put under administration. The court verification of the transfer can occur because there is currently no system in place for the municipal courts to know when a property is under HPD administration or is subject to a pending HPCC claim. There also does not appear to be a legal obligation for the court to verify this matter. While the described activity is not in itself illegal, it is contrary to the spirit and aim of the UNMIK Regulation 1999/23 and also illustrates the negative consequences of increasing frustration engendered by residual inefficiencies in HPD/CC.

7. *Improved Management of Abandoned Property; Enhanced Implementation*

Since the OSCE's last Report, there has been a 12-fold increase in the number of enforced eviction orders. Out of a total of 4,345 cases initiated (listed in the inventory), 2,325 properties are under the administration of HPD and 806 properties have been allocated with a temporary permit.[60] The HPD has enforced 252 eviction orders relating to properties under its administration[61] and 322 eviction orders issued by the HPCC. Including the 142 occupants who moved voluntarily, HPD has enforced 716 decisions. The mechanism mandated by UNMIK Regulations 1999/23 and 2000/60 has resolved a total of 2,591 claims, more than a 4-fold increase since January 2002. Out of these 2,591 claims, 1,690 have been resolved by decision of the HPCC, of which 341 (23 %) have been implemented (20 times more than one year ago).

[58] See Section 12, UNMIK Regulation 2000/60.

[59] According to the HPD Office in Mitrovicë/Mitrovica, claimants generally do not withdraw their claims. The reason is that the claimant wants to avoid paying property transfer taxes in the Republic of Serbia.

[60] Section 12.4, UNMIK Regulation 2000/60:

"The Directorate may grant temporary permits to occupy property under its administration, subject to such terms and conditions as it sees fit. Temporary permits shall be granted for a limited period of time, but may be renewed upon application."

[61] See Section 12.6, UNMIK Regulation 2000/60:

"The Directorate may issue an eviction order in relation to a property under administration at any time in any of the following circumstances:

(a) where the current occupant does not qualify for a temporary permit;
(b) where a temporary permit has expired; or
(c) where the holder of a temporary permit ceases to qualify for accommodation on humanitarian grounds or does not comply with the terms and conditions of the temporary permit."

Table B: Breakdown of properties under HPD administration by region as of 11 March

Properties under HPD Administration	**Cases initiated**		**Properties under administration**		**Properties temporarily allocated**	
	No	%	No	%	No	%
Gjilan/Gnjilane	1,236	28.4 %	553	23.8 %	84	10.4 %
Mitrovicë/Mitrovica	1,039	23.9 %	522	22.5 %	269	33.4 %
Pejë/Peć	515	11.9 %	429	18.5 %	172	21.3 %
Prishtinë/Priština	1,521	35.0 %	791	34.0 %	281	34.9 %
Prizren	34	0.8 %	30	1.3 %	0	0.0 %
Total	**4,345**	**100.0 %**	**2,325**	**100.0%**	**806**	**100.0 %**

Table C: Breakdown of voluntarily vacated properties and enforced evictions by region as of 11 March

Enforcement of HPD and HPCC decisions	**Total**		**Voluntary vacation of property**		**Enforced evictions**	
	No	%	HPD	HPCC	HPD	HPCC
Gjilan/Gnjilane	136	18.2 %	42	0	74	20
Mitrovicë/Mitrovica	102	13.6 %	41	0	60	1
Pejë/Peć	32	4.3 %	15	0	13	4
Prishtinë/Priština	479	64.0 %	25	22	105	327
Total	**749**	**100 %**	**123**	**22**	**252**	**352**
			145		**604**	

8. *Administration of Abandoned Property*

HPD is mandated to supervise the temporary utilisation or rental of abandoned housing for humanitarian purposes.[62] HPD's rules of procedure regulate the administration and allocation of property, on a temporary basis, to refugees and IDPs. Once the property is placed under its administration, HPD has broad powers to evict illegal occupants and allocate property to those that qualify on the basis of humanitarian need. The criteria for determining who qualifies for allocation are not stipulated in HPD's rules of procedure, but in internal HPD documents.[63] HPD can therefore

[62] Section 1.1, UNMIK Regulation 1999/23. Section 1, UNMIK Regulation 2000/60 defines abandoned housing as "any property, which the owner or lawful possessor and the members of his/her family household have permanently or temporarily, other than for an occasional absence, ceased to use and which is either vacant or illegally occupied".

[63] The HPD's internal allocations policy reads:

1. "Applicants should be at least 16 years of age.
2. Applicants should not currently have access to permanent or reasonable temporary accommodation.
3. Applicants should not have access to sufficient financial resources which would enable them to resolve their housing problems in the private market.
4. Applicants should not have previously refused temporary accommodation without an adequate and acceptable explanation.
5. Applicants should be able to demonstrate a connection with the local area provided that this does not jeopardise their security."

decide, without any other administrative or judicial review, who is an illegal occupant and who merits a humanitarian permit.[64]

As of 11 March 2003, HPD has processed 4,345 cases of which 2,325 are currently under its administration. A total of 806 units have been allocated on the basis of a temporary permit issued by HPD. The majority of such permits have been granted to both current occupants and vulnerable parties on the grounds of lack of financial resources and lack of access to accommodation, in accordance with HPD's internal procedural rules. HPD has reported that applicants, who meet all the criteria except the access to sufficient financial resources, would be eligible for a temporary permit on rental basis. The OSCE has been informed that HPD is addressing the issue of a rental scheme but that nothing has yet been implemented, though the rental scheme might be implemented by a separate body.

9. *The Delegation of Authority to Municipalities*

HPD is mandated to conduct an inventory of abandoned private, state and socially owned housing. HPD has the right, under Section 15, UNMIK Regulation 2000/60, under its supervision to delegate this responsibility to the municipalities.[65] To overcome its own lack of capacity and to include the local authorities in the process, HPD issued an Administrative Directive foreseeing delegation of authority to the municipalities.[66]

The overall relationship between the municipalities and HPD has not significantly improved since the OSCE's last Report in January 2002. In Mitrovicë/Mitrovica region, the responsibilities delegated by HPD concerning the inventory of abandoned houses have produced negligible results. The main reason is that the persons responsible for conducting the inventory at the municipal level are not employed directly by HPD and therefore there can be no direct supervision. Another factor is the reluctance of municipal officials to participate in a sensitive procedure in which the threat of eviction creates some security concerns. However, several of the municipalities have started to work with HPD. In Gjakovë/Đakovica, HPD and the Local Communities Office worked together on resolving a case involving a Kosovo Egyptian claimant whose property was occupied by a Kosovo Albanian. The OSCE has identified the same level of co-operation in Štrpce/Shtërpcë municipality. In Skenderaj/Srbica, two municipal officials of the Directorate of Urbanism successfully conducted an inventory. The Prishtinë/Priština municipality provided HPD with six (6) full-time staff members to work in the HPD building. They were in charge of conducting the inventory of 355 properties in six (6) months. Satisfied by the work undertaken, the Director of the Directorate of Finance and Property decided to provide HPD with additional staff as well as equipment for 2003. Podujevë/Podujevo municipality will follow this example.

a) *Training of Municipal Staff*

Prior to the promulgation of UNMIK Regulation 2000/60, HPD launched a municipal training scheme. All municipalities were invited to attend. However, not all municipalities have had staff trained, for example Gllogovc/Glogovac and Shtime/Štimlje. In municipalities with staff who attended the training, the OSCE identified several cases of inappropriate implementation of the delegated authority. The inadequate training has resulted in an attempt by Deçan/Dečani municipality to rent the residential property and allocate it for social welfare needs which was halted as a result of intervention by the OSCE.

[64] For more information, see the OSCE, Department of HRRoL, "Property Rights in Kosovo", January 2002, page 22.
[65] Section 15.2, UNMIK Regulation 200/60 allows HPD to delegate "any of its functions" to the relevant municipal service subject to supervision arrangements established by HPD.
[66] HPD Directive No. 2000/1 On the Execution of the Allocation Scheme in accordance issued in accordance with Section 15, UNMIK Regulation 2000/60.

10. *Non–co-operation between Municipal Officials, Municipal Housing Committees and the HPD*

The continuing absence of co-operation between HPD, Municipal Housing Committees (MHCs) and NGOs further complicates the implementation of HPD/CC's mandate. HPD has vacant apartments under its administration due to a lack of potential beneficiaries. Currently, HPD only delivers permits to people illegally occupying properties under its administration or illegal occupants evicted following HPCC decisions. Within the framework of the housing reconstruction programme, lists of potential beneficiaries are supposed to be established in each municipality. These lists should be the result of a joint effort by village committees, NGOs and municipal services to find beneficiaries.

According to Section 2.1, UNMIK Regulation 2000/60, any property right acquired in accordance with the law applicable at that time remains valid unless UNMIK Regulation 2000/60 provides otherwise. In contravention of this provision, the Municipal Assembly in Gjakove/Đakovica promulgated three decisions, outside of its competency, annulling property transfers undertaken after 1989. Two of these decisions have been overturned by the SRSG. The first decision taken in April 2002 annulled three property sales. The second decision passed by the Policy and Finance Committee of the Municipal Assembly in June 2002 annulled all property sales since 1989 and ordered the MCO to change its records to reflect the pre-1989 property rights. In response, the then Officer-in-Charge of HPD/CC sent a letter of protest to the President of the Municipal Assembly. The President of the Municipal Assembly admitted to the OSCE in August 2002 that he was fully aware that neither the Municipal Assembly nor its committee possessed the authority to issue these decisions, but that due to the lack of progress in the work of HPD/CC and KTA, he felt politically pressured to take action.

11. *Post-eviction Incidents*

A specific problem relates to post-eviction incidents, such as threats against HPD staff, the re-occupation of apartments and damaging of vacated properties.[67] The OSCE is concerned that these incidents continue to occur without the appropriate response from the police authorities. The OSCE was informed by HPD that approximately every second vacated apartment is (illegally) re-occupied, and every third flat is subject to criminal damage. The HPD has acknowledged that it does not have the means to protect properties placed under its administration although its rules of procedure mandate it to "make reasonable efforts to minimise the risk of damage to any property under its administration".[68]

HPD has reported cases of plundering and damaging of apartments, to the extent of rendering them uninhabitable.[69] There was a series of incidents reported by the HPD's Prishtinë/Priština office in August 2002.[70] HPD subsequently lodged official complaints with the UNMIK Police for burglary

[67] Section 13.6, UNMIK Regulation No. 2000/60: "The Directorate shall notify the claimant of the scheduled date of the eviction. Following the execution of an eviction, if the claimant or temporary occupant is not present to take immediate possession of the property, the responsible officer shall seal the property, and notify the claimant. Any person who, without lawful excuse, enters a property by breaking a seal may be subject to removal from the property by the law enforcement authorities." See also Article 145, Criminal Code of the Autonomous Province of Kosovo, Official Gazette SAPK, 1977.

[68] See Section 12.8, UNMIK Regulation 2000/60.

[69] Properties under the HPD's administration are regularly broken into in Hogosht/Ogoste, Abdullah Presheva Mahala, Gjilan/Gnjilane municipality, Letnice/Letnica and Viti/Vitina municipality. According to HPD the majority of Croat properties in Letnice/Letnicë have recently been re-occupied. In Mitrovicë/Mitrovica in early 2003, the HPD placed four buildings under its administration that were subsequently looted and partially burned.

[70] Case 1: On 14 August, the HPD found a property under its administration unsealed. The front door had been forcefully broken and all the furniture and bathroom equipment was missing. Case 2: On 15 August, the HPD reinstated claimants in two apartments and found both properties unsealed, with the front door forced in, the lock changed and the bathroom equipment missing. Case 3: On 16 August, during a routine check, the HPD found the wooden fence of a house destroyed, the front door forcefully opened, the bathroom totally destroyed and the windows of the house broken. Case 4: On 18 August, during a routine check, the HPD found the front entry and the garage of a property opened, and two occupants inside the property. A unit from UNMIK Police

and intentionally inflicted damage to private properties. As of February 2003, HPD had not obtained any response from the UNMIK Police.[71] In general, however, the UNMIK Police and the Kosovo Police Service (KPS) react promptly and arrest offenders, though there are signs of deficiency in the effective prosecution of these cases.[72]

D. The OSCE's Pilot Staff Accommodation Policy (PSAP)

Since the lack of implementation of property legislation is a key concern of UNMIK and has a detrimental effect on return, the rule of law and human rights, UNMIK has a responsibility to address this issue. To be consistent with its mandate in Kosovo, it is crucial that the OSCE ensures that its staff comply with applicable law and do not interfere knowingly or otherwise with others' right to return. The OSCE believes that effective institution building begins by setting a good example and sending a clear message both within and outside the OSCE that unlawful use of property should not be tolerated. The OSCE Code of Conduct requires all mission members to comply with local and international law.

Acknowledging these mission beliefs and policies the Department of Human Rights and Rule of Law implemented a Pilot Staff Accommodation Policy (PSAP) between 2 and 18 September. The purpose of the PSAP was to ensure that staff do not illegally occupy residential property in Kosovo and to encourage staff to legalise their situation.[73] The staff of the Department were asked to provide relevant documentation that demonstrated their compliance with applicable law and the requirements of the PSAP. The PSAP applied to local and international staff as well as those in the field and headquarters. In addition, staff members were asked to provide the documentation that demonstrated their landlord's compliance with applicable law and the requirements of the PSAP. Staff have changed their accommodation or initiated measures to ensure they comply with PSAP requirements. The PSAP continues to be implemented within the Department and preparations to expand it mission-wide are continuing.

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was called to the spot and the suspects were taken into custody. Case 5: On 22 August, an apartment under HPD administration was entered by force. The neighbours reported to the HPD that the illegal occupant broke the door lock on the day of the eviction and searched the apartment. The HPD lodged an official complaint with UNMIK Police Station South.

[71] UNMIK Police/KPS normally are able to provide the victim or those acting on behalf of the victim, such as HPD, with the current case status within a reasonable time frame. In order to address deficiencies in the system, UNMIK Police and KPS are currently reviewing if an Operational Bulletin to the KPS Policy and Procedures Manual (PPM) should be added to allow the victim of a crime to be given a copy of the initial incident report with a "case" number in order to facilitate the victim finding out the status of an individual case.

[72] The OSCE welcomed the opening of criminal proceedings regarding such cases in Lipjan/Lipljan. On 12 and 13 November 2002, after post-eviction inspections, the HPD posted five orders against former illegal occupants for intentional criminal damage and trespass on the front door of a property under its administration. One of the illegal occupants was sentenced to three-month conditional imprisonment.

[73] Instituting such a policy is nothing new for the OSCE. Its work in Bosnia and Herzegovina (BiH) demonstrated the magnitude and significance of the role property issues play in rebuilding post conflict societies.

PART III: JUDICIAL PROTECTION OF PROPERTY RIGHTS

In this third part, the problems encountered by the regular courts of Kosovo in protecting property rights are discussed. The regular courts normally represent the primary judicial remedy for violations of property rights. Under the current legal framework, the regular courts also must verify most property transfers before they can be registered in the appropriate record and have full legal effect. Thus, the regular courts represent a key institutional structure in the protection of property rights.

Chapter 3: Regular Courts of Kosovo

Synopsis

- The regular courts in Kosovo play a central role in securing and protecting property rights by adjudicating property disputes and other claims as well as verifying most types of property transfers.
- The grafting of new regulations onto the existing legal framework causes confusion and problems in the protection of property rights.
- Courts lack prompt access to translated UNMIK Regulations and laws in force.
- Minority claimants appear to encounter problems in physically accessing the courts and in the courts protecting their rights in their absence.
- Frustration with the inefficiency of other institutions, such as HPD/CC, has resulted in the regular courts receiving and adjudicating claims outside their competencies.
- Lack of clarity in the law, resources, and awareness of the remedies available by both the courts and the claimants has led to delays, including case backlogs, and problems in adjudicating and executing decisions.
- These delays and problems appear to amount to undue interference with the rights to property, to an effective remedy and due process before the courts.

A. Introduction

Kosovo's transition to and development of a market economy partly depends upon private and legal persons' ability to transfer property[74] and the ability to securely utilise it. Among other functions, the civil courts in Kosovo oversee and ensure legal transfers of property, the resolution of property disputes and the protection of property from trespass when claims do not fall under the competence of HPCC.[75] They play an integral part in the acquisition of property rights and provide the primary remedy to violations of property rights, whether trespass or illegal expropriation. In view of this role, the civil court's effective functioning, which includes ensuring respect of due process rights, is critical to people's ability to fully exercise their property rights. This chapter examines whether the civil courts are able to adequately fulfil their role by examining the current legal framework governing how the civil courts protect property rights. It then looks at the implementation of the legal framework to determine if the civil courts successfully protect rights by both serving as an effective remedy and not causing unreasonable interference in the acquisition of property rights.

The OSCE found that while the legal framework establishing the procedures through which the courts protect property rights is adequate, the courts' implementation of the legal framework is problematic. Either court structures are incomplete, or resources are inadequate, or courts have circumvented procedures laid out in the legal framework. The OSCE also found that a lack of clarity in or misunderstanding of laws related to specific property issues exacerbates these problems. The result is that the civil courts are unable to protect property rights for private and legal process inside Kosovo.

Before proceeding, it should be noted that, as defined in applicable law, courts include municipal courts, district courts, economic district courts, the Supreme Court and the Federal Court of the Federal Republic of Yugoslavia (FRY).[76]

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[74] Urich Drobnig, *Towards a European Civil Code*, Kluwer Law International, p. 495.
[75] As defined in Section 1.2(a-c) and Section 2.5, UNMIK Regulation 1999/23.
[76] Article 22, Law on Regular Courts, Official Gazette SAPK, No. 21/78, and Article 34, Code of Civil Procedure, Official Gazette SFRY, Nos. 4/77-1478, 36/80-1182, 69/82-1596. Article 369, The Constitution of the Socialist Federal republic of Yugoslavia joined with Constitution Law for Application of Constitution of the Socialist Republic of Yugoslavia (1974) also confers jurisdiction to the Federal Court.

B. Legal Framework

The applicable law establishes the courts' responsibilities in relation to property rights in two main areas, the registration of transfers of property rights and the resolution of property disputes. The courts' responsibilities to verify and register contracts transferring property rights are primarily established in the Law on Transfer of Real Property[77] and UNMIK Regulation 2001/17 On the Registration of Contracts of Sale of Real Property in Specific Geographical Areas of Kosovo,[78] which modifies this procedure for sales of residential property lying within Specific Geographical Areas (SGA) designated under the regulation. Specifically, UNMIK Regulation 2001/17 instructs the court not to register any contract of sale for such residential properties unless it possesses proof that the UNMA[79] has approved the sale pursuant to the regulation.[80]

The courts' competencies as a legal remedy for property disputes are laid out primarily in applicable SFRY law, including the Law on Regular Courts,[81] the Code of Civil Procedures,[82] and the Law on Execution of Decisions.[83] Their competencies in relation to administrative lawsuits are outlined in the Law on Administrative Disputes.[84] Together these laws establish clearly the substantive and territorial jurisdiction of the civil courts as well as detailed procedures which sufficiently account for claimants' rights of due process and appeal for all civil cases, with some specific provisions for property-related claims of unlawful infringement or deprivation.[85] UNMIK Regulations, however, have modified the competencies of the courts in relation to specific categories of property matters. As mentioned in Part II, UNMIK Regulation 1999/23 has removed claims regarding certain categories of residential property rights from the courts' jurisdiction.[86] In general, this change in jurisdiction is now basically understood, though there are instances when the courts do not respect this change, as discussed below.[87] UNMIK Regulation 2002/13 On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters[88] also mandates the removal of competencies from the regular courts to a unique institution. Under this regulation, a Special Chamber of the Supreme Court is created and has the primary jurisdiction[89] to adjudicate claims regarding decisions and other actions of the Kosovo Trust Agency (KTA) and other types of claims relating to enterprises administered by the KTA that are specified in the regulation.[90]

It should be noted that during civil proceedings, courts apply other laws in relation to property rights, such as the Law on Basic Property Relations[91] or the Law on Expropriation.[92] As they do so to

[77] Official Gazette SAPK, Nos, 45/81 and 29/86.
[78] Entry into force 22 August 2001.
[79] As of 1 April, the title of UNMAs changed to UNMIK Municipal Representatives (UNMRs). Throughout this report, the title UNMA will be used when referring either to actions of these officials prior to this date, or if a UNMIK Regulation refers to a UNMA.
[80] Section 4, UNMIK Regulation 2001/17.
[81] Official Gazette SAPK, No. 21/78.
[82] Official Gazette SFRY, Nos. 4/77-1478, 36/80-1182, 69/82-1596.
[83] Official Gazette SFRY, Nos. 20/78, 6/82 , 74/87, 57/89.
[84] Official Gazette SFRY, No. 4/77.
[85] For instance, the Chapter 28, Code on Civil Procedures details procedures for claims involving trespass of property.
[86] Section 1.2(a-c), UNMIK Regulation 1999/23.
[87] See the OSCE, "Property Rights in Kosovo", January 2002 for a more in-depth discussion regarding potential confusion and conflicts of jurisdictions.
[88] Entry into force 13 June 2002. UNMIK Regulation 2002/12 established the Kosovo Trust Agency whose role is to manage the privatisation of socially owned enterprises and to oversee the management of public owned enterprises in Kosovo.
[89] The precise meaning of the term "primary jurisdiction" in the regulation remains unclear. Specifically, when Section 4.1 is read together with Sections 4.2 and 4.3 the question arises whether primary jurisdiction means "original"/"first-instance" jurisdiction or that the Special Chamber is given the right to examine the claim first and decide whether to refer it to the regular courts, reserving the right to review the decision.
[90] Section 4, UNMIK Regulation 2002/13.
[91] Official Gazette SFRY, No. 6/80.
[92] Official Gazette SAPK, Nos. 21/78, 46/86.

determine if a remedy is required, a specific principle has been violated, or a procedure under the competence of another governmental authority has unlawfully interfered or deprived the claimant of their property rights and the sanction applicable, within the context of this chapter they will not be addressed. This chapter is concerned with how the courts apply such laws within the procedures set out in the legal framework outlined above, not the effectiveness of such laws themselves. Indeed, while the legal framework governing the functioning of civil courts appears adequate to protect property rights, its implementation is problematic.

