

Human Rights and Communities Department
Legal System Monitoring Section

Judicial Proceedings Involving Domestic Violence

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Judicial Proceedings Involving Domestic Violence

The Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) is concerned that failures in the handling of domestic violence cases might violate domestic law as well as international human rights standards.

Many international treaties and instruments have directly addressed the issue of domestic violence. Recognizing that a majority of the victims of domestic violence worldwide are women and children, both the Convention on the Elimination of Discrimination against Women (CEDAW) and the Convention on the Rights of the Child (CRC) have emphasized the role that authorities must play in protecting vulnerable individuals from violence and abuse within the private sphere.¹ Violence against women is particularly insidious because, as the United Nations Commission on Human Rights has stated, “[a]ll forms of violence against women occur within the context of *de jure* and *de facto* discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the state.”²

Domestic violence and judicial proceedings regarding domestic violence may also implicate a number of the rights guaranteed under the European Convention on Human Rights (ECHR).³ Among these are the right to life (Article 2), the right to be free from inhuman or degrading treatment or punishment (Article 3), the right to a fair trial (Article 6), the right to respect for private and family life (Article 8), and the right to freedom from discrimination (Article 14). Article 1 of the ECHR requires authorities to guarantee these rights and freedoms to everyone within their jurisdiction. Authorities’ positive obligations, in some cases under Article 2 or 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the ECHR, may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals.⁴

¹ The CEDAW urges states to “pursue by all appropriate means and without delay a policy of eliminating violence against women” and to “[e]xercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.” See General Recommendation 19 of the Committee on the Elimination of Discrimination against Women, adopted in 1992, Article 24(t)(i) and (iii). The CEDAW was adopted by UN General Assembly Resolution 34/180 of 18 December 1979. The CRC requires that authorities enact “all appropriate legislative [...] measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s), or any other person who has care of the child.” The CRC was adopted by UN General Assembly Resolution 44/25 of 20 November 1989, and entered into force 2 September 1990.

² United Nations Commission on Human Rights, Resolution 2003/45, paragraph 8, cited by the European Court of Human Rights (ECtHR) in *Opuz v. Turkey*, ECtHR Judgment of 9 June 2009, paragraph 188.

³ The European Convention on Human Rights (ECHR) and the corresponding case-law of the ECtHR are directly applicable in Kosovo, see UNMIK Regulation 1999/24 on The Applicable Law in Kosovo, Section 1.3.(b); see UNMIK Regulation 2001/9 on A Constitutional Framework for Provisional Self-Government in Kosovo, Section 3.2(b); Articles 22(2) and 53 of the constitution. The ECHR was adopted by the Council of Europe in Rome on 5 November 1950.

⁴ *Bevacqua and S. v. Bulgaria*, ECtHR Judgment of 12 June 2008, paragraph 65. Authorities have a positive obligation to take adequate measures to ensure that individuals are not subject to inhuman or degrading treatment, including such ill-treatment administered by private individuals. *A. v. the United Kingdom*, ECtHR Judgment of 23 September 1998, paragraph 22; *Z. v. United Kingdom*,

UNMIK Regulation 2003/12 on Protection Against Domestic Violence (hereinafter, UNMIK Regulation 2003/12) establishes a civil procedure by which alleged victim(s) of domestic violence may file a petition for a protection order, an emergency protection order, or an interim emergency protection order.⁵ The UNMIK Regulation 2003/12 contains an exhaustive list of acts or omissions which may constitute domestic violence if committed against a person with whom the perpetrator is or has been in a domestic relationship.⁶ If the court determines that the petition it has received is grounded, it may issue either a protection order or an emergency protection order, respectively. Requests for interim emergency protection orders are to be filed with law enforcement authorities outside of court hours, and if granted, expire at the end of the next day that the court is in operation.⁷ Section 2 of the UNMIK Regulation 2003/12 enumerates the measures that all three types of orders may mandate.