C. Implementation of the Framework: Resources, Procedures, Laws

In Kosovo, individuals' property rights have been endangered because the courts have not functioned as the legal framework prescribes. Not only are resources and structures that are required to guarantee fully an effective remedy and due process not adequately managed, but the courts themselves have inappropriately applied the law or circumvented procedures.

1. *Problems with Managing Resources, Including Missing Structures*

In order to implement the legal framework appropriately from a practical perspective, resources, including copies of the laws themselves, appropriate structures or institutions, and other human and physical resources, must be available to the courts. These resources also should be managed appropriately by the courts in order to apply the laws in a timely manner and to protect rights to due process and property.

a) *Insufficient Access to Laws*

Fundamental to the effective operation of the court system is timely access for the courts to the laws in effect. Within Kosovo, the OSCE has found that the timely delivery of official and translated newly promulgated laws (UNMIK Regulations) to the courts has been a persistent problem which threatens to gravely affect the protection and promotion of property, due process, and other rights. For instance, when asked in November 2002, none of the municipal courts of the Pejë/Peć region had received UNMIK Regulation 2002/13, approximately five (5) months after the jurisdiction-modifying law took effect. Indeed, almost every court has complained to the OSCE about not having adequate access to laws.

If the courts are not made aware of new UNMIK Regulations, especially those affecting the jurisdiction of the court, then they cannot apply or respect them properly. Without translation and dissemination of and training on new regulations prior to new regulations taking effect, the courts cannot fully ensure that property rights are respected, through judicial protection of the rights to due process and an effective remedy.

This problem has been recognised and efforts have been made to address it. Such efforts include those by the Kosovo Law Centre (KLC) to publish and, in conjunction with the OSCE, to distribute the laws. A Sub-Group of the Inter-Pillar Working Group on Human Rights (IPWGHR)[93] also made concrete recommendations to relevant bodies within UNMIK as to how regulations and administrative directions could be translated, published and distributed in a more timely fashion.

b) *Missing Structures*

Another key element for the effective operation of the courts and protection of relevant rights is the active functioning of the remedial structures which are mandated by law. Two key structures, the Federal Court and the Special Chamber of the Supreme Court on Kosovo Trust Agency (KTA)

[93] The IPWGHR is the working group of the Human Rights Oversight Committee, established as a high-ranking organ mandated to review UNMIK legislation and practices for compliance with human rights standards. The OSCE notes with regret that on occasion UNMIK has failed to put draft legislation before the Committee, through the IPWGHR, for review.

Related Matters, are not fully functioning in the current system, thereby preventing the full utilisation of remedies.[94]

The Federal Court no longer has effective access to, nor possibly territorial jurisdiction over, legal matters in Kosovo.[95] As no UNMIK Regulation or Administrative Direction clarifies the competencies, if any, of the Federal Court over cases which it may have subject-matter jurisdiction, these cases may remain stalled at the Supreme Court of Kosovo for a lack of an officially designated alternative. The problem this creates is illustrated by two cases which are currently pending at the Supreme Court of Kosovo. Both cases involve the release or return of property in which a request for extraordinary review of a decision has been filed under the Code of Civil Procedure with the Supreme Court.[96] According to the Code such requests must be filed directly with the Federal Court.[97] Yet, as the Supreme Court of Kosovo's competencies over these cases is not clarified, the Supreme Court has not yet assessed if it possesses jurisdiction over them. The cases, and consequently any resolution of potential violations of property rights, remain stalled.

Since the Special Chamber of the Supreme Court on KTA Related Matters is not fully functioning, a similar situation can be anticipated for those who seek remedies for violations of property or other rights which require adjudication by the Special Chamber. [98]

Unless the situation caused by the lack of access to the Federal Court can be officially clarified and the Special Chamber established, property rights will not be fully protected by Kosovo's judicial system.

c) *Human and Physical Resource Problems*

Human and physical resources either are insufficient or not managed efficiently to provide adequate protection of rights of due process, effective remedy, and subsequently of property rights. Almost every municipal and district court complained to the OSCE that a lack of staff interferes with its ability to adjudicate civil and property disputes in a timely manner. In particular, they complained that they do not have adequate administrative staff, such as court recorders, to provide timely issuance of

[94] The Special Chamber of the Supreme Court on Constitutional Matters, which is provided for in Chapter 9(4)(11) of the Constitutional Framework, is not functioning either. The Professional Development Section of UNMIK Department of Justice, however, has drafted an Administrative Direction to establish the Special Chamber. Currently, consultations with the President of the Supreme Court and other Supreme Court judges are ongoing.

[95] Section 1.1, UNMIK Regulation 1999/1 as amended by UNMIK Regulation 2000/54 gives UNMIK authority over the administration of justice in Kosovo.

[96] Article 34(2) of the Code of Civil Procedure states that the Federal Court has jurisdiction over such cases. In one case (KCRJ 1/2002), a Kosovo Albanian filed a claim for release of property in the Municipal Court of Podujevë/Podujevo on 5 April 2001. The court approved the claim, which was then appealed to the District Court of Prishtinë/Priština. The District Court refused the appeals and confirmed the lower court's verdict on 18 October 2001. On 19 February 2002, the Supreme Court reversed the District Court's decision in a Decision on Revision. The Request then was filed on 13 August 2002. It remains pending at the Supreme Court. In the second case (KCRJ 1/2002), two Kosovo Albanians from Lipjan/Lipljan were involved in a dispute over the return of moveable property. The Municipal Court approved the claim on 6 February 2002, and the District Court of Prishtinë/Priština confirmed this decision on 3 April 2002, as did the Supreme Court. The respondent then filed a request for extraordinary review at the Supreme Court.

[97] Articles 416 and 418(1), Code of Civil Procedure.

[98] Administrative Direction 2003/13 outlining the rules of procedure and functioning of the Special Chamber of the Supreme Court on KTA Related Matters was promulgated and public notice was given that the Special Chamber could accept claims starting 16 June. Not all the judges, however, have been sworn in to allow the Special Chamber to adjudicate claims. It also should be noted, that while in some foreign jurisdiction an institution such as the Special Chamber would not enjoy effective jurisdiction until its rules of procedures were promulgated and it was functional, in the context of Kosovo, this is not the case. The Special Chamber gained effective jurisdiction upon the promulgation of UNMIK Regulation 2002/12. The same occurred upon the promulgation of UNMIK Regulation 1999/23 granting HPCC exclusive jurisdiction over certain categories of residential property claims.

decisions or other administrative elements required by the law. For instance, the president of the Municipal Court in Gjakovë/Đakovica told the OSCE that due to this reason, there is normally at least a three (3) month delay between the pronouncement of the judgement and the issuance of the written decision.

Yet, in the cases encountered where there were long delays, they are not always attributable to inadequate staffing, but instead may result from mismanagement of judges available. In the Municipal Court of Prizren, a case pending since 1996 was delayed for one year because the judge dealing with the case was on leave for a year and the court failed to re-assign the case to another judge. Indeed, many deficiencies appear to be the result of substandard court administration and management rather than effects of the applicable law.

The OSCE is concerned that lack of resources in and deficient management of the courts could result in delays, such as those detailed above, which may amount to undue interference in both due process and property rights. In fact, the OSCE notes that a system-wide backlog of cases already exists and threatens to develop into such interference.

d) *The Backlog of the Courts: Case Load*

As can be seen from Table D below, Kosovo has a widespread and, in places, overwhelming backlog of civil and property cases filed with municipal courts. The OSCE has gathered statistics from every municipal court on how many civil cases have been filed with the court prior to, and after the establishment of UNMIK (12 June 1999), how many of these have been resolved, and how many of these remain pending. Property cases then were separated from these figures.

N.B.: *For the purposes of this chart, property cases are defined as all residential and commercial real property cases, including those involving socially owned property. This includes ownership disputes, illegal occupations, boundary disputes, expropriation and breaches of rental agreements.*

Table D: Backlog of Property Disputes before the Municipal Courts in Kosovo (as of 12 December 2002)

	Municipal Court	**Civil Cases** *Admitted*						**Civil Cases** *Solved*		**Civil Cases** *Unsolved*	
		Prior 12/06/99		*After 12/06/99*		Total					
		Civil	*Property*	*Civil*	*Property*	Civil	Property	Civil	Property	Civil	Property
1	Suharekë/ Suva Reka	*674*	*145*	*636*	*240*	1310	385	424	145	886	240
2	Rahovec/ Orahovac	*791*	*141*	*2364*	*308*	3155	449	614	138	2541	311
3	Dragash/ Dragaš	*368*	*139*	*692*	*204*	1060	343	450	181	610	162
4	Malishevë/ Mališevo			*265*	*156*	265	156	195	72	70	84
5	Prizren	*3076*	*568*	*2253*	*756*	5329	1324	3213	615	2116	709
6	Deçan/Dečani	-	-	*235*	*107*	235	107	128	66	107	41
7	Gjakovë/ Đakovica		*32*	*3369*	*523*	3369	555	557	166	2812	357
8	Gjilan/ Gnjilane (also covers Novobërdë/ Novo Brdo)	-	-	*1567*	*626*	1567	626	930	411	637	215
9	Gllogovc/ Glogovac‡			*266*	*81*	266	81	114	47	152	34
10	Istog/Istok	-	-	*372*	*290*	372	290	218	163	154	127
11	Kaçanik/ Kačanik	-	-	*232*	*70*	232	70	103	37	129	33
12	Klinë/Klina	-	-	*562*	*331*	562	331	282	128	280	203
13	Kamenicë/ Kosovska Kamenica	-	-	*390*	*175*	390	175	307	135	83	40
14	Mitrovicë/ Kosovska Mitrovica (also covers Zvečan/Zveça, Zubin Potok and Leposavič/ Leposaviq)	-	-	*562*	*127*	562	127	124	60	438	67
15	Lipjan/ Lipljan‡	-	-	*557*	*297*	557	297	260	234	297	63
16	Pejë/Peč	*160*	*21*	*891*	*832*	1051	853	377	444	735	388
17	Podujevë/ Podujevo‡	-	-	*405*	*171*	405	171	157	132	248	39

18	Prishtinë/ Priština‡ (also covers Obiliq/Obilić and Fushë Kosovë/ Kosovo Polje)	-	-	*4015*	*2001*	4015	2001	1183	764	2830	1237
19	Skenderaj/ Srbica			*190*	*56*	190	56		42		14
20	Ferizaj/ Uroševac (also covers Shtimje/ Štimlje and Štrpce/ Shtërpce)			*924*	*391*	924	391	258	177	666	214
21	Viti/Vitina	-	-	*234*	*140*	234	140	74	55	160	85
22	Vushtrri Vučitrn	*220*	*27*	*772*	*330*	992	352	633	223	359	134

† Prior to 1999, Malishevë/Mališevo was not a municipality. Its territory was under the administration and the judicial competencies of Rahovec/Orahovac, Klinë/Klina, Suharekë/Suva Reka, and Gllogovc/Glogovac.
‡ The court informed the OSCE that these records were either destroyed or missing/removed to Serbia proper.

As can be seen from Table D, almost every municipal court in Kosovo has at least one third of its admitted civil and property cases pending.[99] Eight (8) courts have at least half of its admitted civil and property cases unresolved, with other courts such as those in Rahovec/Orahovac and Gjakovë/Đakovica having more than two-thirds of its civil and property cases pending. Yet, other courts, such as those in Kamenicë/Kamenica, Podujevë/Podujevo, Lipjan/Lipljan and Skenderaj/Srbica, appear to be managing their caseloads more efficiently, having only about a quarter of their property cases pending. Such variations raise again the question of what causes the delays.

e) *The Backlog of the Courts: Enforcement of Judgements*

For the remedy provided by the courts to be effective, decisions must be enforced. In Kosovo, though, inadequate and inefficient allocation of resources prevents efficient execution or enforcement of judgements. The Department of Judicial Administration's (DJA) periodic report "On the Work of the Regular and Minor Offence Courts" covering the period July-September 2002 revealed a substantial deficiency in the volume of judgements executed by the municipal courts. The report shows that out of a total of 25,777 cases pending in the execution phase at municipal courts throughout Kosovo, only 662, or less than 3%, were resolved during the reporting period. While it is difficult to pin down all of the reasons for this backlog, several factors can help to explain the situation, such as the absence of designated "execution clerks" in some municipalities and the subsequent *ad hoc* assignments of responsibilities to various court support staff. Several court presidents[100] have mentioned this factor as a (or *the*) major problem of enforcement. This problem is currently being addressed by the DJA.[101] Other factors which may explain problems in executing and enforcing judgements include inadequate co-operation and communication between judiciary and police, cumbersome procedures in applicable law, the lack of a clear understanding by some judges and prosecutors as to which laws are applicable, and incomplete data in police reports and case files

[99] Many courts have cases pending which were admitted prior to 12 June 1999, but as the OSCE was not able to obtain more detailed data, a reliable analysis of this aspect cannot be done in this report.
[100] This includes presidents of the municipal courts of Pejë/Peć, Mitrovicë/Mitrovica, Vushtrri/Vučitrn, Skenderaj/Srbica, Gjilan/Gnjilane, Kamenicë/Kamenica, Viti/Vitina, and Kaçanik/Kačanik; and the president of the Prishtinë/Priština District Court.
[101] OSCE Department of HRRoL Weekly Report, 13 – 19 January 2003.

(for example, lack of addresses of parties).[102] However, interviews with court presidents throughout Kosovo reveal that the way the courts are administered is another factor significantly affecting to the ability of courts to execute and enforce judgements.

f) *Overall Concerns related to Resources*

No matter the reason, such backlogs may lead to delays constituting unlawful interference with due process and property rights both under domestic and international law. Under the Code of Civil Procedure, such delays appear to be unacceptable, as courts are instructed to conduct the procedure without "unnecessary delay".[103] Even if the courts do not have enough judges or staff to handle the caseload promptly, the delay may be inevitable but not acceptable under international human rights standards. [104] Article 6(1), ECHR mandates that civil rights be determined within a reasonable period of time, and requires that government authorities take appropriate steps to ensure the speedy progress of the proceedings, [105] and be particularly diligent in cases involving title to land.[106] Moreover, government authorities are responsible, under international law, for any unreasonable delay caused by its judicial or administrative authorities.[107] In fact, the European Court of Human Rights has held government authorities liable for not increasing the number of judges and administrative staff to cope with a backlog of cases and prevent the backlog from becoming permanent.[108] Thus, the inadequate provisioning of resources, including structures and access to laws, and insufficient management of resources results in the courts not merely being unable to effectively protect property rights, but also unlawfully interfering with them by violating rights to due process and effective remedies.

2. *Misapplication or Circumvention of the Legal Framework*

Resource and administrative issues are not the only factors rendering the Kosovo courts' protection of property rights largely inadequate. The OSCE has found that the substantive work of the court is problematic as well. In property related cases, courts, specifically judges, either circumvent the legal framework governing civil proceedings or misapply applicable law when determining claims and imposing sanctions. Some of this misapplication and circumvention, as the OSCE established, can be attributed to a lack of clarity in the laws governing property rights in general.

a) *Lack of Clarity in Property Law*

Cases which have come to the OSCE's attention illustrate that despite attempts by UNMIK to remove legal uncertainty and account for the legal gaps created by the unique circumstances in Kosovo, problems remain which create difficulties in adjudicating property cases. As noted in the *Introduction*, the implications of different types of ownership regimes, especially socially-owned property, is still not fully understood, and must be viewed as underlying many of the difficulties presently facing the courts when applying property laws.

i. *Confusion Regarding the Jurisdiction of the Regular Courts and the HPD/CC*

As discussed previously, UNMIK Regulation 1999/23, removed three categories of claims—those related to property rights lost due to discrimination or acquired through informal transactions between 24 March 1989 and 12 June 1999 and to those who acquired property rights prior to 24 March 1999 but whose rights are interfered with by illegal occupation—from the jurisdiction of the regular courts

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[102] See "Report on the Execution of Court Decisions in the Field of Civil Law," Reinvest Institute for Development Research, Prishtinë/Priština, April 2002. See also "Judicial Reform Index for Kosovo", American Bar Association Central and East European Law Institute (ABA-CEELI), April 2002.

[103] Article 10, Official Gazette SFRY, Nos. 4/77-1478, 36/80-1182, 69/82-1596.

[104] UNMIK and its subsidiary agencies are bound to respect international human rights standards by Clause 11(j),UN SCR 1244 (1999), Section 2, UNMIK Resolution 1999/1 and Chapter 2(b), UNMIK Regulation 2001/9.

[105] *Union Alimentaria Sanders SA v. Spain*, ECHR, A157, para. 35 (1989).

[106] *Poiss v Austria* A 117, para. 60 (1987) and *Hentrich v France* A 296-1, para 61 (1994).

[107] See case law from the European Court of Human Rights, in particular *Weisinger v Austria* A 213 (1991), *König v FRG* A 27 (1978), *Guincho v Portugal* A 81 (1984).

[108] *Zimmerman and Steiner v. Switzerland* A 66, para. 29 (1983).

in Kosovo and confer exclusive jurisdiction to HPCC.[109] While the knowledge and understanding of the jurisdiction of HPCC amongst Kosovo's regular courts has improved since the OSCE's 2002 Report, problems remain in how the courts apply it.

The OSCE is aware of several cases where municipal courts incorrectly assessed jurisdiction in relation to the HPCC. In Lipjan/Lipljan, the Municipal Court erroneously held that a case involving illegally occupied commercial property was within the competence of HPCC. A Kosovo Serb claimant filed a claim with the court to regain possession of an illegally occupied bar to which he had gained the right to use prior to 24 March 1999. In its decision, the Municipal Court declared that it did not have the competence to hear the claim filed by the Kosovo Serb claimant.[110] As HPCC does not have jurisdiction over commercial property, the case fell under the jurisdiction of the courts. When the OSCE approached the court, it became apparent that the court did not fully understand the jurisdiction of HPCC.[111] The Municipal Court referred the claim to the Prishtinë/Priština District Court and the claim remains pending.[112]

The increasing frustration with HPCC's inefficiency, i.e. its ineffectiveness as a remedy,[113] has precipitated attempts by HPCC claimants to seek redress in the regular courts system. For example, a Kosovo Bošniak woman from Pejë/Peć approached the OSCE regarding a case which involved certification of an informal transaction, illegal occupation, and an allegedly illegal third-party transfer of the property in question. Though the claimant had filed a "category C" claim with HPCC through HPD[114] regarding the property, she filed a claim at the Municipal Court in Pejë/Peć claiming that her ex-husband did not own the property and illegally sold the property as a third party. Despite HPCC possessing exclusive jurisdiction to determine the legal property right holder and to subject the current occupant to an eviction—though not regarding the alleged illegal sale—the Municipal Court did not reject the case, delay consideration of the part of the case over which it had jurisdiction until the resolution of the HPCC claims, [115] nor, apparently, did it check with HPCC to see if a claim on the property was pending or was resolved. Such cases illustrate the complexity of many property situations in Kosovo which compound the confusion within the regular courts regarding HPCC's jurisdiction.

HPCC's inefficiency has also led to confusion regarding whether or not the court can consider a case, if an HPCC claim is pending. For example, in the Prishtinë/Priština Municipal Court confusion arose because a Kosovo Serb property right holder sold his illegally occupied property to a Kosovo Albanian after filing a claim with the HPCC to repossess it. The new Kosovo Albanian owner then filed a claim at the Municipal Court requesting it to evict the illegal occupant. The court, after its decision[116] was confirmed by the District and Supreme Court,[117] ordered the eviction of the illegal occupant in May 2002 (and again in October 2002 after the illegal occupant re-entered the property). Until HPCC had determined who legally held the property rights to the property, the Kosovo

[109] See Section 1.2(a-c), UNMIK Regulation 1999/23. See Chapter 3, Section B, pages 12-14 for a description of the claim categories.
[110] Decision 1999/2001, December 2001.
[111] The presiding judge referred the OSCE to a decision of the Supreme Court of Kosovo (Decision 46/2001) issued on 25 October 2001. The decision, however, does not refer to commercial property or determine that HPCC has such jurisdiction.
[112] Under Article 29, Law on Regular Courts, district courts are competent to decide property disputes exceeding the value of 100,000 dinars.
[113] See Part II, Chapter 2, Section C, pages 14-22 for a discussion of HPD/CC operations and efficiency.
[114] See Section 1.2(c), UNMIK Regulation 1999/23.
[115]Once the HPCC claim is resolved and confirms the property right holder, the municipal court would have jurisdiction to entertain a claim connected with the allegedly illegal third-party transfer of property. In addition, if the HPCC deemed it desirable, under Section 2.5, UNMIK Regulation 1999/23, the HPCC could refer the above-mentioned parts of the case to the courts while it was adjudicating the HPCC claim.
[116] Decision 736/2000, 5 April 2001.
[117] Decision 41/2001, 18 September 2001.