Whether or not there is an ongoing criminal proceeding against the respondent does not prejudice a decision on a protection order.⁸ Domestic violence is not a distinct crime *per se*,⁹ however, the violation of an order issued under the UNMIK Regulation 2003/12 is a criminal offense.¹⁰ The UNMIK Regulation 2003/12 requires automatic prosecution of the violation of a protection order, emergency protection order or an interim protection order.¹¹ Such a violation, in whole or in part, is punishable by a fine of 200 to 2000 Euros or imprisonment of up to six months.¹² UNMIK Regulation 2003/12 also requires automatic prosecution of the crimes of light bodily injury and/or damaging the property of another person, when committed within the context of a domestic relationship.¹³

Since the publication of its *Report on Domestic Violence Cases in Kosovo* in July 2007, the OSCE has continued to monitor domestic violence cases in Kosovo courts.¹⁴

ECtHR Judgment of 10 May 2001, paragraph 73; *M.C. v. Bulgaria*, ECtHR Judgment of 4 December 2003, paragraphs 148-166.

⁵ Promulgated on 9 May 2003.

⁶ “Domestic relationship” means a relationship between two persons: (a) who are engaged or married to each other or are co-habiting with each other without marriage; (b) who share a primary household in common and who are related by blood, marriage, or adoption or are in a guardian relationship, including parents, grandparents, children, grandchildren, siblings, aunts, uncles, nieces, nephews, or cousins; or (c) who are the parents of a common child. UNMIK Regulation 2003/12, Section 1.1.

⁷ See UNMIK Regulation 2003/12, Section 13.

⁸ UNMIK Regulation 2003/12, Section 8.2.

⁹ The Criminal Code of Kosovo (Provisional Criminal Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments; hereinafter, CCK) does not incriminate “domestic violence” as such under one specific article, but does provide for penalty enhancements, or aggravated clauses, for particular crimes when occurring in the context of a “domestic relationship.” See, for instance, the crimes of light bodily harm (art. 153(4) CCK); grievous bodily harm (art. 154(3) CCK); coercion (art. 160(2) CCK); threat (art. 161(3) CCK); unlawful deprivation of liberty (art. 162(4) CCK); rape (art. 193(7,8) CCK); sexual assault (art. 195(2)7,8 CCK) a.o..

¹⁰ UNMIK Regulation 2003/12, Section 15.

¹¹ UNMIK Regulation 2003/12, Section 16.1.

¹² UNMIK Regulation. 2003/12, Section 15.

¹³ UNMIK Regulation 2003/12, Section 16.2 and 16.3.

¹⁴ The report observed that the major problematic areas involving domestic violence proceedings included: unlawful delays in scheduling hearings and in deciding on applications for protection

The primary problems observed by the OSCE in its monitoring since the publication of the 2007 report include unlawful delays in scheduling hearings or in deciding on applications for protection orders and emergency protection orders, failure to involve Center for Social Work representatives in civil domestic violence proceedings, misapplication of the relevant law by courts and failure to prosecute domestic violence crimes.

A. Delays

Judicial delays in domestic violence cases may jeopardize the personal integrity of victims and lead to violations of both domestic and international law. According to the ECtHR, justice must be administered “without delays which might jeopardise its effectiveness and credibility”.¹⁵ The long established case-law of the ECtHR requires authorities to organize their legal systems so as to allow the courts to comply with human rights standards.¹⁶

In addition, the Committee of Ministers of the Council of Europe has stated that it “is necessary to make available to parties simplified and more rapid forms of proceedings and to protect them against abusive or delaying tactics.” Its principles state that “[...] civil proceedings should consist of no more than two hearings, the first of which might be a preliminary hearing of a preparatory nature and the second for taking evidence, hearing arguments, and if possible, giving judgment.”¹⁷

Domestic law foresees clear deadlines for the court to decide on petitions for protection orders and emergency protection orders. For protection orders, the court must decide within 15 days, while for emergency protection orders the deadline is 24 hours.¹⁸ The purpose of these short deadlines is to protect petitioners from risk of further harm. However, unlawful delays in scheduling hearings or in deciding on petitions for protection orders and emergency protection orders continue to be a commonly observed violation of serious concern in domestic violence cases.¹⁹ The following two examples of unlawful judicial delays monitored by the OSCE:

orders; the absence of the representatives of the Centre for Social Work in the hearings where alleged victims or witnesses were children and insufficient reasoning of domestic violence decisions. In addition, the report also noted concerns regarding the appellate procedure in domestic violence cases and the failure of the authorities to *ex officio* prosecute criminal offences that occurred during domestic violence incidents. The report is available at http://www.osce.org/documents/mik/2007/07/25771_en.pdf.

¹⁵ See *Katte Klitsche de la Grange v. Italy*, ECtHR Judgment of 27 October 1994, paragraph 61, reaffirmed in *Ferrari v. Italy*, ECtHR Judgment of 28 July 1999, paragraph 21.

¹⁶ See *Zimmermann and Steiner v. Switzerland*, ECtHR Judgment of 13 July 1983, paragraph 29. When faced with a temporary backlog of business, public authorities must take, with the requisite promptness, remedial action to deal with an exceptional situation of this kind. See *Baggetta v. Italy*, ECtHR Judgment of 25 June 1987, paragraph 23.

¹⁷ Article 1, Recommendation No. R (84) 5, On the Principles of Civil Procedure Designed to Improve the Functioning of Justice, adopted by the Committee of Ministers on 28 February 1984 at the 367th meeting of the Ministers' Deputies, Council of Europe.

¹⁸ UNMIK Regulation 2003/12, Section 7.1 and 9.1.

¹⁹ See the aforementioned *Report on Domestic Violence Cases in Kosovo* (July 2007), as well as the OSCE Department of Human Rights and Rule of Law (now Department of Human Rights and Communities) Monthly Reports from March 2005 and August 2005.

On 8 January 2009, in a court in the Prishtinë/Priština region, a petition for a protection order was filed by the petitioner against multiple respondents for alleged psychological violence and denial of access to the house where she had lived for 25 years. On 11 February 2009, the first trial session was held and both parties were heard. However, the judge determined that the conditions to continue the hearing were not met, and postponed the hearing. In the second hearing held on 4 March 2009, almost two months after the petition was filed, the court finally issued a decision on the petition for a protection order.

On 14 February 2008, in a court in the Prishtinë/Priština region, a petitioner filed a petition for a protection order against her husband and his immediate family members with whom she shared the same household. The petitioner sought a protection order due to alleged psychological and physical duress. On 24 April 2008, nine weeks later, the court issued a decision finding the petition for the protection order was grounded.

In the above examples, despite explicit statutory deadlines, decisions on petitions for protection orders were made only six to nine weeks after the original petitions had been filed.

The problem of judicial delays is particularly acute with respect to petitions for emergency protection orders. Courts frequently fall far afoul of the 24-hour deadline for deciding on petitions for emergency protection orders. The OSCE has observed multiple cases in the Prizren region where, following successive delays in deciding on petitions for emergency protection orders, courts have instead issued regular protection orders. This misapplication of the law, compounded with the unlawful temporal delay, may result in further harm to victims of domestic violence. Following are examples of repeated postponements which resulted in violations of the statutory deadline and jeopardized the rights of those involved in the proceedings:

On 19 March 2009, in a court in the Prizren region, the petitioner filed an application for an emergency protection order against his son, due to alleged harsh behaviour and threats of attack.²⁰ The first hearing was not scheduled until 6 April 2009. The hearing was postponed until 15 April and then until 24 April 2009. These postponements were made first due to the absence of the judge, and later due to the absence of the respondent, who was in detention. The main hearing finally took place on 7 May 2009, at which time the court issued a regular protection order.

On 30 March 2009, in a court in the Prizren region, a pregnant juvenile petitioner filed a petition for an emergency protection order due to alleged violence suffered from her partner, with whom she was living in extra-marital relationship, and his family members. The first hearing was held seven days after the petition was filed, only to be postponed for 23 April 2009, and again postponed for 5 May 2009. The sessions were postponed first due to lack of evidence that the respondent had been duly summoned, and later following the

²⁰ The protected party requested that the court issue the orders described in Section 2(1) (a) - (d) and (f), UNMIK Regulation 2003/12.

respondent's statement that he had difficulty in understanding the petition as it was not in his mother tongue, Bosnian. The third and final hearing took place on 5 May 2009, when the judge realised that the petition was for an emergency protection order. At that time he asked the protected party whether she wanted a protection order, or an emergency protection order. The protected party replied that she wanted a regular protection order, and no longer an emergency protection order. On a same day, 35 days after the petition for an emergency protection order was filed, the court issued a decision granting a regular protection order.

The above failures of the court to decide on petitions within the legally mandated timeframe put at risk the bodily integrity of the victims and undermine the nature of emergency protection orders. Emergency protection orders are to be used in response to an immediate or imminent threat to the safety, health, or well-being of the protected party.