Albanian's contention that he was the rightful owner cannot be confirmed. Any decision by the court to evict the illegal occupant therefore is questionable and should not have been adjudicated.

ii. *Confusion over UNMIK Regulation 2001/17*[118]

Another area of misapplication relates to the procedures established for the courts under UNMIK Regulation 2001/17.[119] It requires that all contracts of sale of residential property undertaken for such property within designated SGAs of Kosovo receive approval by the relevant UNMA before the competent court verifies the sale. It explicitly forbids the competent court from registering a contract of sale of a property within a SGA without proof of the UNMA's approval.[120] It also obliges the UNMA to provide the competent court with the appropriate documentation.[121]

While most of the municipal courts that the OSCE approached claimed to possess, be aware of and understand the provisions and procedures outlined by UNMIK Regulation 2001/17 some appear to have difficulties in comprehending and implementing it. Confusion remains over the breadth of UNMIK Regulation 2001/17. For example, the UNMIK Municipal Legal Officer (MLO) in Fushë Kosovë/Kosovo Polje reported to the OSCE in May 2002 that the Municipal Court in Prishtinë/Priština has broadly interpreted what is meant by "residential property" in the regulation. According to the MLO, the court refused to register an inter-ethnic contract related to agricultural land claiming that it required prior registration by the UNMA.

During a meeting with the OSCE in November 2002, the president of the Municipal Court of Pejë/Peć stated that the court became clear about its obligations in relation to UNMIK Regulation 2001/17 after a March 2002 training session he attended where it was made clear that *any* contract of sale of residential property within an SGA fell under the jurisdiction of UNMIK Regulation 2001/17 and must be registered with the UNMA.[122] Still, the OSCE is aware of cases after this training where the Pejë/Peć Municipal Court registered contracts of sale of property within an SGA without the required documentation. During a routine verification process, the MLO in Pejë/Peć municipality discovered that, as of 12 November 2002, the court had registered 25 contracts of sale of property within SGAs without receiving the required documentation—none of the contracts were accompanied by either a receipt from the MCO determining if the property is located within an SGA or the required certificate of approval by the UNMA.

iii. *Confusion over Socially-Owned Property and UNMIK Regulation 2002/13*

The OSCE has encountered cases where the courts appeared confused about the jurisdiction of the Special Chamber of the Supreme Court on KTA Related Matters as related to UNMIK Regulation 2002/13, largely because the courts are not aware of the regulation. For example, the cases involving a property dispute between the Visoki Deçan/Dečani Serbian Orthodox Monastery and two socially-owned enterprises, the Apiko Honey Factory and the Ilirija Hotel, may now be under the jurisdiction of the Special Chamber. In the cases, the two socially-owned enterprises requested the Municipal

[118] This section will deal purely with the regulation in relation to the regular courts. For a more detailed explanation and analysis of the regulation, please see Part IV, Chapter 5, pages 47-54.
[119] On the Registration of Contracts of Sale of Real Property in Specific Geographical Areas of Kosovo, 22 August 2001.
[120] Section 4, UNMIK Regulation 2001/17.
[121] Section 3.2, UNMIK Regulation 2001/17. The section has been widely interpreted to apply to both acceptances and refusals of sales.
[122] The UNMR, as well as the HPD, are currently investigating the matter. A similar pattern emerged after a June 2002 survey of Fushë Kosovë/Kosovo Polje, Prishtinë/Priština, and Obiliq/Obilić muncipal courts. In 2002, the OSCE found 6 residential property transactions within SGAs that were registered by the court without prior registration of an UNMA. After April 2002, according to the UNMIK Local Community Officers (LCOs) in Fushë Kosovë/Kosovo Polje, Prishtinë/Priština and Obiliq/Obilić municipalities, the municipal courts have complied with the regulation and referred inter-ethnic sale to the UNMA for approval.

Court to annul the donation of property by the Republic of Serbia in 1997. The Deçan/Dečani Municipal Court, unaware of the regulation, annulled the donation.[123]

Thus, it appears that courts have difficulties adjusting and appropriately applying laws governing property rights. These difficulties appear to result both from a lack of clarity in the law as well as a lack of diligence by the courts.

b) *Circumvention of Legal Framework or Procedures*

Even if a coherent and comprehensive legal regime and sufficient resources exist, the laws have to be applied appropriately and without discrimination. The OSCE has observed instances, primarily related to minority communities, in which the courts have circumvented the procedures outlined in the legal framework governing the functioning of the courts and not protected property rights equally or fully as result of interference with rights to due process and an effective remedy.

i. *Access to the Court for Minorities*

Under Article 6(1), ECHR, all individuals have the right to access a court. This access must not only be established in the law, but be available in fact.[124] Many Kosovo Serb communities' lack of freedom of movement can hinder their ability to access the courts. Until recently, Kosovo Serbs in Mitrovicë/Mitrovica have tended to utilise the parallel court structures. Kosovo Serbs in other areas appear to have access problems as well.[125] Courts questioned by the OSCE in the Prizren and Pejë/Peć regions regarding this issue indicated that Kosovo Serbs and other people displaced from their property regularly access the courts through authorised representatives.

ii. *The Right to an Interpreter*

Part of the legal framework governing civil proceedings as well as of the guarantees given under due process rights is that claimants on both sides should understand the court's proceedings. [126] According to Article 102 of the Code of Civil Procedure[127] the parties to a dispute have the right to follow the procedure in their own language. An interpreter should therefore be provided if necessary. However, claimants are not always informed of this right. In a case before the Municipal Court in Ferizaj/Uroševac, a Kosovo Serb who had filed a claim requesting the eviction of the illegal occupants of her flat,[128] was not provided with an interpreter. According to the Kosovo Serb, the hearings were conducted in Albanian but the claimant was not allowed to bring an interpreter, nor informed that she could be offered one by the court. When questioned about this by the OSCE in October 2002, the judge responded that the language normally used during civil proceedings is that of the defendant, that the judge had communicated with the claimant in Serbian. She also said that the claimant was able to respond to inquiries during the proceedings in Albanian. Even if the Kosovo Serb could understand Albanian, the statement by the judge that proceedings are conducted in the language of the defendant is unfounded. As explained above, this is contrary to the Code of Civil

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[123] For case analysis, see Annex A, pages 75-77.

[124] *Golder v UK*, A 18 (1975)

[125] For a more detailed analysis, see Section 2,OSCE/UNHCR Tenth Assessment on the Situation of Ethnic Minorities in Kosovo, 10 March 2003.

[126] UNMIK DOJ is currently in the process of drafting a Justice Circular on Court Interpreters and Translators.

[127] Official Gazette of SFRY, No. 4/77-1478, 36/80-1182, 69/82-1596

The article states:

> "(…) If the proceedings are not conducted in the language of a party or other participants in the proceedings, there shall be provided oral interpretation into their language of things stated during the hearing, as well as oral interpretation of documents used as evidence during the hearing.
>
> "The parties and other participants should be informed about their right to follow the proceedings in their own language through assistance of an interpreter."

[128] The woman purchased her flat on 18 June 2002. Her claim therefore would not meet the requirements for a "category C" claim to fall under the jurisdiction of the HPCC. See Section A(2)(a)(I) of this chapter, pages 32-34, and Part II, Chapter 2(B), pages 12-14. The claim was thus correctly addressed to the municipal court.

Procedure. Such actions also violate the principle of 'equality of arms', i.e., that all parties have a reasonable opportunity to present their cases under conditions that do not place any party at substantial disadvantage,[129] and thus the right to a fair trial guaranteed in Article 6(1), ECHR.

iii. *Proceedings in Absentia*

A number of municipal courts appear to have violated the absentee parties' rights, and therefore Article 6(1), ECHR despite claims by them that they fully respect such rights. According to the Code on Civil Procedure (the Code), cases can be tried despite the absence of a party, i.e. *in absentia*.[130] If done, the Code stipulates that court must act as lawyer *in abstentia* or appoint a representative as well as ensure that it has considered all relevant evidence before reaching a decision.[131] The OSCE has identified cases handled *in absentia* in which procedural guarantees have not been afforded to the absent party in proceedings and the law has been misapplied to the facts.

In Klinë/Klina, the OSCE has monitored two municipal court cases held *in absentia* where the absent party was not afforded the procedural guarantees codified in the Code. In both cases the absent party to proceedings was Kosovo Serb and the persons illegally occupying their properties applied to the court for a temporary measure—preventing legalisation of the sale of the property by the Kosovo Serb owner to a third party. In one of these two cases, the Kosovo Serb owner was not informed that court proceedings had been initiated, as required by Article 11 of the Code. In the second case, the court refused to accept certified authorisation from the Kosovo Serb owner for the third party purchaser to represent them at court.[132] In both cases, the court also misapplied the law and erroneously ordered temporary injunctions when none of the requisite three criteria stipulated in Article 442 of the Code had been met: (1) to remove imminent danger of wrongful injury; (2) to prevent violence; or (3) to avert an irreparable damage. Nor did the cases fall into the category where such measure could be applied—trespass of property.[133] Similarly, the OSCE identified a case at the Municipal Court of Gjakove/Đakovica where the court initially refused to accept the notarised written authorisation presented by a Kosovo Egyptian to act on behalf of a relative in the case to repossess an illegally occupied kiosk.[134]

In other cases, the courts appear to have attempted to effect a judgement involving property rights to the disadvantage of a minority. This appears to have been done in order to deny the disadvantaged parties their property rights. Such actions would render the court an ineffective remedy, breaching Article 13, ECHR. They also breach the principle of 'equality of arms', circumventing the requirements of both the Code and Article 6(1), ECHR. Furthermore, the emerging pattern illustrated through the three above cases also raises concerns that these rights may be interfered with based upon the ethnicity of the disadvantaged party, thereby constituting a breach of Article 14 on non-discrimination in conjunction with Article 6(1) and Article 1, Protocol 1, ECHR.

D. Conclusion

Despite a generally solid legal framework through which to work, the ability of the regular courts in Kosovo to implement the legal framework and apply property laws adequately in order to protect the full bundle of property rights is questionable. The lack of clarity within the constantly evolving legal regime combined with limited and ineffectively managed human resources and institutions causes

[129] *Neumeister v Austria* A 8 (1968).
[130] Article 295, Code of Civil Procedure.
[131] Article 81, Code of Civil Procedure.
[132] In accordance with Article 77 of the Code on Civil Procedure, the judge reasoned that the value of the claim was over the amount of 2,500 DM and on these grounds, only a lawyer could act as the Kosovo Serb's representative at court.
[133] Article 442 is within Chapter 28, which concerns trespass to property as defined in Article 439 of the Code of Civil Procedure.
[134] Under Article 81, Code of Civil Procedure, written authorisation may be required of a person acting as legal representative on behalf of the party to the proceedings.

backlogs. This lack of clarity coupled with sporadic unwillingness of the courts to guarantee due process to all without discrimination means that in Kosovo not only are the rights to a fair trial (Article 6, ECHR) and to an effective remedy (Article 13, ECHR) precarious, but consequently so are property rights. Indeed, this chapter has illustrated that the regular courts in Kosovo may not be able or willing to fully protect rights of due process and property.

PART IV: ADMINISTRATIVE REGULATION AND PROTECTION OF PROPERTY RIGHTS

This part looks at how effective the municipal and central administrations are at protecting property rights. Three different legally established procedures and their related remedies are examined in separate chapters: the expropriation procedure, the procedure to register residential property transfers within specially designated geographical areas (UNMIK Regulation 2001/17), and the regulation of illegal construction.

The OSCE has found property rights are inconsistently and inadequately protected by institutions in all procedures, whether due to inadequacies of the law, circumvention of the law, or inconsistent application of the law.

Chapter 4: Expropriation

Synopsis

- The expropriation procedure allows a state authority to legally interfere with or deprive a property right holder of their property if in the common interest and such interference/deprivation is appropriately compensated.
- The legal framework for expropriation provides adequate protections for property rights.
- However, municipal level institutions have circumvented the procedures and unlawfully deprived property right holders of property.
- Central level institutions also have been found to by-pass these procedures and overstep their authority in initiating public projects on privately-owned property without utilizing the expropriation procedure through municipalities, thereby violating property rights holders' rights.
- Attempts by KFOR to compensate for use or usurpation of property have not resulted in a clear, uniform, or effective policy, nor has KFOR appeared to provide compensation when municipalities expropriate on their behalf.

A. Introduction

In order to rebuild the infrastructure of Kosovo as well as to enable government authorities to act in the common interest, these authorities must be able to gain access to and utilise property when necessary. The procedure of expropriation, through which this is done, is an essential tool of the state and enables it to legally use or take others' property in the common interest either for itself or another legal entity. This chapter assesses if property rights are adequately protected when authorities wish to expropriate. It first examines the legal framework, primarily the Law on Expropriation (the Law),[135] for its ability to ensure such protection, and second, analyses if government authorities, in particular municipalities, utilise the procedure in such a manner as to protect legal and natural persons'' rights to property.

The OSCE found that while the Law outlines a procedure and remedies compliant with international standards, municipalities and other government authorities are either inappropriately applying or circumventing the procedure thereby precipitating unlawful interference with property rights. Such actions, moreover, may also constitute violations of due process, and, in cases which involve minority community members, possibly discriminatory practices.

B. Restriction of the Right to Property: ECHR Standards

As discussed above in the *Introduction*, to be compliant with the ECHR, interference with property and other rights must be provided by the law, have a legitimate aim, be necessary in a democratic society, and be the least intrusive measure to achieve the aim pursued. The elements required for an expropriation procedure to be compliant with the ECHR, in particular Article 1, Protocol 1, are that expropriation be (a) in the common interest; (b) the law mandating it is accessible and precise, and (c) the state appropriately compensates people for its interference with their property rights. Such compensation has to be given promptly.

The common, or public, interest is broadly defined, and may include reasons for interference based upon public safety, spatial planning and pollution control. To meet the requirement of proportionality, which underpins all laws which interfere with ECHR rights, the expropriation act has to be appropriate, the least restrictive measure possible and the act (including the compensation) has to

[135] Official Gazette of SAPK, No. 21/78, as amended by the Law on Amendments and Supplements of Law on Expropriation, Official Gazette of SAPK, No. 46/86.

strike a fair balance between the public interest and the interest of the property right holder. Further, the law must not have a discriminatory effect.

C. Legal Framework

The legal framework controlling expropriation in Kosovo remains primarily the Law on Expropriation and its amendments, as in force since 1986.[136] The Law itself provides adequate safeguards against undue interference with property rights, and complies with the ECHR standards outlined above. The Law requires that the 'common interest' be determined publicly prior to expropriation, and that the property right holder be determined and be given compensation to offset the interference suffered. The Law also provides for remedies to the procedure when interference is thought to be disproportionate, or unlawful.

More specifically, the Law lays out four (4) stages which the expropriating government authority, normally the municipality, must follow.

1. *Preparatory Work (if necessary):* Before submitting a proposal for the determination of the common interest or the submission of a proposal for expropriation, the expropriator may need to carry out preparatory work on the land[137]. Permission for such work is obtained by submitting a proposal to the municipal body competent for legal property issues. If appropriate, the competent municipal body issues permission, including a time limit in which to complete the works, and requires the payment of compensation.[138] Compensation is determined in the procedure described below. This permission does not include permission to construct.[139]

2. *Determination of Common Interest*: Once any preparatory work is complete and prior to any proposal for expropriation, a decision, or "Determination of Common Interest", must be made on whether or not the plans for the property are in the 'common interest'. Real property may be expropriated "when necessary for the construction of economic housing, communal, health; and other objects in the common interest." [140] The common interest is usually determined by the 'urban plan'. If there is not an urban plan, the municipal assembly decides.

3. *Decision on Expropriation*: If a proposal is deemed to be in the common interest, and all the preparatory work has shown that the land is suitable for the intended development, then a proposal for expropriation is submitted to the competent municipal authority within two years of the "Determination of Common Interest"[141] for approval and the issuance of a "Decision on Expropriation". At this point, the proposal, and thus the "Decision", is required to identify the owner and/or user of the property in question.[142]

4. *Decision on Compensation*: The Law establishes how much compensation should be paid and by whom for the expropriation of real property. By agreement of the parties, compensation may also be determined in granting property rights in co-ownership or in

[136] Other laws, such as general administrative law, including the Law on Administrative Procedures, the Law on Administrative Disputes, Official Gazette SFRY, No. 4/77, and UNMIK Regulation 2000/45 also is applicable. For compensation issues, the Law on Non-Contested Procedures, Official Gazette SAPK, No. 42/86, also is applicable.
[137] Article 7, Law on Expropriation, Official Gazette SAPK 46/86.
[138] Article 11, Law on Expropriation. The procedures for determination of the amount of the compensation apply (see below).
[139] Article 9(3), Law on Expropriation.
[140] Article 2, Law on Expropriation.
[141] Article 12, Law on Expropriation.
[142] Article 13, Law on Expropriation.

another form.[143] The decision on compensation can only be taken once the "Decision on Expropriation" becomes final.

The Law and other applicable legislation also provide for a range of mechanisms to remedy situations where decisions may have unlawfully interfered with property rights of individuals. Of particular importance, it includes provisions to remedy an incorrect "Decision on Expropriation" and/or level of compensation.

D. Implementation of the Framework: Circumvention or Inappropriate Application

While the legal framework is comprehensive and adequate to protect the rights of property right holders, its implementation or application has not reflected this. Instead, municipalities responsible to apply the Law either circumvent or inappropriately apply it or are circumvented by other government authorities wishing to use land and interfere with property rights. The result in both cases is the unlawful deprivation of property rights and a failure by government authorities to protect such rights.

The OSCE has identified several cases where municipal authorities commenced expropriation procedures without the preliminary identification of the owners, where ownership has been incorrectly determined, and where municipalities circumvented the law by changing the status of the property to be expropriated. Further, public utilities and central level institutions have used land without following expropriation procedures.

1. *Municipalities' Failure to Expropriate*

a) *Case 1: Failure to Identify Property Rights Holder, Multi-ethnic Market in Fushë Kosovë/Kosovo Polje*[144]

Without following expropriation procedures, the UNMIK Municipal Administration in Fushë Kosovë/Kosovo Polje started construction of a multi-ethnic market in October 2001 on the land of a Kosovo Serb, completing the market in March 2002. That same month, the alleged owner, who had not been contacted or compensated by the municipality, claimed possession of the property and requested a remedy to the unlawful interference with his rights. He submitted an inheritance decision, possession lists and a copy of a cadastral certificate[145] supporting his claim for possession, to UNMIK Municipal Administration. In September 2002, in response to the OSCE inquiries regarding the case, the UNMA responded that UNMIK is in the process of verifying the submitted documentation and the ownership of the land. In October 2002, the MLO told the OSCE that he advised the UNMA that the Municipal Assembly should pass a Decision on Expropriation because the Kosovo Serb had a valid claim over the property in question and is therefore entitled to compensation according to applicable law. As of February 2003, no such decision had been taken. If expropriation procedures had been followed properly, the municipality would have been required to determine the property rights holder prior to construction and to compensate appropriately for interference with these rights. By not doing so, the municipality appears to have failed to protect the Kosovo Serb's property rights and instead unlawfully interfered with them.

b) *Case 2: Incorrect Identification of Owner, Deçan/Dečani Municipality Monastery Case*

[143] See Article 2(a), Law on Amendments and Supplements of Law on Expropriation, Official Gazette SAPK 46/86.
[144] See OSCE Department of HRRoL Weekly Report, 30 September-6 October 2002, for a more detailed discussion.
[145] Letter of the alleged owner (and others) to the UNMA of Fushe Kosovë/Kosovo Polje, dated 13 March 2002.

In Deçan/Dečani, the municipality appears to have circumvented expropriation procedures and potentially deprived parties of their property. [146] The case involves the destruction of the "Mermer House" and "Hotel Turisti", which were located in the centre of Deçan/Dečani and both appear to be owned by the Visoki Deçan/Dečani Serbian Orthodox Monastery. In May 2001, the Municipal Assembly of Deçan/Dečani approved the demolition of these two structures. [147] The Municipal Assembly based its decision on pre-1997 cadastral records, which were provided by the Directorate of Urbanism, Reconstruction and Construction. The decision stated that the municipality owned the properties in question. [148] The buildings were destroyed in June 2001. [149] The properties, however, appeared to have been legally transferred to the Visoki Monastery in 1997.[150] UNMIK halted further potential usurpation once the Monastery alerted it to the problem in July 2001. [151] Even so, the municipality had attempted to deprive the Monastery of its property by circumventing expropriation procedures and claiming the property to be municipal. Discussions regarding compensation and use of the land continue.

c) *Case 3: Alteration of Property Status, Prizren, Roma Cultural Centre*

The Prizren municipality has allegedly deprived a displaced Kosovo Roma of his right to property, by erroneous implementation of applicable law. On 5 July 2001, the Municipal Assembly of Prizren adopted a proposal for expropriation of the Kosovo Roma's land plot to create a Roma Cultural Centre. The municipal Directorate for Property and Legal Issues declared the property abandoned and then halted this expropriation procedure because, under the Law on Basic Property Relations, once the property is classified as abandoned the property right ceases and the property is transferred into public ownership.[152] With this transfer, the municipality avoided compensating the claimant under the expropriation procedure. After deciding on the transfer, the Directorate provided 30 days for appeal. Just after this deadline passed on 10 August 2001, the displaced property right holder returned to Prizren and lodged a claim with the municipality against its action.[153] The OSCE notes that the municipal Directorate for Property and Legal Issues erroneously determined that the claimant's property was abandoned. Under both domestic and international applicable law those forcibly displaced through the conflict and unable to return due to security or other concerns are prevented from enjoying their property rights and are not considered as abandoning property, and, therefore, do not forfeit their rights.[154] Due to this erroneous determination, the OSCE is concerned that the Kosovo Roma property right holder may not be able to exercise his right to an effective remedy to challenge the determination of transfer of his property rights, including the determination of abandonment. By

[146] This case is distinct from those lodged at the Deçan/Dečani Municipal Court, involving an ownership dispute between the Visoki Deçan/Dečani Serbian Orthodox Monastery and two socially-owned enterprises, Apiko Honey Factoy and "Ilirija" Tourist Company. For a discussion of those cases, please see Annex A.