B. Failure to involve Center for Social Work representatives in civil domestic violence proceedings

In addition to excessive delays in scheduling hearings and deciding on the request for protection orders, the OSCE has observed failures of the courts to hear the opinion of representatives of the CSW in cases involving juveniles. Although according to the UNMIK Regulation 2003/12 the role of a representative from the CSW is only to be heard as a witness,²¹ Article 80 of the Law on Contested Procedure foresees legal representation of a person who is under the age of 18.²² Moreover, the CRC states that in all actions concerning children in the courts of law, the interests of the child shall be a primary consideration.²³ It is the court's responsibility to involve the CSW in cases involving juveniles where necessary.

The OSCE has monitored domestic violence cases involving juveniles where the representatives of the CSW were either not summoned or were never heard by the court. For instance:

In the case noted above, the pregnant juvenile petitioner filed a petition for an emergency protection order due to alleged physical and psychological violence suffered from her partner, with whom she was living in extra-marital relationship, and his family members. No representative of the CSW was ever summoned by the court during the proceedings.

On 24 February 2009, in a court in the Prishtinë/Priština region, a petition for a protection order was filed by the petitioner against her husband due to alleged domestic violence suffered by her and their five children (three of whom were minors). In the petition, the petitioner asked the court to issue a protection order preventing the respondent from committing acts of domestic violence against her and their children and to oblige him to return their son to residence with the family of the petitioner due to the danger to his physical and mental safety created by living with the respondent. The judgment found

²¹ Section 7.2 of the UNMIK Regulation 2003/12.

²² See Law No.03/L-006 on Contested Procedure, Article 182.2(k).

²³ CRC, Article 3.1.

the petition for protection order grounded. However, the CSW was absent throughout the proceedings.

In both of these cases, a representative from the CSW should have been present to represent or testify with regard to the best interests of the juveniles concerned.

C. Misapplication of the law by courts

The OSCE has observed that courts in Kosovo frequently misapply the UNMIK Regulation 2003/12 when dealing with petitions for protection orders or emergency protection orders. As a consequence, courts sometimes conduct proceedings and issue judgments which are in violation of both domestic and international law. In particular, the OSCE has monitored cases in which courts: 1) failed to treat regular and emergency protection orders differently from one another both in carrying out trial proceedings and in issuing judgments; 2) failed to issue judgments which conformed with the formal requirements of the UNMIK Regulation 2003/12; and 3) issued protection orders negatively affecting the rights of individuals who were not named as respondents in the case.

1. Failure by courts to treat regular and emergency protection orders differently from one another

The OSCE has observed that courts frequently treat protection orders and emergency protection orders in the same way, and often fail to acknowledge the legal differences between these two types of petitions. As mentioned above with respect to judicial delays, one of the primary differences between protection orders and emergency protection orders is the legally mandated time within which courts must decide on the respective petitions. By failing to decide on petitions for emergency protection orders in a particularly expedient manner, courts may breach petitioners' rights to an adequate legal framework which affords protection against acts of violence by private individuals.²⁴

When presented with a petition for an emergency protection order, the court must also determine whether the respondent poses "an immediate or an imminent threat to the safety, health, or well-being of the protected party or a person who has a domestic relationship with the protected party or who is to be protected by the protection order."²⁵ In addition to failing to decide on petitions for an emergency protection

²⁴ According to ECtHR jurisprudence: "[...] the authorities' positive obligations – in some cases under Articles 2 and 3 and in other instances under Article 8 taken alone or in combination with Article 3 of the Convention – may include, in certain circumstances, a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals." See *Bevacqua and S. v. Bulgaria*, ECtHR Judgment of 12 June 2008, paragraphs 64-65. Furthermore, authorities must take appropriate steps to safeguard the lives of those within its jurisdiction. See *L.C.B. v. the United Kingdom*, 9 June 1998, *Reports of Judgments and Decisions* 1998-III, paragraph 36. See also *Osman v. the United Kingdom*, ECtHR Judgment of 28 October 1998, paragraphs 115-116.

²⁵ UNMIK Regulation 2003/12 Section 10.1(b). In order to issue an emergency protection order, the court must also determine that the same grounds exist as are required for issuing a regular

order within the requisite 24-hour timeframe,²⁶ the OSCE has observed that when presented with petitions for emergency protection orders, courts often fail to adequately determine whether an immediate or imminent threat exists. Instead of deciding on petitions for emergency protection orders by promptly evaluating whether the conditions set forth in the UNMIK Regulation 2003/12 Section 10.1 (a)-(c) exist, courts instead render a decision without evaluating these criteria. In several monitored cases, courts entertained extraneous proceedings before or in lieu of determining the existence of the requisite grounds for issuing an emergency protection order.