[147] This decision was not recorded in the official minutes of the Municipal Assembly session.

[148] Based on these records, the UNMA also did not raise objections. The Director of Directorate of Urbanism told the OSCE on 11 February 2002 that the municipality presented these pre-decision records because it believed the decision granting the land to the Monastery to be discriminatory. The OSCE notes that only a court can rightfully make such a determination.

[149] Controversy remains over this demolition and if the appropriate procedure was followed in effecting the demolition order. Specifically, if the land was indeed municipal, then under Chapter 9, Section 48, Article 14, UNMIK Regulation 200/45 the UNMA had to approve the demolition, which he did not.

[150] Through a 5 November 1997 decision (Republic of Serbia, Decision No. 464-2914/97) and recorded in the Cadastre as a 10 March 1998 Possession List indicates.

[151] The Monastery sent UNMIK Police and the UNMA a letter of complaint in July 2001.

[152] Article 46(1) and (3), Law on Basic Property Relations, Official Gazette of SFRY, No. 6/80.

[153] It is not clear whether the claimant had justified reasons for failing to appeal within the legal deadline.

[154] Article 46, Law on Basic Property Relations says that for the property to be classified as abandoned the owner must "in an indisputable manner express[] his/her will that he/she doesn't want to hold it anymore." (This does not appear to conflict with Section 1, UNMIK Regulation 2000/60). See *Loizidou v Turkey* (merits), European Court of Human Rights, 18 December 1996, Reports 1996-IV, para. 63-4 in which the Court found the denial of or inability to access to property due to conflict did not suspend property rights but constituted an interference in the exercise of them. See also OSCE Department of HRRoL Weekly Report, 3-9 February 2003, for further analysis and international applicable case law.

circumventing the procedure, the Prizren municipality not only may have unlawfully deprived the displaced Kosovo Roma of his property, but also interfered with his right to return to his home.

2. *Central Institutions' Failure to Seek Expropriation*

Not only have municipalities improperly applied or circumvented expropriation procedure and deprived property rights holders of their rights, but central institutions have as well. When these institutions have attempted to do so, the municipalities involved also failed to act adequately to remedy the circumvention of the expropriation procedure by initiating an expropriation procedure or taking other appropriate action to protect the property rights of its constituents.

a) *Case 1: Misuse of Authority: Kosovo Trust Agency (KTA) and Mitrovicë/Mitrovica*[155]

In this first case, the KTA not only misclassified the status of the property involved, as was done in the previous case in Prizren, and overstepped its authority in doing so, but the municipality failed to act despite its awareness of KTA's actions and the construction. The case involved KTA granting the right of use and permission to construct on private land for a water canalisation project of Ibar Lepence Water Company (Water Company), a publicly-owned company which KTA administers. The Mitrovicë/Mitrovica municipality, aware of KTA's actions and the subsequent construction, failed to act to ensure compliance with its own regulations or to protect the rights of its constituents. The case involved property belonging to nine (9) displaced residential property rights holders in the area of Suvi Do/Suhadoll and the bordering municipality of Zvečan/Zveçan.[156]

Similar to the Prizren case above, the KTA identified the properties as abandoned by refugees outside Kosovo without providing a legal basis.[157] This determination was made despite two of the property right holders being displaced inside Kosovo and expressing their objections to the ongoing construction.[158] As explained above, under applicable law this determination results in the properties reverting to public ownership, normally under the authority of the municipality. KTA appeared to assume that by making this determination the properties fell under their authority. Yet, as the properties were not an asset of an enterprise under its control, KTA had no authority to exercise such control, regardless of whether or not the determination was correct.[159] Instead, according to applicable law, in order to interfere lawfully with the property rights of such individuals, appropriate legal procedures, such as temporary or permanent expropriation done through the appropriate municipal authority[160] or private agreement, must be utilised. By not undertaking such actions, KTA erroneously circumvented expropriation procedures and unlawfully deprived the property right holders of their rights to both their property and due process.[161]

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[155] See also OSCE Department of HRRoL Weekly Report, 3-9 February 2003, for a more detailed discussion.
[156] Article 1, Protocol 1, and Article 6, ECHR.
[157] Letter from Acting Deputy Managing Director of Publically-Owned Enterprises, KTA to IBAR-LEPENC Water Company, 13 September 2002.
[158] Two of the property rights holders affected who are currently displaced in Pristinë/Priština approached the danish Refugee Council (the implementing partner) and KFOR during the construction to complain about the unauthorised construction on their properties. This action indicates that they had not legally abandoned their properties. This action and that these property right holders were not displaced outside Kosovo as KTA claimed raises concerns about the process used by KTA to determine that the properties were abandoned.
[159] Section 5.1, UNMIK Regulation 2002/12. KTA appeared unaware of these limitations on its authority, as evidenced by the 13 September 2002 letter, and an 18 December 2002 email sent by the Head of the Water Sector of KTA to the OSCE. In the later email, the Head of the Water Sector of KTA refers to KTA's "reserved powers related to water utility companies". Such reserved powers are not delineated in UNMIK Regulation 2002/12 or any subsequent Administrative Direction.
[160] See Law on Expropriation and specifically Article 2 which refers to construction of water supply systems and Chapter V which provides for emergency and temporary expropriation procedures.
[161] As raised in the OSCE Department of HRRoL Weekly Report referred to in footnote 155, concerns also arose to the actions of KTA in relation to the authorisation of construction.

Despite being aware of both the construction and determination, the municipality did not act, further failing to protect the property right holders of their rights.[162] Indeed, the municipality was aware not only of the actions of KTA described above but did not require KTA to wait for it to expropriate the land for it. It also was cognisant that KTA had illegally authorised the IBAR LEPENC Water Company (Water Company), a publicly-owned enterprise, to start construction on privately-owned land for the project. According to UNMIK Regulation 2000/53 On Construction in Kosovo also known as "Rexhep Luci Regulation on Construction", only a "competent municipal authority", usually the relevant Directorate of Urbanism, and not KTA, may issue a construction permit, which is required for all construction in Kosovo.[163] In issuing the permit, the municipality would have been required to verify the holder of the property right. Expropriation, therefore, was unlawfully by-passed by both the actions of the KTA and the inaction of the municipality and resulted in the violations of rights.

b) *Case 2: Urgency Results in Bypass: Kosovo Electric Company and Prishtinë/Priština Municipality*[164]

In a second case, which was monitored in the Prishtinë/Priština region, the OSCE found that the expropriation procedure was not followed fully by either the Kosovo Electric Company (KEK) or the Prishtinë/Priština municipal authorities. In December 2002, a Kosovo Albanian from the Prishtinë/Priština municipality approached the OSCE regarding the illegal occupation of his land by KEK. According to him, in October 2002 KEK initiated construction of a temporary electricity pole on his land without the authorisation required under the Law on Expropriation. According to this law, KEK is required, through the appropriate government authority, to expropriate the land either permanently or temporarily and provide compensation to the property right holder.[165] Both KEK and the Prishtinë/Priština municipality reported to the OSCE that no expropriation procedure had been initiated, but justified their action by the urgent need for the work.[166]

The municipality itself failed to take the requisite action to protect the rights of its citizens. Instead, the UNMA rejected his responsibility to act to remedy the situation. This refusal was despite his own directorate's determination that a violation of its instructions existed, and only two days before the municipality provided "permission for preparatory work".

Overall, municipal authorities and central institutions appear to disregard the expropriation procedure, rendering the comprehensive legal framework almost irrelevant. The OSCE remains concerned that until both central authorities and municipalities stop circumventing the expropriation procedure and instead apply them diligently, property rights and rights of due process will continue to be violated.

3. *Special Implementation: KFOR and Expropriation*

KFOR is another type of authority that might need to interfere or deprive people of their property rights on public interest grounds. While this report does not intend to provide a detailed analysis of KFOR's expropriation and compensation procedures, the OSCE identified areas of concern related to

[162] On the Self-government of Municipalities, 11 August 2000. Section 33 binds the municipal administration to respect and protect human rights. Section 48.2 mandates the UNMIK Municipal Administrator to intervene to "ensure" that human rights are protected.

[163] Section 2, UNMIK Regulation 2000/53 On Construction in Kosovo also known as "Rexhep Luci Regulation on Construction" states "All construction shall require a construction permit issued by the competent municipal authority." Section 1, UNMIK Regulation 2000/53 defnes "construction" as "the erection, installation, replacement, renovation, enlargement, alteration, conversion or demolition of any building or structure…" and "includes changes made to the function or use of real property that deviate from recognized urban plans."

[164] See OSCE Department of HRRoL Weekly Report, 6-12 January 2003, for a more detailed discussion.

[165] Article 2, 11, 22, and 48 among others, Law on Expropriation, Official Gazette SAPK, No. 46/86.

[166] Article 22-27, Law on Expropriation. The OSCE notes, however, that this procedure is initiated following a formal declaration of emergency in the specific regions of Kosovo affected by a natural disaster or emergency. The regions mandating emergency expropriation procedures are assigned by Kosovo's central executive authorities (see Article 23).

the claim procedures adopted and implemented by HQ KFOR and the various Troop Contributing Nation (TCN).

HQ KFOR has made efforts to establish a standardised Kosovo-wide process by which citizens of Kosovo could file claims for compensation against HQ KFOR and its TCN for property damage and loss. These efforts were made pursuant to the provisions of Section 7 of UNMIK Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, which states that KFOR shall establish Claims Commissions in order to settle third party claims for, *inter alia*, property loss and damage.[167] However, until March 2003, property claims against KFOR were dealt with within the framework of an *ad hoc* "draft" Kosovo Claims Policy, which, although not binding on TCNs, set out internal KFOR guidelines for property claims processing and adjudication. In the absence of an alternative procedure, the "draft" policy was *de facto* adopted by HQ KFOR, although it was never formally recognised by the TCNs.

On 22 March 2003, COMKFOR promulgated Standard Operating Procedure 3023 for Claims in Kosovo (the SOP). The SOP is not a binding policy document, but simply provides information about the role of HQ KFOR Claims Office, and states that each TCN is responsible for adjudicating claims that arise from their own activities, in accordance with their own claims rules, regulations and procedures. In this regard, the SOP sets out advisory steps that the TCNs should consider when establishing their own processes for receiving, investigating, adjudicating and paying claims.

The SOP sets out the responsibilities of the HQ KFOR Claims office. This office is responsible for investigating and adjudicating all claims against HQ KFOR. When the claims officer has collected all information required, the claims officer reviews the claim to determine whether it meets the requirements set out in Section 7, UNMIK Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo. If the claims officer determines that HQ KFOR personnel were involved and at fault, the claims officer will recommend payment of the claim. If the claimant agrees with the amount, the claimant will sign a settlement agreement in full and final satisfaction of the claim. If the claimant rejects the offer, the claimant can appeal to the KFOR Kosovo Claims Appeal Commission (KCAC). If the claimant subsequently loses the appeal, the claims officer settlement offer is revoked. If the KCAC decision does not unanimously reject the appeal the settlement offer remains open.

Concerning appeals, Section 7 of the SOP re-affirms the existence of the KCAC, but describes it as "a non-binding voluntary appeal system" in which HQ KFOR Claims Office and those TCN who wish, will participate. However, in the procedures of the KCAC, when and upon what grounds a claimant can appeal are not defined, leaving the remedy of questionable effectiveness.[168] In order to change a decision of the TCN or HQ KFOR the KCAC's three judicial officers must reach a unanimous decision. Moreover, the decision of the KCAC is persuasive but not final and the KCAC's powers are not legally binding on either the TCNs or HQ KFOR.

The SOP has the advantage of being more concise than the former "draft" Claims Policy. Further, HQ KFOR and the majority of TCNs[169] have agreed to abide by the guidelines set out in the SOP. However, the SOP has no legally binding force on the TCNs, the legal basis on which both claims and

[167] Section 7, UNMIK Regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo: "Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK, or their respective personnel, and which do not arise from 'operational necessity' of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for."

[168] Paragraph 1, Annex C, the SOP where the procedures of KCAC are outlines only states: "Where a claimant disagrees with the decision of the HQ KFOR Claims Officer or the TCN Claims Officer, the claimant may appeal to the Kosovo Claims Appeals Commission (KCAC) if he is entitled to do so." It does not define the entitlement further.

[169] However, as of the release of this report, the US, French, Swedish, and Russian KFOR contingents do not accept the jurisdiction of KCAC to settle claims against them

appeals will be adjudicated remain imprecise, and KFOR's immunity from claims on the grounds of "operational necessity" remains unaffected as well as undefined.

The OSCE has noted several cases of KFOR taking measures that have infringed on individuals' property rights. In one example, following the construction of a temporary US KFOR base in Dragaš/Dragash in September/October 2002 without the consent of the landowners, US KFOR offered landowners a "take it or leave it" nominal annual rent of 0.15 Euro per square metre. No reference was made to the draft Kosovo Claims Procedure, and no provision was made to allow the landowners to appeal. No compensation has yet been paid.

In another instance, the Norwegian Refugee Council (NRC), acting on behalf of a group of IDP property owners residing outside Kosovo, has been in negotiations with German KFOR for almost 2 years regarding 27 apartments occupied by KFOR in Prizren since July 1999. Although KFOR is co-operating with the claimants and has agreed to negotiate a rental agreement under the auspices of the HPD, no rental agreement has yet been signed, and the decision of the German Defence Ministry is still awaited. In this case, however, German KFOR has at least recognised the competence of the HPD to verify the ownership claims of those seeking compensation.

In Pejë/Peć, 57 compensation claims were made to the municipality and KFOR concerning damage caused during KFOR construction of a transit road between KFOR routes "CAT" and "PENGUIN" during late 2000 and early 2001. After long delays, the municipality initiated an expropriation procedure on behalf of KFOR, and, with the support of the Legal Advisor of KFOR, issued a "Declaration on the Common Interest" in 2001 as required by applicable law.[170] However, the preparatory activities for the expropriation[171] were not followed as it was done *ex post facto*. To OSCE's knowledge, no further action was taken by the municipality to complete the expropriation in accordance with the above-mentioned law. The UNMA indicated to the OSCE last November that KFOR has committed itself to compensating the affected individuals. However, no compensation has yet been paid.

E. Conclusion

Despite the Law on Expropriation providing an adequate legal framework for government authorities to lawfully interfere in property rights in the common interest, the relevant authorities at the municipal and central levels appear to consistently neglect it and fail to protect the rights of the property right holders involved. The case studies mentioned above provide a clear illustration of the problems that can occur when responsible administrative bodies fail to follow the expropriation procedures. Individuals and other legal entities are deprived of their property rights, and interference with a number of other rights can follow. Such cases have a great impact on the right to return of the displaced. Depriving returnees of their property and building on it discourages return and hampers its sustainability.

Furthermore, legal requirements aimed at protecting property rights are ineffective if they are not followed in all circumstances (unless a special exception is made—e.g. times of national emergency). If they are not followed, then the public may perceive that the law does not have the ability to protect their interests, thereby preventing the full establishment of the rule of law.

[170] See Article 3, Law on Expropriation, Official Gazette SAPK, No. 46/86.
[171] See Article 7, Law on Expropriation.

Chapter 5: Controlling Residential Property Transfers (UNMIK Regulation 2001/17)

Synopsis

- UNMIK Regulation 2001/17 On the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo aims to help ensure a safe and secure environment, sustainable living conditions for all communities in Kosovo and to facilitate the return of refugees and displaced to their homes.
- To do so, the Regulation is designed to prevent the sale and purchase of property in specific geographical areas (SGAs) which may be part of a strategy aimed at driving out members of minority communities in those areas.
- The UNMIK Regulation 2001/17 has been surrounded by controversy on the question of whether it fetters the right of minority individuals to freely dispose of their property thus preventing them for exercising their property rights without interference.
- Property right holders' ability to seek remedies is impaired by the lack of public explanation stating why SGAs were chosen, and the failure to provide detailed reasons for refusal of registration.
- Frustration from the limited geographical applicability of these measures has resulted in their extra-legal application and the unlawful interference with property rights by the municipal administration.

A. Introduction

In Kosovo, there is concern that property sales can and are being used to prevent the return of minority communities to their homes in specific areas. These are termed 'strategic purchase and/or sale'. To address this concern, the SRSG promulgated UNMIK Regulation 2001/17 (the Regulation). It introduced a mechanism to monitor and control such property sales in designated specific geographical areas (SGAs). The Regulation requires an additional check of a sale within such a SGA by the UNMA, now the UNMR,[172] before a purchase can be submitted to the court for legalisation.[173] While the Regulation is supposed to provide a mechanism through which to protect property rights, it remains unclear if, when implemented, the Regulation achieves its articulated aim and without a disproportionate interference in property rights. This chapter briefly examines the Regulation itself and then analyses if the Regulation's implementation has proven effective in achieving its legitimate aim.

Indeed, the Regulation has been roundly criticised. It was feared that it would deter registration of property, leading to informal transactions and circumvention of the official (court) system. Concern has been expressed at its attempt to prevent strategic purchase/sale by restricting the right of

[172] As of 1 April, the title of UNMAs changed to UNMIK Municipal Representatives (UNMRs). Throughout this report, the title UNMA will be used when referring either to actions of these officials prior to this date, or if a UNMIK Regulation, such as UNMIK Regulation 2001/17, refers to a UNMA.

[173] On 22 August 2001, the SRSG signed UNMIK Regulation 2001/17 On the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo. On 19 October 2001, almost two months later, Administrative Direction 2001/16 Implementing UNMIK Regulation 2001/17 On the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas in Kosovo was endorsed, designating specific areas in Prishtinë/Priština, Fushe Kosovë/Kosovo Polje, Lipjan/Lipljan, Obiliq/Obilic, Pejë/Pec, Rahovec/Orahovac, and Dragash/Dragaš municipalities. On 28 February 2002, under Administrative Direction 2002/4, the SRSG designated further specific geographical areas in the municipalities of Gjilan/Gnjilane, Novobërdë/Novo Brdo, Kamenicë/Kamenica and Viti/Vitina. These directions made the regulation operational in the respective municipalities.

individuals in certain areas to sell their property – thus effectively fettering their ability to freely dispose of their property, and perhaps forcing them to stay in areas they may wish to leave.

The stated aim of the Regulation is legitimate, and has at its heart a desire to maintain and protect the ethnic diversity in certain areas of Kosovo and to ensure that the right to return of refugees is protected. The OSCE found, however, that, when implemented, the procedures laid down in the Regulation create more problems than they solve from a human rights perspective, preventing the Regulation from meeting its stated aim. Some sections of the Regulation are imprecise, particularly the criteria for the designation of an area as an SGA and the grounds on which a UNMA can refuse to register a sales contract. The OSCE observed that the ill-defined criteria in the Regulation allows broad discretion on the part of UNMAs applying the Regulation and, subsequently, the Regulation is not utilised consistently and its is circumvented in practice.

B. Legal Framework: The Regulation

The Regulation does not prohibit sales in general but requires that sales be reviewed by an institution prior to the courts to determine if the contract was fairly concluded and does not reflect a systematic buy-out of minority-owned property. The Regulation is not meant to serve as an instrument to restrict the sale of real property owned by minorities, but as a necessary instrument to protect the legitimate interests of both the individual and the community at large, as expressed in its preamble.

1. *Designation of Special Geographical Areas*

The Regulation permits the SRSG to designate SGAs. Such designation normally applies to a defined area within a municipality and depends upon the fulfilment of the criteria below and a recommendation from the UNMA. The criteria require that within the area:

(a) security concerns exist;
(b) evidence of an existing pattern of systematic sales of minority-owned property at unrealistic prices is present; and
(c) sales of residential property in areas where property rights of minority communities are of special concern.

Once an area becomes an SGA the standard procedures regulating the sale of residential property, registration and its verification change.

2. *Registration of Contract with the UNMIK Municipal Administrator/Representative*

The Regulation further stipulates the procedure for the registration of the contract with the UNMA. It gives the UNMA the competence to verify that the sale was not done under duress and will not adversely affect the situation for communities within the SGA. To do so, the Regulation provides the UNMA the ability to investigate the reasons for the transfer of the property as well as the origin of the money designated to purchase the property, providing a time limit for the UNMA to issue its decision.

Registration may be refused and the sale/purchase become invalid, if the UNMA has reasonable grounds to believe that:[174]

(a) the transaction is directly or indirectly carried out or fostered by an organisation or structure with the aim to systematically buy minority-owned properties in order to change the ethnic balance within the designated area;
(b) the transaction was carried out under duress;
(c) the sale price of the property in question is unrealistic;
(d) that the source of the funds for the purchase of the property is questionable and the *bona fide* nature of the transaction is not established; or

[174] See Section 3, UNMIK Regulation 2001/17.

(e) the transaction is objectively deemed, on the basis of reports of law enforcement authorities, to affect the security situation in a designated area in a way that would be of serious detriment to other minority owners of residential property in that area.

The Regulation provides for the establishment of a Regional Review Committee (RRC) composed of the representatives of UNMIK, HPD, the OSCE and UNMIK Police to review the designation of SGAs and to monitor the registration process with a view to safeguarding a uniform registration practice in all SGAs.

3. *Remedies*

The Regulation entitles the parties to file requests for reconsideration of the first decision by the UNMA to refuse to register the contract within 30 days of the UNMA's refusal. Within 30 days of the receipt of the application for reconsideration, the UNMA must give his/her final decision. Within 60 days from the date on which the decision becomes final, the parties are entitled to appeal to an *ad hoc* panel. If an appeal is lodged, the SRSG based on the proposal of the DOJ, will appoint a panel of three judges on an *ad hoc* basis of which at least two have to be international.[175]

4. *UNMIK Regulation 2001/17's Compliance with the ECHR*

The Regulation interferes with property rights under Article 1, Protocol 1, ECHR. The interference is prescribed by law (through promulgation by the SRSG), but some parts of the law are imprecise, particularly the criteria for the designation of an area as an SGA (shown above) which are extremely broad. Their breadth allows for inconsistent interpretation in the Regulation's implementation by the UNMA.

The Regulation seems to have a legitimate aim, as stated in the preamble, which is to ensure a safe and secure environment and adequate living conditions for all communities as well as the right to return for those displaced. The authorities, with this wording, have tried to strike a fair balance between the interest of the community and the need to protect individual rights so that the individual is not excessively burdened.[176]

Even so, the need to register a sales contract with the UNMA may generate an unnecessary and burdensome interference with property rights. Property rights holders should not be left with too much uncertainty as to the fate of their properties.[177] Despite an established reconsideration and appeal process, individuals may be affected by the measures mandated by the Regulation and left alone and uncompensated.

Further, it is debatable whether the Regulation is required in a democratic society as there is existing applicable law which provides a mechanism to prevent sales under duress. The Law on Obligations and Torts states that "[s]hould a contracting party or a third person provoke by threat the justified fear of the other party, because of that the latter enters into contract, the other party may request that such contract be nullified".[178] This could have been amended to include measures to address strategic purchase and sale.

Overall, the Regulation does not appear to comply with the ECHR because the restrictions it mandates to meet its legitimate aim may be disproportionate.

[175] Section 7, UNMIK Regulation 2001/17 does not refer to any further rules regarding the composition of such panel (like UNMIK Regulation 2000/64 On Assignment of International Judges/Prosecutors and/or Change of Venue), which leaves the question of composition, venue and procedure of the panel open to interpretation.
[176] *James v UK* (1986) 8 EHRR 123.
[177] See *Sporrong and Lonnroth* case, footnote 7, para. 73.
[178] Article 60(1), Official Gazette SFRY 29/78. See also Article 65 on fraud.

C. Implementation of the Framework: Unclear Efficacy of the Regulation

There are several consequences of implementation of the Regulation that have been recognised as problematic. These problems primarily concern the limited impact of its implementation, a lack of understanding of the Regulation, and the disproportionate interference with individuals' property rights. The cumulative effect of these problems begs the question of whether the Regulation achieves its stated aims.

1. *Ineffective Implementation*

There are indications that the Regulation does not serve the aim originally envisaged and it seems to have little or no impact. UNMIK representatives of the Prishtinë/Priština, Obiliq/Obilić and Fushë Kosovë/Kosovo Polje municipalities reported that the Regulation has had no significant impact on sales, since all the critical sales took place before its entry into force. For example, in the village of Devet Jugovica/Nëntë Jugoviq, 50% of the residential property had already been sold before the entry into force of the Regulation. In Fushë Kosovë/Kosovo Polje and Obiliq/Obilić, UNHCR numbers concerning the departure of Kosovo Serbs indicated a greater number of properties were exchanged than contracts submitted for registration. It is possible that individuals are participating in "informal transactions" outside the state system.

An assessment carried out by the OSCE suggests that not all property transactions occurring in SGAs are being registered appropriately. As of mid February 2003, a total of 892 applications had been submitted to the 11 UNMAs of which 87 (9.75%) cases have been rejected.

Table E: Implementation of UNMIK Regulation 2001/17

	Applications received	Applications rejected	Application pending with /decided by the ad hoc Panel[179]
Prishtinë/ Priština	19	0	0 /0
Fushë Kosovë/ Kosovo Polje	213	18	0 / 0
Lipjan/ Lipljan	99	15	0 / 2
Obiliq/ Obilić	46	0	0 / 0
Pejë/ Peć	227	34	0 / 0
Rahovec/ Orahovac	26	1	0 / 0
Dragash/ Dragaš	15	1	0 / 0
Gjilan/ Gnjilane	13	1	0 / 0
Novobërdë/ Novo Brdo [180]			
Kaçanik/ Kačanik	1	0	0 / 0
Kamenicë/ Kamenica*	28	16	0 / 0
Viti/ Vitina	205	1	4 / 0
Total	892	87	4 / 2

*Note: *The UNMA in Kamenicë/Kamenica reported to the OSCE that UNMIK in Kamenicë/Kamenica has received totally 157 requests. These applications have been mainly addressed to UNMIK in Kamenicë/Kamenica from areas which are not designated as SGAs in accordance with the Regulation.*

2. *Misunderstanding of the Regulation*

a) *Limited SGAs leads to Extra-legal Application of the Regulation*

Frustration engendered by the limited number of SGAs throughout Kosovo has led to extra-legal expansion of the applicability of the Regulation. Several municipalities without SGAs have submitted requests to the SRSG to designate SGAs in their AoR. For instance the municipality of Ferizaj/Uroševac has no SGAs. Since August 2001, the Municipality submitted three requests to establish an SGA to the SRSG. However, all requests have been declined without explanation in spite

179 Since the entry into force of the Regulation, the panel in Lipjan/Lipljan has decided on two cases. Case no. AP 1/02, dated 27 June 2002 and Case no. AP 3/02 dated 5 July 2002.
180 No figures available.

of a significant amount of property sales that occurred in Ferizaj/Uroševac municipality.[181] A proposal to include Pristinë/Priština city under an SGA has also been submitted three times but all requests have been rejected because the municipality has not provided requested detailed justification for such a designation. Prizren municipality submitted a proposal in September 2001 but this request has been declined.

The rejections led to frustration amongst the UNMAs, and consequentially to interference caused by erroneous implementation. This has been observed in both the courts and the municipalities. For example, in Mitrovicë/Mitrovica and Vushtrri/Vučitrn municipalities and Gjilan/Gnjilane region, the municipal courts ceased to verify contracts for the sale of property after the Regulation entered into effect, but prior to the SRSG designating any SGAs. The judges in Mitrovicë/Mitrovica stated they received instructions from the DOJ to cease verification of contracts until further notice. Eventually, the UNMAs were able to convince the courts to resume the verification of contracts pending SRSG designation. The misinterpretation of the Regulation by these courts temporarily curtailed individual property rights without a legal basis.

In March 2002, the UNMA in Vushtrri/Vučitrn informed the OSCE that in his reports to the UN Regional Administrator (UNRA), he gave notice that he issued instructions that contracts for property sales near the enclaves must be submitted to him for review in order to control the situation. This instruction was given without the SRSG designating an SGA pursuant to the Regulation. The UNMA reported that he had petitioned the Central Authority to designate areas in the municipality to ensure strategic sales do not occur.[182] In his reports to the central level, the UNMA clearly stated he was reviewing contracts for sales in the enclaves on a case-by-case basis without the SRSG designating the SGAs. He stated that such action was necessary if a multi-ethnic Kosovo was to exist.[183]

b) *Lack of Available Resources*

The effective implementation of the Regulation is also hindered by the lack of available resources for the UNMA to monitor transactions and to review suspect sales properly. UNMIK's downsizing has affected the number and kind of employees able to actively conduct reviews and follow up investigations on rejected property contracts to ensure that 'informal transactions' do not take place. Moreover, the OSCE is concerned about the poor understanding of the Regulation by the public and the municipalities. It is imperative to ensure that the courts, local authorities and the UNMAs understand the Regulation fully.

c) *Inconsistent Interpretation*

As can be seen in the case below, when it is implemented fully, the Regulation has not struck an appropriate balance between the protection of the common interest in service of its legitimate aim and the protection of the right to property. Instead, the OSCE considers that applying the relevant criteria stipulated in the Regulation to a refusal to register a contract results in disproportionate and unreasonable interference with property rights, in particular the seller's right to dispose of his/her property.

On 11 March 2002, a Kosovo Albanian purchaser and a Kosovo Serb vendor requested the UNMA to register a contract of sale in Lipjan/Lipljan. The UNMA refused the registration of the contract on security grounds: the transaction would endanger the freedom of movement of Kosovo Serbs in

[181] The Office of The Legal Advisor (OLA) responded three times that the submitted request does not meet the criteria under Section 1.2 lit. (a) and (b). The Municipal Court of Ferizaj/Uroševac reported that 536 Kosovo Serb and Montenegrin properties (apartments, land, commercial premises, etc.) have been transferred to Kosovo Albanians—among which 182 were residential properties—since the promulgation of the Regulation.

[182] The UNMA's request was not accommodated because he did not provide "p-codes" (OSCE location codes used for designating polling sites). He then provided the codes, but has received no response or guidance from the central authority.

[183] The UNMA's instructions did not comply with the procedure set forth in the regulation, and therefore created an unlawful burden on individuals attempting to sell property in the vicinity of enclaves in the municipality.

Lipian/Lipljan. In April 2002, the parties made a request for reconsideration. The Kosovo Serb seller provided medical reasons: he and his wife were old and sick (especially his wife) and he was not able to take care of her anymore. He wanted to leave and join his only son in Serbia proper. They required the money from the sale to cover their medical expenses. The UNMA recognised the difficulties of the Kosovo Serb couple, but nevertheless rejected the request for reconsideration, following the security report drafted by KFOR.

On 8 May 2002, the Kosovo Albanian appealed the UNMA's decision to the panel, arguing that the two parties, who had known each other for 30 years, had always been on good terms. The Kosovo Albanian also stated that, without being pressured, the Kosovo Serb wanted to sell. He also stated that many Kosovo Albanians already inhabited the neighbourhood. The Kosovo Serb explained to the panel that the determination upon which the UNMA's decision was based was erroneous. It was not the dirt road on which his property is located which is used by Kosovo Serbs from the southern part of town to reach Kosovo Serbs in the northern part of town, but a better parallel street two blocks from the main road.[184] However, the panel followed the arguments of the UNMA and in July 2002 rejected the appeal. It argued that as Kosovo Albanians already lived in the area, it was "deemed crucial to preserve the critical street [where the house was located] as a street predominantly inhabited by Serbs to secure the safe access for Serbs from that neighbourhood and the Serbs living further South to the Serb quarter in the Northern part of town."[185]

The OSCE notes that the UNMA's grounds for refusing to register the contract in the first instance was based on a wide interpretation of the criterion that the sale "would affect the security situation in a designated area in a way that would be of serious detriment to other minority owners of residential property in that area".[186] Such a broad interpretation precipitated a balancing of rights and interests in which the freedom of movement of a minority community—not necessarily the minority owners—on a secondary street overrode the right of the owner to dispose of his property as he deemed necessary.[187] Such a balancing of rights does not appear to be necessary to achieve the legitimate aim of the Regulation. The OSCE notes further that the UNMA's misinterpretation of the criterion stipulated in the Regulation to the facts in this case resulted in an undue interference with an individual's right to sell their private property. More clearly-defined criteria in the Regulation would have allowed the UNMA to strike a balance between the public policy considerations in the Regulation and human rights considerations.

3. Unequal Implementation and Enforcement

The resulting unequal implementation and enforcement of the Regulation due to the misunderstandings outlined above means that it may be discriminatory under Article 14, ECHR, which imposes an obligation on authorities to provide a non-discriminatory framework where individuals can enjoy their property rights. The Regulation requires approval of the UNMA of any contract in a SGA. Members of ethnic minorities in general, primarily if not exclusively, inhabit such SGAs and thus would be the primary subject of these restrictions. Restrictions are discriminatory if they are applied in differential manner based on ethnicity. While different treatment of individuals in similar situations by the state may be justified, the legitimate aim of the Regulation does not justify the disproportionate burden it imposes on individuals wishing to sell their property in an SGA.

[184] See statement by the Kosovo Serb to the panel during a hearing on 10 June 2002 and declaration by the UNMA.
[185] According to the UNMA of Lipjan/Lipljan, the transaction might have taken place unofficially, because in December the Municipality noticed the spot that the house was on was then vacant. No further verification was organised.
[186] Section 3.1(e), UNMIK Regulation 2001/17.
[187] The reasoning provided by the UNMA and appeal panel appears to be based upon the criteria to establish an SGA, not that provided under Section 3.1 for the refusal of the registration of a contract, belying further confusion surrounding the Regulation.

4. *Exclusion of Agricultural Land from the Regulation*

The OSCE has monitored a rise in the number of inter-ethnic agricultural land sales. The OSCE found that not only do such land sales cut off minority farmers from accessing valuable land for agricultural exploitation, but they can also effectively isolate minority communities, as such lands are usually located along the main travel routes into and out of minority communities. The OSCE is concerned that strategic buying of agricultural lands could significantly increase, commensurate with increases in the number of returns. Some strategic purchasing of minority agricultural lands has already occurred in several areas, suggesting the same trends and practices that occurred with purchases of residential properties. In light of these trends and practices, effective, pragmatic legislative/policy measures should be implemented to address this problem.

5. *Future Direction of Regulation*

An ongoing inter-agency working group is discussing the Regulation and has drafted recommendations to address some of the concerns about the Regulation raised above. These recommendations include, *inter alia*, broadening implementation of the Regulation and expanding its scope to cover agricultural land and commercial property. One suggestion of the working group is to extend interpretation of the Regulation, without amendments, to agricultural land and commercial property through the concept of 'associated property'.[188] One recommendation is to better utilise the RRC mechanism, in order to designate more SGAs. The issue of balancing the public policy aims against individual property rights when designating SGAs and when an UNMA refuses registration of a contract is also under discussion by the working group. On this issue, the OSCE has raised its concern, illustrated by the case outlined in this chapter, that a refusal to register a sales contract can result in an unreasonable and disproportionate interference with an individual's right to property.

D. Conclusion

UNMIK Regulation 2001/17 is problematic and has not as yet been able to effectively achieve its aim. Recent and welcome discussions amongst relevant agencies have enabled the OSCE to address some of the concerns highlighted in this chapter. As seen, the Regulation has a dramatic impact on the right of individuals to buy and sell property and currently acts as a deterrent to registration, which may make it harder to monitor the situation in vulnerable areas. Individuals appear to be acting outside the law, and engaging in informal transactions. In this context, recommendations should be formulated to improve the implementation of the Regulation and expand the scope of the Regulation should take into account lessons learnt, based on how current implementation of the Regulation results in undue interference with individuals' property rights.

[188] Section 1, UNMIK Regulation 2000/60 defines 'associated property' as 'land and buildings owned or used by the claimant, which form a unit with a residential property'.

Chapter 6: Regulation/Prevention of Illegal Construction

Synopsis

- Illegal construction affects the property right holder in two ways; either by another person building on his/her land, or through the regulation or lack thereof of construction by municipal authorities.
- The construction of a building without an appropriately issued construction permit, or illegal construction, is a widespread problem in Kosovo. It is regulated primarily by the municipal authorities.
- Lack of clarity in the legal framework prevents effective regulation of illegal construction. The appropriate central level authority with which to submit a complaint is not defined; nor is the relationship between procedures established by UNMIK Regulations and procedures under domestic legislation.
- Remedies are not adequately defined in the law or implemented in practice, nor is there consistent implementation between municipalities.

A. Introduction

Illegal seizure of property and construction upon it is a widespread problem in Kosovo, and represents a fundamental breach of property rights under Article 1, Protocol 1, ECHR. Problems arise due to major gaps in the law with regard to the ways in which the municipality should reach administrative decisions and what procedural rules it should follow, as well as arbitrary interpretation of the existing legal framework. Illegal construction has a detrimental effect not only on property rights but on the entire return process, economic growth, and the provision of reconstruction assistance. In particular, ineffective judicial review of administrative decisions leaves individuals without an effective remedy against unlawful interference with their property rights by municipal authorities. This chapter examines the legal framework on this issue, and its application, to ascertain the ways in which property rights are being interfered with.

B. Legal Framework

Municipal authorities in Kosovo are given the general authority to regulate construction within their municipality under UNMIK Regulation 2000/45 On Self-Government of Municipalities in Kosovo. UNMIK Regulation 2000/53 On Construction in Kosovo (hereinafter 'the Regulation') goes further than UNMIK Regulation 2000/45 and gives municipal authorities the framework through which to regulate construction.[189] Urban planning laws which remain applicable in Kosovo, such as the Law on Land for Construction lay out detailed procedures and requirements for the legal use of land. Municipal Instructions also are applicable and relate in the main to specific procedures.

1. *The Requirement of a Building Permit and Issuance of Municipal Instructions*

The Regulation provides that any "construction" (defined as 'any building or structure' in Section 1) requires a permit issued by the municipal authorities[190]. The Regulation authorises changes to urban

[189] This Regulation is also known as the 'Rexhep Luci' Regulation on Construction. Mr. Rexhep Luci, a respected architect and the Director of the Department of Planning, Reconstruction and Development, was murdered on 11 September 2000.

[190] Section 1 of UNMIK Regulation 2000/53 also defines demolition as 'construction' for the purposes of regulating construction of real property. It provides that " 'Construction' means the erection, installation, replacement, renovation, enlargement, alteration, conversion or demolition of any building or structure, excluding routine work done to maintain existing buildings or structures and excluding minor work specified by the competent municipal authority in Municipal Instructions as not requiring a construction permit.

plans previously adopted by some municipalities. Section 2.2 of the Regulation requires municipalities to give notice to the public of the procedures to be followed when issuing a construction permit; the technical, safety and environmental specifications; the requirements for connections to the utilities; and applicable deadlines for decisions to be taken by the municipality. The municipality should issue Municipal Instructions in order to notify the public of procedures regulating construction within that municipality. The Regulation provides, in Section 4, that no Municipal Instruction shall be valid if it is in conflict with applicable law.

2. *Sanctions: Measures Against Illegal Constructions*

Section 5 of the Regulation provides that if a person constructs without a construction permit or violates a construction permit, they "shall be subject to such sanctions as provided in the applicable law". An exception is where the construction falls under the ambit of Section 4, namely that it was commenced without a construction permit between 10 June 1999 and the entry into force of the Regulation.[191] In accordance with Section 9, the Regulation supersedes conflicting provisions in the Law on Land for Construction,[192] as amended. According to this law, if illegal construction on urban land for construction has been completed, "the municipal assembly can grant [the illegal constructor] this land for use without a contest" so that s/he can continue to construct.[193] The illegal constructor will gain the right of ownership over the object being constructed.[194] The OSCE notes the Law on Land for Construction attempted to preserve property of value to the municipality, even where it failed to comply with requirements for obtaining a construction permit.[195] However, the Regulation empowers municipal authorities to take actions necessary in the public interest, specifically to "protect public health, safety, or security".[196] Necessary actions may include, but are not limited to, demolition of constructions.

In general, when municipal inspectors identify illegal constructions, the inspectors impose a fine,[197] issue an order requiring the person to stop the construction and apply for a construction permit within a time limit established in the relevant Municipal Instruction. In deciding on the issuance of the construction permit, the Directorate of Urbanism assesses whether the building conforms to the urban plan and technical conditions. If a construction permit is not applied for or is refused, the Directorate issues a demolition order.

3. *Available Remedies*

a) *UNMIK Regulation 2000/53 On Construction in Kosovo*

Section 6 of the Regulation gives a person the right to request reconsideration of a municipal decision issued on the basis of the Regulations' provisions. Section 6 of the Regulation also requires municipalities to outline reconsideration procedures in Municipal Instructions. Where the municipality confirms its original decision upon reconsideration, a person has the right to further administrative and judicial review as provided by 'applicable law'.[198] The Regulation also provides

'Construction' includes changes made to the function or use of real property that deviate from recognised urban plans."

[191] Where a construction falls within the ambit of Section 4, UNMIK Regulation 2000/53, persons responsible for the construction are required to apply to the municipal authorities for a construction permit. Construction permits issued under Section 4 are accordingly deemed effective retroactively.

[192] Article 16. Official Gazette SAPK, No. 14/80 and 42/86.

[193] Article 61(a), Law on Land for Construction.

[194] *Ibid*.

[195] The principle that property should be preserved if it can serve a useful purpose can also be found in the Law on Basic Property Relations, Official Gazette of SFRY No. 6/80.

[196] Section 7, UNMIK Regulation 2000/53.

[197] Municipal Instructions establish this competency, i.e. Art. 21 of the Municipal Instructions relating to building permits for Construction of Buildings and Structure in the Municipality of Prishtinë/Priština, Art. 49 of the Municipal Regulation on Construction of Buildings of Citizens and Juridical Person in Podujevë/Podujevo, Art. 10 in the Regulation on rules and procedure for construction and use of buildings in Shtime/Štimlje.

[198] See Section 6.3, UNMIK Regulation 2000/53.

that, where persons have been denied a permit, or otherwise sanctioned under the Regulation, they may exercise their right to appeal against such a decision. The reconsideration procedures by which a person may appeal a municipal decision must be in accordance with applicable law and international human rights standards.

b) *UNMIK Regulation 2000/45 On Self-government of Municipalities in Kosovo and other Applicable Law*

Under UNMIK Regulation 2000/45, a person may file a complaint against a municipal administrative decision if he or she alleges that their rights have been infringed by that decision. Complaints must be submitted in writing to the CEO or made in person at his office within one month from the complainant being notified of the decision. If the complainant is dissatisfied with the response of the CEO, the complainant may refer the matter to the Central Authority, which shall consider the complaint and decide upon the legality of the decision. The decision of the Central Authority must be issued within two months.

In accordance with Section 35.7 of the Regulation, complaints filed with the municipal authorities are "additional to any rights that [a] person may have to refer an administrative decision to the Ombudsperson or to a court of law". Additionally, Section 36 of the Regulation provides that a person "…may seek relief in a court of law against decisions of a municipality..". The remedial avenues available to a person under the Law on Administrative Procedures are applicable, insofar as they do not conflict with the complaints mechanism laid down in Section 35. Once a person has exhausted available remedial avenues, by referring their complaint to the Central Authority, they may initiate an administrative lawsuit at the Supreme Court. It should be noted that Article 31 of the Law on Regular Courts[199] provides that the Supreme Court is competent to decide on the "legality of a final administrative enactment in an administrative contest". In legal practice in Kosovo, a "final" administrative enactment is a second instance administrative decision. However, under Section 35, UNMIK Regulation 2000/45, the Central Authority is a third instance body. Therefore, it could be argued that a person may initiate an administrative lawsuit before referring their complaint to the Central Authority.

c) *Municipal Instructions*

Numerous municipalities have promulgated Municipal Instructions that contain review and appeal mechanisms. There is no uniform approach.

4. *Concerns Regarding the Legal Framework*

a) *The Question Regarding the 'Central Authority'*

As mentioned above, UNMIK Regulation 2000/45 refers to a 'Central Authority' as the competent second level body to review complaints lodged against a municipal administrative decision. Which agency acts as the Central Authority and for what issues, however, remains undefined. This lack of definition, as the OSCE has observed, has resulted in the inability of property right holders to enjoy fully an effective remedy to possible violations of their rights.

Prior to the promulgation of UNMIK Regulation 2001/9, the Central Authority was clearly defined as UNMIK, because UNMIK Regulation 2000/45 defines the Central Authority as UNMIK acting under the authority of the SRSG, and intended it specifically to be the Administrative Department of Local Administration.[200] Once UNMIK Regulation 2001/9 and subsequent legislation establishing the

[199] Official Gazette of SAPK, No. 21/78.

[200] UNMIK Regulation 2000/9 On the Establishment of the Administrative Department of Local Administration, 3 March 2000. See Interoffice Memorandum on "Review of Municipal Decisions by the Central Authority" from The Legal Advisor, Ref. No. 2002-00671, 24 May 2002 which expresses this intention.

competencies of the various ministries[201] were promulgated, the identity of the Central Authority became unclear for all types on municipal administrative decisions.

Despite requests for the SRSG to definitively clarify this issue, an official interpretation does not exist. The Legal Advisor to the SRSG, however, has issued two memoranda regarding this issue. In these memoranda, he states that the UNMIK Directorate of Administrative Affairs should act as a focal point for receiving and distributing appropriately second-instance complaints,[202] but does not explicitly define which ministry or UNMIK Directorate would be the appropriate body to adjudicate the complaint. Instead, The Legal Advisor leaves such designation open to interpretation by stating only that the complaint, through the UNMIK Directorate of Administrative Affairs, should be "filed with the next higher administrative level, dependent upon the nature of the matter in question".[203] He places the responsibility on the Directorate to "distribute each complaint to the appropriate reserved or transferred body" and to provide "clarification and guidance" in identifying these bodies.[204]

This lack of clarity has left some municipalities confused as to the role of the UNMIK Municipal Administration in the appeals process. On 12 July 2002, a Kosovo Gorani reported to the OSCE that municipal inspectors of the Directorate for Inspection and Public Services in Prizren had removed his kiosk without prior notification. A complaint was submitted to the Directorate on 17 July 2002. On 23 July 2002, the Directorate issued a decision with retroactive effect, failing to refer to remedies available to the complainant. The complainant then submitted a request for reconsideration of the decision issued on 23 July 2002 to the UNMA,[205] from whom the complainant never received a reply. On 16 August 2002 the Kosovo Gorani submitted a complaint to the Board of Directors of the Municipal Assembly in Prizren but met administrative silence.[206] The complainant then submitted complaints on 11 November 2002 and 23 January 2003 to what was believed to be the Central Authority - the Ministry of Public Services, but has not yet received a response.

Indeed, in practice, the OSCE has found that this lack of definitive designation has resulted in the majority of complaints not being reviewed beyond the CEO. As with the complainant above, where complainants have taken steps to exercise their right to an effective remedy by referring their complaints to what they believe to be the Central Authority, their complaints are met with administrative silence either because the municipality is unclear where to refer the complaint or is slow in referring them to the Central Authority. For instance, the MLO in Podujevë/Podujevo municipality reported to OSCE that he does not know where to refer appeals against municipal administrative decisions, leading to complaints effectively being stalled. According to the CEO and Directorate of Urbanism in Pejë/Pec municipality, only one appeal out of 95 complaints submitted to reconsider rejections by the first instance body had been forwarded directly by the municipality to the 'Central Authority'. No response or communication has been provided to the municipality. Still, the OSCE noted that the municipality appears to "know" who the Central Authority is for property related matters—the Ministry of Environmental and Spatial Planning (MESP). For example, in Klinë/Klina, the municipal authorities forwarded four (4) appeal cases to the 'Central Authority' on 9 September 2002. Still, according to municipal officials, no response has yet been received.

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[201] UNMIK Regulation 2001/19 On the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 13 September 2001, UNMIK Regulation 2002/5 amending UNMIK Regulation 2001/19, 4 March 2002, and Administrative Direction 2002/10 Implementing UNMIK regulation 2001/19, 31 May 2002.

[202] Interoffice Memorandum on "Central Authority pursuant to section 1.2, 35.3 and 35.4 of UNMIK Regulation 2000/45 on Self-government of Municipalities in Kosovo", Ref. No.2002-02352, 28 October 2002 and Interoffice Memorandum on "Review of Municipal Decisions by the Central Authority".

[203] Interoffice Memorandum of 24 May 2002.

[204] Interoffice Memorandum of 28 October 2002.

[205] As of 1 April, the title of UNMAs changed to UNMIK Municipal Representatives (UNMRs). Throughout this report, the title UNMA will be used when referring either to actions of these officials prior to this date, or if a UNMIK Regulation refers to a UNMA.

[206] The Board of Directors is appointed by the Municipal Assembly and is responsible, *inter alia*, for implementing all municipal decisions, in accordance with Section 31 of UNMIK Regulation 2000/45.

In the municipalities of Leposavić/Leposaviq, Zvečan/Zveçan and Zubin Potok, where Kosovo Serbs constitute the majority, the existence of apparent parallel administrative structures further complicates the issue of the 'Central Authority'. The Director of the Directorate of Urbanism in Leposavić/Leposaviq stated to the OSCE in January 2003 that the relevant ministry in Belgrade was the competent body to receive appeals against municipal administrative decisions. In Zubin Potok, when the same question was raised with the Director of the Directorate of Urbanism, she responded that given the lack of clarity in the law, the only available remedy was the Ombudsperson Institution of Kosovo.[207]

b) *Ad Hoc Appeal Procedures: Mechanism in Municipal Instructions and Regulations*

According to UNMIK Regulation 2000/45, all municipal decisions are subject to review by the CEO. It is unclear whether this complaints mechanism provides a parallel remedy to any remedies provided for by Municipal Instruction. Moreover, the OSCE notes that only a small number of Municipal Instructions includes provisions on complaints, reconsideration and appeals procedures. Generally, Municipal Instructions contain references to UNMIK Regulation 2000/45, however they lack specific references to complaints, reconsideration and appeals procedures. Even where the Municipal Instruction stipulates available remedial avenues, there is great divergence between Municipal Instructions.

For example, according to the Municipal Instruction On Construction of Premises and Usage of Public Space of Kamenicë/Kamenica municipality, a person can exercise their right to appeal against a municipal decision by appealing to the Board of Directors of the Municipal Assembly. The decision of the Board of Directors can then be appealed at the Supreme Court of Kosovo. In contrast, the municipality of Fushë Kosovë/Kosovo Polje issued a Municipal Instruction on 'Rules and Procedures of Construction and Use of Buildings', which provides for a second instance appeal directly to the CEO, who then establishes an appeals panel, chaired by the CEO. Following this second instance appeal, no further appeals procedure is stipulated in the Municipal Instruction.

c) *Effect of an Appeal/Reconsideration: Suspension*

The OSCE is concerned by the risk of infringing the right to an effective remedy caused by implementation of Section 6.3 the Regulation. Section 6.3 stipulates that an appeal or request for reconsideration to an independent judicial body "shall not suspend the enforcement of any sanction imposed by municipal authorities". Section 6.3 of the Regulation therefore supersedes the inconsistent provision in the Law on Land for Construction, whereby an appeal against a decision of the municipality delays the execution of the decision. [208]

Such a provision, however, is in contravention of international human rights standards as it may preclude the full exercise of effective remedies and therefore constitute unlawful interference with property rights. Subsequent interpretation and practice indicates that the SRSG has recognised this problem. In a memorandum from The Legal Advisor to the UNMIK Regional Administrator in Prishtinë/Priština, The Legal Adviser instructs that "[e]xecution is the final act implementing the sanction and this final act should be suspended pending the reconsideration or review process," and that the term 'enforcement' does not mean implementation or execution by the relevant municipal body. The Legal Adviser argues that, recalling the principle of legality set forth in UNMIK Regulation 2000/45[209] "[t]o proceed with demolition would usurp the inherent jurisdiction of the court to order a stay of execution". He further reasons that it would be a denial of justice and that the municipal authorities would risk "claims for damages in the event that the demolition order was

[207] The Ombudsperson Institution's decisions are not binding and therefore, recourse to this institution cannot be regarded as an effective remedy.
[208] Article 16(2), Law on Land for Construction, Official Gazette SAPK, No. 14/80, 42/86.
[209] Section 33. "Law and justice shall bind the administration of the municipality, and in particular the human rights and freedoms contained in the European Convention for the Protection of Human Rights and Fundamental Freedoms and the Protocols thereto shall be observed. All administrative actions shall comply with the applicable law."

overturned on review; and [t]o do so would be contrary to the Law on Administrative Procedures and the Law on Planning and Organization of Space […]" Instead, he explains that the Regulation should be interpreted so that the "claimant cannot proceed with the construction of a building, or act in contravention of the sanction, before the reconsideration process is finalized."[210]

The SRSG himself has followed this interpretation by using his executive authority to intervene to suspend the enforcement of a municipal decision pending appeal. In Executive Decision no. 2001/6, he suspended implementation of a decision issued by the UNMA and CEO in Gllogovc/Glogovac municipality to demolish properties "until further notice pending review of the decision of the UNMA and the CEO… by the competent court and the Municipal Assembly."[211] This intervention followed an 8 May 2001 attempt to demolish business premises despite the property right holders' submission to the CEO of a complaint against a municipal decision in April 2001. Prior to the demolition attempt, the municipality had not responded. The municipality initiated the demolition procedure in March 2001 after the municipality, in decisions signed by the CEO and UNMA, revoked temporary construction permits relating to the business premises that were issued before 1999.[212] The lack of response to the complaint by the municipal authorities provided grounds for the property right holders to appeal to the Supreme Court of Kosovo.[213] The Supreme Court issued a decision in July 2001, ordering the CEO in Gllogovc/Glogovac to issue a decision suspending enforcement of the demolition order until further notice.[214] In February 2002, the municipal authorities in Gllogovc/Glogovac issued a new demolition order, based on the previous municipal decision.[215] Concurrently, the parties filed an administrative dispute before the Supreme Court against this demolition order. In a further Supreme Court petition in March 2002, the property right holders requested the municipal authorities to refrain from proceeding with the demolition. The Supreme Court has not yet responded to either application. In March 2002, however, at the request of the Ombudsperson, the SRSG issued another Executive Decision, ordering the suspension of the demolition order pending the ruling of the Supreme Court.[216] As a result, Gllogovc/Glogovac municipal authorities suspended enforcement of the demolition order.[217] Thus, through interpretation and practice, the SRSG appears to be nullifying this problematic provision.

[210] Interoffice Memorandum, Ref. No. 2002-004-72, dated 24 April 2002.
[211] Dated 7 May 2001. The SRSG predicated that decision on the fact the "the persons affected may suffer irreparable harm if their homes and businesses are demolished proper to the completion of the review of their appeals […]".
[212] Gllogovc/Glogovac municipal Decision No. 351-156, dated 28 March 2001. After 1999, the municipality issued demolition orders and the UNMA intervened to halt enforcement of these demolition orders.
[213] Article 26, Law on Administrative Disputes, Official Gazette SFRY, No. 4/77.
[214] Supreme Court of Kosovo decision no. 19/2001, dated 27 July 2001.
[215] See Decision no. 351/59, issued on 25 February 2002. In February 2002, two municipal directors issued a decision allowing the execution of the demolition order (issued in March 2001) arguing that the final decision of the district court (civil procedure) constituted also a final administrative decision. In reality, there was still no final administrative decision as the CEO had remained silent.
[216] See letter by the Ombudsperson, Registration no. 238/2001 and Executive Decision by the SRSG no 2002/3.
[217] The Executive Decisions, however, also had unintended and concerning consequences. The Gllogovc/Glogovac municipal authorities decided to no longer issue any demolition orders. Not issuing demolition orders could result in violations of property rights as well as may preclude the exercise of effective remedies to such violations. In addition, municipal officials now send all decisions relating to fines for not complying with an order to halt construction to the minor offences courts, though it does not have the competence to deal with administrative matters. Municipal officials also send cases it believes require demolition orders to the municipal court. The municipal court rightly refuses to adjudicate these matters, as they are outside its competencies. These actions by municipal officials may violate due process rights.

C. Implementation of the Framework

1. *General Inconsistency*

Municipal officials reported to the OSCE that they are in possession of the applicable law on construction. However, while there are several Municipal Instructions addressing the issues that are analogous, the general picture is that each municipality is handling illegal construction differently. For example, the time frame for submission of a re-application varies between 15 and 30 days from the notice of first non-compliance. Some Municipal Instructions also refer to the urban plan, which often does not exist or is outdated.

The burden upon municipal officials to implement imprecise Municipal Instructions is increased by the difficult political environment in some regions. Municipal officials have encountered resistance to their attempts to regulate construction by both politicians and the population in general.[218] Difficulties in transferring the responsibility for implementing UNMIK Regulations and applicable law to municipal officials have been reported last year by UNMAs.

2. *Compliance of Administrative Decisions with Applicable Law*

Another issue related to the practical application of the legal framework is the compliance of administrative decisions or orders relating to the issuance of construction and permits with applicable law. On 16 January 2002, the Kosovo Supreme Court held that Removal/Demolition Orders issued by the Pejë/Peć Directorate for Urban, Rural and Environmental Planning and the verdict of the appeal body, the CEO of the municipality, have no legal effect. The Supreme Court found that they lacked the required elements of an introduction, provision and justification as stipulated by the Law on Administrative Procedures.[219] This ruling overturned the administrative decision at first instance and the decision of the CEO on appeal. In annulling the decisions by the Municipality, the Supreme Court ordered the municipality to re-initiate the legalisation procedure, utilising appropriately formulated administrative decisions and orders.[220] The Directorate of Urbanism failed to revise its administrative decisions and orders to comply with the decision and applicable law. After two cases of attempted removals with non-compliant orders and decisions were brought to the OSCE's attention, on 16 May 2002 the MLO instructed the Directorate to provide her with all administrative orders and decisions utilised. The MLO, with the recommendations of the OSCE, revised the administrative orders and decisions to comply with applicable law.[221]

3. *Discriminatory Application of Legal Framework Against Minorities: Kristali Case*

The discriminatory application of the legal framework regulating construction gravely affects the ability of property right holders from minority communities to exercise these rights, as the "Kristali" case from the Pejë/Peć municipality shows. In this case, the Pejë/Peć Directorate of Urban Environmental Planning and Development prevented the RAE community displaced from the Kristali area of the municipality from accessing and reconstructing their houses through a determination that the urban plan designated the area as a "proposed industrial zone". Two persons who produced evidence of their ownership rights were denied permits to reconstruct their houses based on this determination, as stated in a letter to the Norwegian Refugee Council (NRC) by the Directorate of Urbanism. At the same time, however, illegal residential constructions existed in the area which were unregulated by the Directorate and the Directorate had issued permits for residential construction to Kosovo Albanian applicants. In May 2002, the OSCE, NRC, and UNHCR raised its concerns regarding the situation to the UNMIK Municipal Administration and the Director of the Directorate. It was determined that the zoning of the Kristali area had been changed to "commercial-residential"

[218] Many municipal officials involved in regulating construction expressed concerns for their security.
[219] Article 206 and 245. Official Gazette SFRY, No. 47/86.
[220] The decisions referred to all administrative acts of the municipality, which includes orders, decisions, and other action taken through writing by municipal authorities.
[221] The OSCE then initiated a survey of administrative acts throughout the region raising awareness of the need to comply with applicable law.

by a 30 September 2000 decision of Pejë/Peć municipal authorities. Following subsequent pressure from the OSCE, UNHCR, and other interested parties, the UNMA initiated discussion with the CEO and Director of the Directorate. According to the MLO, the Director indicated in these discussions that he refused to issue permits only when individuals did not have the appropriate documentation. Still, an agreement was reached between the UNMA, the CEO, and the Director to reconsider the previous applications for building permits in light of the new decision and, if necessary, assist new applicants in obtaining the required documentation, to inventory and regulate illegal construction in the area, and to investigate allegations of discriminatory treatment. It was reported to OSCE, however, that a property right holder was later refused a permit for reconstruction based on the zoning designation. On 15 November 2002, the UNMA also showed OSCE an inventory undertaken between July and October 2002 by the Directorate of Urbanism which indicated that over 100 structures were illegal. During a subsequent meeting with the Director, he indicated to the OSCE that these illegal constructions had not been regulated.

As this case illustrates, selective application of the legal framework can illegally deprive property right holders of their property rights. The OSCE remains concerned by indications of discriminatory and partial implementation of applicable law.

D. Conclusion

On the basis of cases reported by the OSCE, it is evident that infringements of individuals' property rights are happening on a regular and widespread basis. Moreover, the consequences of these infringements have knock-on effect on the returns process and efficient urban planning. The OSCE is particularly concerned by the lack of an effective remedy for individuals' whose property rights are infringed. There is a clear need for relevant international agencies, the MESP to address all detrimental aspects of this issue at the central level and to ensure effective oversight of currently inconsistent practices at the municipal level.

PART V: PROTECTION OF PROPERTY RIGHTS THROUGH SPECIALLY-ESTABLISHED STRUCTURES

In the final part of this report, specially-established structures, such as those created for the return and reconstruction processes, are analysed to assess if structures, which are outside the governmental legal framework, can effectively protect property rights. The return and reconstruction processes are examined because not only are these two processes fundamental to the sustainable multi-ethnic development of Kosovo society, but they involve many of the institutions and issues discussed in this report as a whole.

Chapter 7: Return-related Reconstruction

Synopsis

- Established and protected property rights are intricately linked to the ability of those displaced from their home to return to it. They are also important when it comes to considering reconstruction of damaged property.
- Secondary displacement, i.e. return to a place other than one's home, has been discussed as an acceptable option, partly as a result of endemic problems with establishing and securing property rights.
- Mechanisms established in the UNMIK Housing Reconstruction Guidelines 2002 effectively prevented violations of property rights when used.
- The lack of legal codification of these mechanisms, however, has resulted in them not being used consistently in the return and reconstruction process, thereby precipitating violations of property rights. Incoherence in the institutional structures for return and reconstruction has added to this problem.
- Illegal occupation by beneficiaries after receiving reconstruction assistance also remains an obstacle in the return and reconstruction processes.

A. Introduction

In Kosovo, property rights are intricately linked with the return of IDPs and refugees to their homes. In order to return home, an individual must be able to physically access his/her property, which includes secure legal tenure to that property. The ability to exercise this right as guaranteed by UN SCR 1244 (1999)[222] is dependent upon the full realisation of the right to property.[223] This full realisation is contingent upon the ability of the institutions and structures examined throughout the report to promote access to property and to ensure the protection of property rights. Unlike the other issues examined in this report, reconstruction of conflict-affected housing—or return-related reconstruction—is not governed by a formal or unique legal framework, though it is governed by the full regime of applicable property-related law. The "UNMIK Housing Reconstruction Guidelines, Kosovo 2002" (the Guidelines)[224] as well as the return process structures like the Municipal and Regional Working Groups (MWG and RWG), though, attempt to provide a framework for this process. In this chapter, the OSCE will evaluate whether the institutions and structures established to facilitate the return-related reconstruction process are sufficient to protect property and other associated rights. The chapter will look both at the return-related reconstruction process in general and at reconstruction projects undertaken by or considered within the return process structures.

The OSCE found that despite attempts to construct a framework for this process, people's property rights are left vulnerable due to the absence of a legal framework which establishes unique mechanisms for this process. Still, the OSCE found that, while they are not legally binding, when the mechanisms within the Guidelines were utilised, they provided a coherent and sufficient mechanism to protect property rights. When the mechanisms within the Guidelines were not employed, property

[222] The Preamble of UN SCR 1244(1999) refers to the need to "provide for the safe and free return of all refugees and displaced persons to their homes". Clause 11(k) give UNMIK the responsibility to "assur[e] the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo".

[223] See *Kevešević v. Federation of BiH*, CH/97/46, 10 September 1998, para. 42 and *M.J. v. R.S.*, CH/96/28, 7 November 1997, para. 32 which argues that the right to return to one's home involves the right to property (Article 1, Protocol I, ECHR) and the right to one's residence/home (Article 8,ECHR). See also *Cyprus v. Turkey* (25781/94), 10 May 2001.

[224] These guidelines were issued by the then Transitional Administrative Department of Health, Environment and Spatial Planning, Housing and Construction Division.

rights were endangered. The OSCE also found that these problems were amplified when structures either were not clearly defined or not properly utilised.

B. Link Between Property Rights and Return

Before evaluating these institutions and structures, however, it is important to understand the link between the *right to property* and the *right to return to one's home*. As seen throughout the report, for any property right holder in Kosovo, realising his/her property rights can be challenging. This challenge can create a tremendous obstacle to return because returnees cannot benefit from reconstruction assistance or obtain the required permissions to rebuild without legally established property rights.[225] Acknowledging security and economic concerns, three property-related issues serve as primary factors inhibiting return for those who hold property rights:

(a) Lack of documentation;
(b) Illegal occupation, restricted access to the property, and related security concerns;
(c) Level of destruction and lack of alternative accommodation.

1. *Lack of documentation*

As explained throughout this report legally establishing property rights, especially for minority communities such as the RAE community, can be particularly difficult due to lack of documentation or access to such documentation.

2. *Illegal occupation, restricted access to the property, and security concerns*

As discussed in Part II, illegal occupation inhibits rightful owners from accessing their property and returning. For example, in Gračanica/Graçanicë municipality in Prishtinë/Priština region, Kosovo Serbs are illegally occupying 70 houses over which Kosovo Roma have property rights.[226] In February 2002, the American Refugee Committee reported that two Kosovo Roma properties were occupied in the village of Hogosht/Ogošte, Kamenicë/Kamenica municipality, preventing return of the property right holders. In the village of Dobrevë e Epermë/Gornje Dobrevo in Prishtinë/Priština region, approximately 60 houses of Serb refugees from Croatia and Bosnia and Herzegovina are illegally occupied by Kosovo Albanians, preventing their return and maintaining the refugees' and IDPs' displacement in Fushë Kosovë/Kosovo Polje town.

Lack of physical access to property also results from security concerns restricting freedom of movement of those displaced inside or outside Kosovo.[227] Such security concerns severely limit Kosovo Serbs' ability to return to many municipalities in Kosovo as well as the ability of some RAE. For example in Pejë/Peć, two RAE reconstruction beneficiaries had their reconstruction sites severely vandalised on 18 November 2002 precipitating a decision by the beneficiaries not to return and the implementing partner, CORDAID, to remove its support. In Mitrovicë/Mitrovica, security concerns are likely to hamper efforts to assist RAE from the "Roma Mahala" to return.[228] The potential implementing partner, ACTED, stated in September 2002 that 50 families must be willing to return together in order for return and reconstruction to be sustainable from a security standpoint.[229]

[225] See Section C below, pages 67-68.
[226] See Section C(2)(b), pages 68-69 for further discussion of the impact of illegal occupation on return.
[227] See Section 1 and 4, OSCE/UNHCR Tenth Assessment of the Situation of Ethnic Minorities in Kosovo, 10 March 2003 and pages 9-16 and 30-38 of the Ninth Assessment of the Situation of Ethnic Minorities in Kosovo for a more in-depth discussion of the security situation and the linkage with physical access to property.
[228] As explained in Section D(2)(a), pages 69-72, below, the "Roma Mahala" is an area of Mitrovicë/Mitrovica town that was mainly inhabited by members of the Kosovo RAE community until just after the conflict in 1999 when the area was burned and most of the houses destroyed. For more information on the destruction of the "Roma Mahala", see OSCE/ODIHR, "Kosovo/Kosova: As Seen, As Told", Part II, page 102.
[229] See below for further explanation of this case.

3. *Level of destruction and lack of alternative accommodation*

Many potential returnees have no home to return to because it has been destroyed. For instance, in the Prizren region, many rural residential properties of Kosovo Serbs have been destroyed. The RAE property in the Kristali area in the Pejë/Peć municipality and in the "Roma Mahala" in Mitrovicë/Mitrovica municipality was burned and cleared after the conflict ended in 1999.

Even when potential returnees do have property rights to land, the lack of temporary or alternative accomodation during the reconstruction period as well as difficulty in securing reconstruction aid acts as a deterent, especially to spontaneous return. In Prizren region, spontaneous return has occurred only to locations where property is not destroyed (or not occupied). In Pejë/Peć, representatives of the RAE community told OSCE in March 2002 that many RAE wish to return to Mahalla e Bates/Batina Mahala and other areas, but do not because they do not have alternative shelter while they rebuild their houses. In addition, within the Pejë/Peć region, many RAE members are squatting in houses within their enclaves with the knowledge of the owners.

C. Legal Framework: UNMIK Housing Reconstruction Guidelines and Applicable Law

In general, reconstruction of conflict-affected housing is governed by the various areas of applicable law discussed throughout this report—from the property rights registry to construction permission to HPD/CC and the courts—as is all types of reconstruction. For reconstruction of conflict-affected housing which is normally administered through the government, whether UNMIK or a municipal authority, specific mechanisms have been compiled in the form of Housing Reconstruction Guidelines, which have been updated and re-issued annually. These Guidelines, however, are not legally binding on authorities allocating or providing reconstruction assistance. For reconstruction assistance distributed within a defined returns project, the UNHCR-UNMIK Manual on Sustainable Return[230] also is designed to assist in the design and selection of reconstruction projects to be implemented. The Guidelines, the OSCE found, provide effective and coherent mechanisms to allocate and distribute reconstruction assistance while protecting property and other associated rights.

Yet, in March, the OSCE had identified confusion amongst MHCs and the proliferation of *ad hoc* structures as a result of uncertainty about the Guideline's applicability in 2003 and recommended the situation be clarified.[231] On 28 April, though, the Director of the Housing and Construction Division of the MESP issued a clarification to Municipal Housing Committees (MHCs) and UNMRs stating that the Guidelines, which were published in 2002, remain applicable to reconstruction programmes in 2003 until other guidelines are issued. Discussions still continue regarding revisions to and the future applicability of future reconstruction guidelines. For the purposes of this report, and to assist in the on-going discussions regarding the future status and form of the Guidelines, the OSCE will examine the content and implementation of the 2002 Guidelines.

1. *The UNMIK Housing Reconstruction Guidelines 2002*

UNMIK issued the non-legally binding Guidelines in 2002 to provide consistency and co-ordination for the reconstruction effort in Kosovo, particularly within the areas of beneficiary identification, construction standards, implementation mechanisms and co-ordination.[232] The overall objective of the reconstruction effort, as given by the Guidelines, is to provide assistance to the most vulnerable individuals in Kosovo, regardless of ethnicity, whose houses or apartments "were damaged or destroyed due to war acts before, during or after the 1998-1999 conflict".[233] In this vein, the

[230] To provide a comprehensive guide to the implementation of organised return or other related projects within the RWG-MWG structure, UNMIK and UNHCR released the Manual in early March. It was designed to be accessible to all parties involved in the returns and reconciliation process.
[231] OSCE Department of HRRoL Weekly Report, 17-23 March 2003.
[232] Forward, the Guidelines.
[233] Section 1, the Guidelines.

Guidelines define the roles of various actors, ranging from the MESP, the implementing NGO partner, and the municipal authorities, to HPD, KCA and the donors. They also provide general beneficiary selection criteria, including a definition of vulnerability, as well as establishing the technical and legal requirements for reconstruction programmes.

a) *The Structures and Mechanisms Established*

As the Tenth Minority Assessment explained, the Guidelines use a single "recommending, co-ordinating, and approving" body within the municipality, in most cases the MHC, to implement the mechanisms the Guidelines mandate.[234] As established in the Guidelines, the MHCs' membership includes the relevant Directorates of the municipality,[235] such as Urbanism and Cadastre, required for selecting beneficiaries and implementing the reconstruction itself. The MHCs' specific composition is proposed by the UNMA (now the UNMR) and established by each Municipal Assembly.[236]

The Guidelines outline the mechanisms and structures through which the MHC, as the central body, ensures that basic vulnerability criteria, as well as the procedural, legal, and technical requirements for reconstruction are met. For example, the Guidelines require the MHC through a Verification Unit and the MCO to "verify and ensure" that the selected beneficiaries have legal access to the targeted property.[237] In fact, the Guidelines provide a 7-step process for the MHC Verification Unit to assist the beneficiary in verifying possession, including actions to be taken when cadastre documents are not readily available. Property rights only are investigated once the vulnerability of the beneficiary is established and the MHC approves the beneficiary as eligible to receive reconstruction aid. Such measures promote property rights and the right to return to one's home. The Guidelines also provide mechanisms to prevent corruption. Not only can the UNMA intervene when s/he deems it necessary, but also the mechanisms have checks and balances, such as the MHC Verification Unit described above.[238] In addition, the Guidelines require three different verification processes when compiling the final beneficiary list.[239] Appeals mechanisms, protecting rights of due process, also exist. For instance, once the final list is posted, complaints regarding the ineligibility of a beneficiary or appeals to be included as a beneficiary can be lodged and must be responded to.[240] In addition, the Guidelines efficiently promote the right to return to one's home by rejecting any 'secondary displacement'—or the return of IDPs or refugees to places other than their place of origin or to their homes—including transfers of a house from rural to urban areas. The only 'displacement' permitted when receiving reconstruction aid is within the same village/community.[241] Moreover, the mechanisms mandate that those displaced either within or outside Kosovo be equally considered for reconstruction aid if they express the desire to return to their place of origin. Selection is to be based purely upon vulnerability.

2. *Concerns Regarding the Framework*

a) *Lack of Oversight Mechanism*

As highlighted in the Tenth Minority Assessment, the Guidelines fail to provide for an effective oversight mechanism, which would create accountability for the implementing partners and authorities involved in the allocation and the distribution of reconstruction assistance. Without such

[234] In Section 2.3.3, the Guidelines allow the MHC to be by-passed when minority projects are being considered. Such an option must be decided by the UN Administrator and be co-ordinated through the LCO, The MHC also must be informed of the process.
[235] See Section 2.3.1, the Guidelines.
[236] See Section 2.3.1, the Guidelines.
[237] In fact, the Guidelines provide a seven-step process for the MHC Verification Unit to assist the beneficiary in verifying possession, including actions to be taken when cadastre documents are not readily available. Moreover, the Guidelines base selection on vulnerability criteria, not upon confirmed property rights.
[238] Section 3.4.5, the Guidelines. According to Section 3.4.3, if case of fraud or information given by potential beneficiaries prove untrue, an approved beneficiary can be removed from the list and the reasons for the removal noted in the minutes.
[239] Section 3.4.1-3, the Guidelines.
[240] Section 3.4.4, the Guidelines.
[241] See Section 2.3, point 2.

mechanisms, the potential for misuse or misallocation of reconstruction assistance and consequentially to violations of property rights increases. For example, in Pejë/Peć, where 2002 funding was temporarily withheld due to allegations of corruption and favouritism during the 2001 programme, the UNMIK Municipal Project Officer, who sat on the MHC, indicated to the OSCE that attempts were made again, but thwarted, to include "politically-accepted" beneficiaries. A similar dynamic appeared in Klinë/Klina where personal and political favourites were promoted as beneficiaries, but rejected by the MHC.

b) *Inability to Prevent Illegal Occupation*

A major weakness within the Guidelines is that neither the municipality nor the implementing partner, as parties of the tripartite agreement created under the Guidelines to distribute assistance, can ensure directly that those who receive assistance vacate the properties which they illegal occupy. Such action would enable others to return to their properties.[242] This inability, however, does not emanate from the tri-partite agreement itself, but from the HPD's and the HPCC's diminished capacity to fulfill their mandate, as described in Part II.

The authority to evict those illegally occupying property rests exclusively with HPD (and if connected with a claim, HPCC). As the parties of the tripartite do not possess the authority to interfere with or remove a property right, the tripartite agreement merely states that HPCC "may issue an eviction order" if the beneficiary fails to vacate the property s/he is illegally occupying (Article 8(3)).

Enforcement of the tri-partite agreement through an HPD eviction can be effective and promote the right to return home for those outside the reconstruction programme. In April 2002, the HPD performed seven (7) evictions of Kosovo Albanians whose homes have been reconstructed in villages outside the town who illegally occupied properties under HPD administration in Vushtrri/Vučitrn town.[243] The HPD evictions, which occurred in the Ashkalia section of town, were coordinated with the efforts of UNMIK Municipal Administration and UNHCR to facilitate the return of members of the Ashkalia community to their former homes. The keys ultimately were turned over to returnees who qualified for humanitarian housing or owned the properties.

The HPD's and HPCC's general diminished capacity, however, means that in every region reconstructed houses remain vacant while beneficiaries continue to illegally occupy properties, thus preventing return of the rightful occupants. For instance, in the village of Potok of Podujevë/Podujevo, the village representatives told the OSCE that seven beneficiaries of reconstruction have never moved into their reconstructed homes. Within Prizren town, illegal occupants remain despite receiving reconstruction aid. Concerns were raised in the Lipjan/Lipljan MWG that eight (8) Kosovo Albanian families receiving reconstruction assistance in Dobrja Vogel/Mala Dobraja would remain displaced in Plemetina/Plemetin, and not return to their reconstructed houses. Within the Pejë/Peć region, every municipality indicated that it would pass on or has provided information to the HPD on beneficiaries who have received reconstruction assistance and not taken possession of the house or vacated illegally occupied property.

[242] As explain in Section 3.4.5, the Guidelines, the 'Tripartite Agreement for the Reconstruction or Repair of Residential Property in Kosovo' (tri-partite agreement) is a contract drafted by the implementer, and signed by the implementing agency, the beneficiary of reconstruction assistance and the MHC, acting for the municipality, when the beneficiary is finally approved. It aims to regulate the obligations of the implementing agency, the beneficiary and the municipality concerning the reconstruction of the beneficiary's property. The purposes of the tri-partite agreement are: (a) to provide a proper legal basis for the reconstruction/rehabilitation works. (b) To ensure that the beneficiary is the rightful owner or lawful possessor of the property (c) To ensure the reconstruction takes place (c) to ensure that the return takes place to houses reconstructed for this purpose and to avoid double occupancy.

[243] The HPD explained it first contacted the illegal occupiers in October 2001 to inform them of their status. The HPD continued its discussions with the occupiers until just prior to the evictions. On the date of their execution three of the occupiers had voluntarily left the property. The remainder had to be instructed to leave the property by the HPD. The HPD invited the OSCE to observe the process, which was also filmed by UNMIK press as part of a story on Rule of Law and the Return of Property.

D. Implementation of the Framework: Inconsistent Utilisation

That neither the Guidelines nor the mechanisms they establish are legally binding upon those authorities and organisations allocating or distributing reconstruction assistance is an overarching and fundamental problem mentioned above. The consequences of this gap are clearly illustrated through an examination of the implementation of return-related reconstruction programmes.

1. *Able to Protect when Mechanism Utilised*

As explained in the Tenth Minority Assessment, the OSCE found that when the mechanisms outlined in the Guidelines were utilised, they effectively promoted the right to return to one's home and protected property rights and rights of due process, as well as prevented corruption for all communities. For example, in Ferizaj/Uroševac, a claim was lodged alleging that an approved beneficiary had misrepresented himself. The claim was confirmed and the person removed from the beneficiary list. In Klinë/Klina, a family tried to build a house on municipal property. The Directorate of the Cadastre and Reconstruction, however, intervened and the illegal construction was prevented.

However, even when the mechanisms were utilised problems occurred. MHCs complained that the implementing partner exerted too much influence over the process, turning the MHC into a rubber stamp for the implementing partners' choices. Such situations are contrary to the Guidelines which envisage that the MHC is to act as the body to approve beneficiaries, while the implementing partner is to provide the MHC with a detailed assessment of the eligibility of potential beneficiaries and its recommendations, and may vote when the MHC approves beneficiaries. Yet, in Ferizaj/Uroševac, the implementing partner selected the 30 beneficiaries after its assessment of the potential beneficiary list presented by the municipality. In Lipjan/Lipljan, the Swiss Development Corporation (SDC) suspended a balancing project attached to a project targeting four (4) Kosovo Ashkalia families at the request of the village leaders after the MHC rejected its candidates and proposed alternate ones not agreeable to the village leaders. These situations indicate that further checks on the implementing partner may be necessary in any revision of the Guidelines, as well as the utility of making them binding.

2. *Unable to Protect when Mechanisms not Utilised*

The OSCE also found that when the mechanisms in the Guidelines were not utilised, rights to property and due process, as well as the right to return to one's home, were jeopardised or even violated, especially in cases of organised returns or minority-targeted projects. Such a pattern was seen in the return-related reconstruction projects in the Mitrovicë/Mitrovica municipality and Pejë/Peć region.

a) *"Roma Mahala" and Secondary Displacement*

In Mitrovicë/Mitrovica, the OSCE has observed that the lack of a legally codified requirement to establish mechanisms to evaluate and address property issues has led to the absence of them, and consequentially has inhibited both the protection and exercise of property rights as well as the right to return to one's home for those who have been forcibly displaced from their homes. Their absence has also led to increasing weight being given to the option of 'secondary displacement'.[244] Specifically, the return process structures considering the viablility of return to the area, the MWG (formerly the Local Working Group) and RWG, have not used the mechanisms provided in the Guidelines or other comprable ones when assessing viability from a property perspective. Instead, the MWG and UNMIK officials[245] have identified the complex property situation in the area as the key obstacle to return.

[244] See also Section 4(V), Tenth Minority Assessment, p.54-55 and the OSCE HRRoL Policy Note on the 'Roma Mahala' and the Rights to Property and to Return Home, 24 March 2003.
[245] The UNMA at the March 2003 MWG did so.

As with most other RAE property right holders, those from the "Roma Mahala" have difficulties producing documentation of their property rights, and there is a mixture of types of property rights held—occupancy rights and ownership rights (informal and formal). Out of 404 property right holders identified by the HPD, only twenty-six (26) families of those on the cadastre list have been identified as being internally displaced inside or outside Kosovo, though efforts are being made to locate those property right holders displaced elsewhere, but have yet to yield results. As this low figure indicates, the efforts undertaken to assess the desire of the property rights holders to return to their homes before making a determination on the status of the area appear inadequate, especially when 80 displaced RAE families residing in the camps in northern Kosovo have expressed their will to return and recover their property.[246] The assumed lack of documentation is a major reason used by the MWG to not assess the situation further. Yet, the mechanisms provided in the Guidelines to facilitate those with documentation problems to receive reconstruction assistance both by helping such potential beneficiaries to confirm property rights and by establishing when alternate documentation is adequate proof to receive reconstruction assistance were not utilised. Instead, the reliance on cadastre proof and its lack of materialisation has allowed a discussion of the viability of 'secondary displacement'—or the return of IDPs or refugees to locations other than their homes—to gain increasing resonance. Such a discussion is supported by local municipal officials who unofficially advocate that the area be converted into a recreational park. These municipal officials are currently preparing such a proposal for Municipal Assembly approval.

Such discussions, precipitated by neglecting the relevant mechanisms, are concerning in light of both the context of the "Roma Mahala" itself and the overarching legal and human rights standards. First, aside from the Kosovo Roma community in the "Roma Mahala" having been forcibly expelled and over 650 of their homes having been looted and burned by Kosovo Albanians in June 1999,[247] any proposal by the municipality to change the use of the land that would require expropriation would necessarily require the determination and compensation of the property right holders of the land affected. Second, as the OSCE pointed out in a recent policy paper, secondary displacement is legal in only limited circumstances in which the benefits gained in common interest outweigh the interference in individual rights involved.[248] Neither the MWG (nor the municipality when it has evaluated proposals for the adjacent area) have undertaken such an evaluation, nor do mechanisms to provide such evaluations exist. In their absence, any secondary displacement which may occur may not strike this fair balance, but be done for political ends and thereby violate the right to return to one's home and right to property.

Not only does support for 'secondary displacement' appear contrary to international human rights standards, but it also seems to contradict earlier statements by the SRSG. UNMIK[249] and the PISG are

[246] The documents used by the HPD to identify the property right holders were from 1951. The Republic of Serbia has provided a list with 902 names to UNHCR based on a aerial map done by municipal cadastre officials in 1994 and a list was compiled in 1998. This list, though, is not based on records of legally secured property rights, but on the actual ground situation in 1994, i.e. the houses standing and the people residing in them, and is not dated or stamped. The UNHCR has begun a new effort to identify property rights holders from this list.

[247] The Kosovo Roma community in the "Roma Mahala" was forcibly expelled and their homes looted and burned by Kosovo Albanians in June 1999 (ODHIR/OSCE, "Kosovo/Kosova: As Seen, As Told, Part II", December 1999, page 102).

[248] OSCE HRRoL Policy Note, The 'Roma Mahala' and the Rights to Property and to Return Home, 24 March 2003.

[249] UNMIK, KFOR and UNMIK Police have yet to fulfil their mandates effectively. In a 21 May 2002, KFOR stated that some areas may remain "unsuitable" for return and stated that KFOR could not provide support for such returns (see HQ KFOR: Policy Paper on the Feasibility to Accommodate Returns in Kosovo", 21 May 2002). Such statements indicated that the conditions for the safe and secure return of all individuals to their homes have yet to be achieved, which also indicates that the unfettered right to property is not secure throughout Kosovo. Refusals, such as KFOR's refusal in 2000 to provide security for those displaced from the "Roma Mahala" to return, may lead to consideration of 'secondary displacement' as the only viable solution..

obliged to guarantee the right to return to one's home.[250] Promoting and implementing 'secondary displacement' without providing those returning a viable option to return their homes, including creating the conditions for such return, may constitute a breach of these rights as well as a core principle of UN SCR 1244.[251]

UNMIK's policy on secondary displacement is not consistently reflected in practice at the regional and municipal level. After UNMIK became aware that the Coordination Centre for Kosovo (CCK) had started organising returns of nine IDP families into 'secondary displacement' to the Kosovo Serb village of Strelica/Strelicë in Kamenicë/Kamenica, despite no security risk being raised by the competent organisations (KFOR and UNMIK Police) for returns to their place of origin,[252] the SRSG sent a letter to the Deputy Prime Minister of SaM denouncing 'secondary displacement' as "detrimental to the returns process".[253]

Yet, in the same municipality, the UNMIK Civil Administration supported the CCK when it purchased property to construct houses and relocate internally displaced Kosovo Serbs from Firiceja/Feriqevë to Boscë/Bosce. According to the UNMIK Local Communities Officer (LCO), the UNMIK Civil Administration supported CCK's initiative because of the IDP's current humanitarian situation and the IDPs stated refusal to return to their place of origin. It is unclear if the IDPs were presented a viable alternative to this secondary displacement or if appropriate efforts were made to create conditions conducive to their return to their homes. In fact, during a 22 August 2002 RWG, both the UNMIK Regional Administrator and UNMA supported this policy and advocated for such flexibility in the future, indicating that efforts to create the conditions for return may not be adequate. A similar situation occurred in Prishtinë/Priština region, where the RWG considered the possibility of loosening the requirement for return and reconstruction to be to one's place of origin or home because some IDPs expressed a desire not to return to their homes, but to resettle in displacement. The 2 October 2002 Prishtinë/Priština RWG discussed a proposal made to the Lipjan/Lipljan MWG for 'secondary displacement' to the village of Starograckë/Staro Gracko. UNHCR protested, stating it would only support such returns on an exceptional basis, and recommended that the RWG reject the proposal.[254] The same RWG approved projects to be implemented by the Swedish Development Co-operation (SDC) which provided reconstruction aid for those in 'secondary displacement'.[255] Additionally, in the Prizren region, secondary displacement was actively supported.

Despite being endorsed by direct representatives of the SRSG in many regions, such positions are contrary to the Guidelines and the SRSG's stated policy. The Guidelines, which are applicable, state that reconstruction assistance can only be provided for secondary displacement within the same village under narrow circumstances. As seen above, the SRSG's policy is not to support secondary displacement. This policy is confirmed in a 21 May 2002 speech in Vushtrri/Vučitrn and in the May 2002 position paper, "The Right to Sustainable Return: Concept Paper". In the speech, the SRSG defined return as return to one's home and requiring multi-ethnicity and integration. In the position

[250] UNMIK's responsibility to ensure the right to return to one's home is outlined in Clause 11(k), UN SCR 1244(1999). The PISGs are bound to ensure this right as well as recovery of property by Article 3.4, UNMIK Regulation 2001/9. Both are obligated to guarantee this right by Articles 8 and 13 with Article 1, Protocol 1, ECHR.

[251] See also Principle 28 and 29(2) of the UN Guiding Principles on Internal Displacement.

[252] This initiative was reported by the UNMA at the 16 July 2002 MWG.

[253] The letter was presented at the 25 July 2002 Gjilan/Gnjilane RWG.

[254] According to UNHCR only one of the eight proposed beneficiaries had a direct connection to the community, while it was not the place of origin of any of them. Apparently, CCK had promised the potential beneficiaries money to move to the area. This attempt, coupled with that in Kamenicë/Kamenica, may signal a disturbing policy of the CCK to encourage return into displacement.

[255] The projects granted reconstruction aid to three Kosovo Ashkalia who purchased properties in Fushë Kosovo/Kosovo Polje and Kosovo Serbs who purchased properties in Plemetina/Plemetin village after they sold their properties in their places of origin.

paper, the SRSG states that the "priority is to support returns to the places of origin" and that the "concept of relocation… will not be endorsed by UNMIK."[256]

The option of secondary displacement has been actively discussed, if not implemented, without mechanisms or evaluation to determine if the option was legal. By not providing legally binding specific mechanisms to evaluate the appropriateness of such proposals, the option of secondary displacement appears to have become an option to manipulate the return process for political ends and a way to avoid addressing systemic or other problems.

b) *Pejë/Peć Region and the Selection of Beneficiaries and Verification*

In Pejë/Peć region, this circumvention of the mechanisms established in the Guidelines, including the selection of beneficiary and property verification procedures, resulted in a number of property concerns turning into violations of applicable law and international human rights standards during the implementation of the organised return project for Biqë/Bica and Grapc/Grabac in the Klinë/Klina municipality. The problems began because no procedures for the selection of beneficiaries or verification of property were established for the project. Instead, UNMIK, in co-ordination with UNHCR, established an *ad hoc* procedure in which acceptance was based upon the receipt of names and an indication of willingness to return without examination of vulnerability or property rights. When the number of potential beneficiaries became greater than slots and property concerns became a problem, the UNMIK Regional Projects Unit decided to convene a "Beneficiary Selection Committee" which excluded local municipal representatives. A similar committee was convened for the Osojan/Osojane return-related reconstruction project in Istog/Istok. The lack of systematic verification of property rights in the initial stages of the Klinë/Klina project, however, resulted in numerous violations of property rights for which no mechanism existed to resolve. Outside the region, the MWGs in Viti/Vitina and Novobërdë/Novo Brdo also failed to establish appropriate mechanisms to select beneficiaries or assist potential beneficiaries to obtain required property rights documentation.

3. *Unable to Protect when Structures not Coherent or not Used Properly*

In addition, the OSCE found that when the structures within which the required mechanisms functioned did not operate properly or were not utilised appropriately, the problems protecting property and associated rights highlighted above were amplified. The violations which occurred within the Klinë/Klina returns project were not due only to the absences of appropriate mechanisms, but also emanated from incoherent and under utilised structures. These structures' incoherence enabled circumvention of them and a lack of transparency, thereby precluding the efficient resolution of property issues affecting the return process.

a) *Under Utilisation of Return Structures*

Within the Pejë/Peć region RWG-MWG structure, there was no effective forum to address or deal with issues outside organised return projects. The MWGs and RWG were convened only when endorsement/approval of projects were required. Neither the MWGs nor the RWG provided an effective forum to address property issues arising for non-Kosovo Serb communities or for spontaneous returnees. This neglect created frustration within the minority communities, and resulted in property concerns remaining an obstacle to return. Specifically for the RAE community, the RWG-MWG at the time was of little utility. Not only did the Regional Administration exclude the RAE balancing project in the Klinë/Klina returns framework from funding, but the community and international organisations, such as UNHCR and the OSCE, were actively prevented from raising property concerns affecting returns and reconciliation, such as those related to the Kristali area in Pejë/Peć.[257]

b) *Incoherent Return Structures Leads to Circumvention*

[256] UNMIK, The Right to Sustainable Return: Concept Paper, May 2002, p. 2.
[257] See Part IV, Chapter 6, Section C(3), p. 61.

As allowed under the Guidelines, the UNMIK Regional Administration decided to utilise a returns and reconciliation structure unique to the region, the Returns Implementation Group (RIG). Established as a subsidiary of the RWG, the RIG inherited the implementing function of a MWG, in order to enable the local political aspects of the returns and reconciliation process to be separated from the more technical issues of implementation. A RIG was to be convened for each municipality involved in an organised return project and established five (5) task forces covering technical topics, including one on Reconstruction and Balancing Projects.[258] As originally conceived, the RIGs were to function directly under the RWG and in parallel to the MWG. In practice, however, it appeared that the RIGs functioned as a working group of the respective MWG.[259] As organised returns projects were proposed for both the Pejë/Peć and Klinë/Klina municipalities, RIGs were convened. For the organised returns project for Osojane/Osojan in Istok/Istog municipality, however, no RIG was ever formed.

Lack of definition of the mandate of the RIGs and its task forces prevented the establishment of mechanisms to protect the rights of potential beneficiaries, such as those established in the Guidelines, and led to attempts to circumvent the structure when property concerns arose in the Klinë/Klina return project. The framework set up by the RIG failed to ensure property rights confirmation prior to construction, to avoid construction on other people's land or without proper permits, and it lacked an effective institutional remedy. Moreover, it resulted in a house illegally construction on municipal land, one (1) possibly built on socially-owned land,[260] and three built on other people's land[261]. In addition, all 41 houses were constructed by the implementing partner Technisches Hilfswerk (THW) without the required municipally-issued permits.[262] Such situations violate UNMIK Regulations 2000/45, 2000/53,[263] and 2002/12, the Law on Basic Property Relations, as well as international standards regarding property and due process rights.

As continuing violations of property, remedies must be found to these illegal constructions, such as legalisation or demolition and compensation. The OSCE, in cooperation with UNHCR pushed the UNMIK Regional Administration to acknowledge and remedy these violations.[264] The UNMIK Regional Projects Unit, which chaired the RIG, did not heed warnings raised by UNHCR, the OSCE, the MLO for Klinë/Klina municipality during RIGs, nor during other returns structure. It was not until the OSCE raised the issues officially outside of the RIG structure to the UNMIK Regional Administrator that the issues began to be addressed. Even then, however, the legal issues were avoided. The UNMIK Deputy Regional Administrator told the OSCE that compliance with applicable law would be a "gradual process" achieved as projects warrant. Such an attitude from the UNMIK Regional Administration is deeply disturbing. As a party to the tri-partite agreement and the supervising authority of the overall project, the UNMIK Regional Projects Unit appeared to be a key responsible party. While the UNMIK Regional Administration eventually did acknowledge that violations existed, it continually refused to take responsibility for its liability, as signatories of the tri-partite agreement in lieu of the municipality.[265] Instead, the UNMIK Regional Administration

[258] Other topics were Emergency Needs, Security, Income Generating Project and Municipal Services.
[259] While the Pejë/Peć RIG was approved by the RWG for its proposed returns project, the Klinë/Klina RIG was first approved in the MWG and then after it began functioning approved by the RWG. No other RIGs were founded.
[260] The house was believed to have been reconstructed partially on the margins of a road which was socially-owned land. It later was discovered that the cadastre map had been read improperly and the house was constructed in the beneficiaries land.
[261] Two (2) beneficiaries had not inherited the land . One house was built on a piece of land belonging to a neighbour.
[262] As required by Section 2.1, UNMIK Regulation 2000/53 On Construction in Kosovo.
[263] UNMIK Regulation 2000/53, Section 2.1.
[264] During the RIG of 15 October 2002, the OSCE expressed its concern regarding the situation and its hope that these problems would be remedied immediately. Yet, no further discussion was allowed at that time, and it required almost one month for an appropriate meeting to be convened and the property issues catalogued.
[265] Section 3.4.5 , the Guidelines, state that the MHC shall take an action if there is a violation against the tri-partite agreement.

attempted to pass on responsibility to the UNMIK Municipal Administration. Yet, the UNMIK Municipal Administration had protested within the appropriate forums to the UNMIK Regional Administration that the required documents and procedures were not being followed. . The OSCE is encouraged that as of 9 May, four of the main issues have been largely resolved or are on their way to resolution.[266] However, the OSCE notes with continuing concern that the house built on municipal land has not been legalised.[267] The OSCE also remains concerned that legalisation has not been sought for any of the reconstructed houses, which were built illegally without construction permits.

If time and political pressure as well as an unclear structure had not prevailed, the Klinë/Klina returns project might have been able to avoid the problems that arose. The inability of the structure, however, to predict and address these issues resulted in a failure to protect property rights.

While the structures primarily used for the Klinë/Klina returns project are no longer in place because the SRSG's Office of Returns and Communities (ORC) has systematically rationalised the return process structures throughout Kosovo, this example illustrates the need for clear definition and proper utilisation of these structures. As this example shows, without a continual utilisation of the structures, as well as the infusion of relevant mechanisms into them, property rights and the right of return will remain vulnerable.

Indeed, the OSCE notes that within the Manual on Sustainable Return and its subsidiary documents, which govern the return process, these issues could be addressed. Currently, mechanisms are not uniformly established or mandated within the MWG-RWG structures to ensure compliance with legal and human rights standards and protection of the rights of potential beneficiaries and third parties affected by return projects. Until such mechanisms are established, the OSCE is concerned that, as the preceding chapter shows, property rights and the right of return to one's home, as well as the effectiveness of the return process will be jeopardised.

D. Conclusion

As the above illustrates, while the relevant applicable law is binding upon authorities involved in the return-related reconstruction process, the protection and preservation of property rights within this process relies upon the use of consolidated, rationalised mechanisms based upon relevant applicable law, such as those detailed in the Guidelines. Although donor funds for reconstruction are dwindling, there remains a clear need for such mechanisms to be binding in order to protect effectively individuals' property rights to regulate the return-related reconstruction process. There is also a need to ensure that individuals' whose houses have been reconstructed do not impede the return process by continuing to illegally occupy other peoples' properties as well as for coherent structures through which to use the established mechanisms. With the establishment of new, standardised return process structures under the ORC and the release of the Manual on Sustainable Return, it is hoped that much of the latter issue will be resolved, but without the integration of relevant mechanisms, property rights and the right of return remain vulnerable.

[266] NRC is assisting the beneficiary who built on another person's land to document the alleged previous transfer of the property. As mentioned above, the house allegedly built on socially-owned land was found in reality to be situated fully within the beneficiary's property.

[267] The UNMIK Municipal Administration approached the president of the Municipal Assembly about resolving the case, but, while dismayed, he has not proposed any solution and asked the UNMIK Municipal Administration to resolve the problem.

ANNEX A:
VISOKI DEČANI SERBIAN ORTHODOX MONASTERY CASES

Two property disputes involving the Visoki Dečani Serbian Orthodox Monastery (the Monastery) highlight a number of the articulated concerns regarding the Kosovo court system's ability to protect property rights and due process in general and for minorities in particular.

Background

Both cases revolve around determining the legality of a 1997 decision by the Republic of Serbia transferring property of socially-owned enterprises (SOEs) to the Monastery.[268] On 28 June 2002, the Municipal Court of Deçan/Dečani in both cases annulled the decision and restored the property in question to the SOEs, as they requested. On 3 September 2002, after receiving the June 2002 decisions, the Republic of Serbia filed appeals against the annulments.[269] Both SOEs on 26 September 2002 contested all grounds upon which the appeals were filed. The appeals have yet to be adjudicated by the District Court of Pejë/Peć.

Competency Ambiguous

One concern arising from these cases is the ambiguity about the courts' competencies in this cases in light of the promulgation of UNMIK Regulations 2002/12[270] and 2002/13.[271] It is unclear if on 28 June 2002 the Municipal Court possessed the competencies to adjudicate the cases as these Regulations entered into force on 13 June 2002 and removed some of the competencies of the regular courts in relation to property disputes involving SOEs. UNMIK Regulation 2002/13 itself is unclear if the above cases would fall under the Special Chamber of the Supreme Court of Kosovo on KTA Matter's jurisdiction, though the SRSG and UNMIK Pillar IV have advocated this Chamber remedy to the Monastery and the Republic of Serbia as an alternative.[272]

On 27 February 2002, KTA, exercised its authority under UNMIK Regulation 2002/12 to refer a case to the Special Chamber if it desired. It informed the District Economic Court of Pejë/Peć, where an appeal had been lodged, that all proceedings would be stopped until the Special Chamber is constituted and that the 28 June 2002 decisions were unenforceable until the Special Chamber decided otherwise. While this action does not clarify the primary jurisdiction of the Special Chamber, it highlights another concern.

The Special Chamber has yet to be formed or become functional.[273] If it is the competent body to adjudicate these cases or if cases are referred to it y KTA, then the Special Chamber's current status prevents the full exercise of the right to an effective remedy as well as of property rights. Linked with these concerns is the concern that the courts did not receive the Regulations nor training on them in a timely fashion.[274]

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[268] Republic of Serbia, Decision No. 464-2914/97, 5 November 1997.
[269] Since, according to the court, the decisions were received by the Republic of Serbia on 6 August 2002, the Republic had until 21 August to file an appeal. The Municipality did not contest the claims raised. A representative of the Monastery indicated that it is aware of the decisions and was working with the CCK.
[270] On the Establishment of the Kosovo Trust Agency.
[271] On the Promulgation of the Law Adopted by the Assembly of Kosovo on the Establishment of an Immovable Property Rights Register.
[272] See specifically, Section 4.1(d) which give the Special Chamber primary jurisdiction over claims involving ownership claims against an SOE currently or formerly under the administrative authority of KTA (it is unclear if the SOEs in question fall under such authority).
[273] An Administrative Direction establishing its rule of procedures is to be promulgated imminently.
[274] See Part III, Chapter 3, Section C(2)(a)(ii), pages 27-27.

Due Process Rights

Moreover, these cases raise concerns over the ability of the courts to effectively protect property and due process rights of minorities.

Right to be Present at the Proceedings

The court may have jeopardized the defendants' right to be present at the proceedings. Under the Code of Civil Procedure (the Code), the court may hold the sessions in absence of parties, if they fail to appear,[275] but, under the ECHR, also must act with diligence to provide notice before continuing the trial without the presence of the defendants.[276] According to the president of the panel, the final session was held after all three defendants (Republic of Serbia, Municipality of Deçan/Dečani, Monastery) were provided two and one half months notice. [277] Only the municipality of Deçan/Dečani attended. The Republic of Serbia in its appeal contends that the court's actions unlawfully denied it the opportunity to speak before the court.[278] It provided evidence that it replied by registered mail to the charges on 5 October 2001 and sent a submission to the court on 12 February 2002 but that neither was received by the court. Regardless of whether the submissions were received, it remains that the court may not have acted with diligence in ensuring the presence of the defendants.

Consideration of Evidence in Parties' Absence

The court also may not have adequately ensured consideration of contrary but relevant evidence resulting in a decision against the absent parties, as required by law[279] and the principle of 'equality of arms' in Article 6(1), ECHR. A 10 March 1998 possession list and 3 February 1988 letter from the Cadastre confirming the Monastery's ownership of the parcels in question exist. Despite this evidence, the court found that the transfer was not legal because it was not recorded in the Cadastre, as required by Article 20 and 33 of the Law on Basic Property Relations. By not considering accessible facts,[280] such as possession lists, the decision can be viewed as biased and could result in discrimination and the violation of rights of due process and property.

Appropriate Application of the Law

The argumentation in the decisions raises further concerns that the law was applied inappropriately.[281] According to applicable law, to be valid, the decision, which was signed into law after 22 March 1999, must be found not to be discriminatory.[282] The court argues that UNMIK Regulation 1999/24 as amended nullifies the decision. While the court may be correct as no contrary law is in effect regarding non-residential property rights acquired within the period mentioned,[283] the court still must establish that the decision's intent or effect were discriminatory to nullify it. The court does not provide such clear reasoning or evidence.[284] Nor does the court provide a clear legal basis for its contention that the Republic of Serbia did not possess the authority to transfer the property from

[275] Article 295, Code of Civil Procedure (the Code).
[276] Article 6(1) requires that the court demonstrate it has acted with diligence to provide the accused effective official notice of a hearing. See *Goffi v Italy* A 76 (1984). OSCE will note that it is aware of property cases delayed repeatedly due to non-appearance of a party.
[277] According to the President of the Panel, the invitations were sent on 18 April 2002. The Republic of Serbia received the invitation on 29 April 2002. The Monastery refused the invitation.
[278] In its 3 September 2002 appeal, it contends a breach of Article 354(2)(7), the Code.
[279] Article 7 and 81, the Code.
[280] See Article 7(1) and (3), the Code.
[281] Article 354(2)(13), the Code defines the contradictory or ambiguous reasoning as a "substantial breach" of procedure.
[282] Section 1 and 2, UNMIK Regulation 1999/24 as amended by UNMIK Regulation 2000/59.
[283] Section 1, UNMIK Regulation 2000/60, defines property as being of residential character and thus would not apply in these cases. No other law, including UNMIK Regulation 2002/12 and 2002/13 addresses preserving rights over non-residential property.
[284] The court attempted to invalidate the transfer by arguing that it did not meet the requirements to be a donation, as it inflicted harm on the workers and community rather than doing good, not that it was discriminatory.

social ownership to the Monastery. The court also bases this contention upon the assumption that the SOEs, or workers, possessed the right to dispose of the property. Applicable law, however, does not clearly establish that this right is granted to SOEs.[285] The court appears not to have considered the full breadth of evidence nor provide the arguments required by applicable law to undertake such an annulment, and, thus to not have effectively protected the rights of due process and to property of the parties involved.

Effect of the Decision

In addition, if the decisions are allowed to stand, then the legal effect of a 28 June 2002 memorandum from the SRSG preventing any further activity or decisions on the property until "further notice" and until the case is adjudicated by the appropriate authority is pertinent. It therefore remains to be clarified not only if the court is the appropriate authority, but also if the decisions can be executed prior to the SRSG rescinding the memo.

In the Monastery cases, it remains unclear if rights to property and to due process have been violated or property rights lawfully restored. If the court is found to be competent, the decisions need to be more closely examined, and the transactions considered in detail in order to determine the validity of the transactions. The SRSG or appropriate authority should undertake the above while maintaining the integrity and independence of the judiciary.

[285] According to Article 2, Law on Registration of Real Properties in Social Ownership, Official Gazette of SAP Kosovo, No. 37/71, only rights of use are registered while the Law on Transfer of Real Property, Official Gazette of SAP Kosovo, No. 45/81. 29/86, 22/88, regulates transfer of "ownership rights" of socially-owned real property (Article 5). Yet, the Law on Basic Property Relations declares no property rights exist over socially-owned property.