The following cases serve as examples:

In a case brought before a court in the Prizren region, the petitioner requested an emergency protection order. However, instead of evaluating whether an immediate and imminent threat existed, the court failed to assess this criterion. Instead, it granted a regular protection order to the petitioner.

In a case brought before a court in the Mitrovicë/Mitrovica region, upon a petition filed by the Public Prosecutor on 27 February 2009, the petitioner requested an emergency protection order. At the main session held on 18 March 2009, the CSW representative presented three statements, signed by the victim and respondent, in which the parties reconciled and “promised each other they will not repeat their violent actions in the future.” The signed statement also indicated that the victim agreed to live with the respondent again. The victim was not present in the court. However, at the main session, the Mitrovicë/Mitrovica Public Prosecutor and the victim’s advocate both supported the petition for emergency protection order. Irrespective of the reconciliation proceedings, on 18 March 2009 the court issued a decision allowing the protected party to use the residence shared by the respondent and the protected party, or a portion thereof. While the decision stated that it was issued pursuant to Section 8.1(b) and 8.3 of the UNMIK Regulation 2003/12, the terms “protection order” and “emergency protection order” were used almost interchangeably throughout the decision. Although no confirmation hearing was set in the decision, the sporadic use of the term “emergency protection order” throughout made both the basis for and intent of the court’s decision unclear.

Although it is unclear in the case above who initiated the reconciliation proceedings, the OSCE has also monitored cases in which courts failed to respect the urgent nature of petitions for emergency protection orders by delaying their decision on these petitions in order to pro-actively entertain reconciliation proceedings.

In a case brought before a court in the Prizren region on 23 March 2009, instead of trying to determine whether the request for an emergency protection

protection order (that there are grounds to believe that the respondent has committed or threatened to commit an act of domestic violence, and that the issuance of the emergency protection order is necessary to protect the safety, health or well-being of the protected party or a person who has a domestic relationship with the protected party and who is to be protected by the protection order). UNMIK Regulation 2003/12 10.1 (a) and (c) (same as UNMIK Regulation 2003/12 Section 8.1 (a) and (b)).

²⁶ See UNMIK Regulation 2003/12 Section 9.1.

order was grounded, the judge used the hearings as a forum to attempt to reconcile the parties. Though parties did eventually reconcile, the court's interruption of these proceedings was improper, as the petition was for an emergency protection order and the judge should have immediately evaluated the evidence as to whether such order was needed by ruling on the petition and then if appropriate, entertained the idea of reconciliation. In addition to unnecessarily delaying the proceedings, these attempts could have put the petitioner's health and safety at risk.

In addition to violating the UNMIK Regulation 2003/12 requirement that petitions for emergency protection orders be decided within a 24-hour period, such initiation of reconciliation procedures may also fall afoul of international law. The ECtHR has previously found that pursuit by the court of dilatory proceedings, along with failure to take sufficient action in reaction to violent behaviour, can lead to a violation of the right to respect for private and family life.²⁷

In the following monitored case, the court entertained a request to execute an emergency protection order, even though protection orders are self-executing.

On 26 January 2009, a court in the Prishtinë/Priština region issued a judgment holding that petitioner's request for an emergency protection order was grounded. Among other measures, the judgment granted the protected party use of the house where she lived with the respondent and their two children. On 23 February 2009, since the terms of the judgment apparently had not been complied with by the respondent, the protected party filed a request for execution of the emergency protection order. The Court eventually executed the decision on the emergency protection order on 4 May 2009, placing the respondent in the house as per the terms of the emergency protection order.

The above procedure is completely unforeseen by the UNMIK Regulation 2003/12. An emergency protection order, once issued, remains in effect until the confirmation hearing, which must be scheduled within 20 days of issuance of the order.²⁸ In the above instance the petitioner had to wait over three months for the enforcement of the emergency protection order, which should be effective immediately upon issuance by the court and enforceable against the respondent upon personal service on the respondent in accordance with the Law on Contested Procedure.²⁹

2. Failure by courts to issue judgments which conform with the formal requirements of the UNMIK Regulation 2003/12

The OSCE has monitored several cases in which courts issued judgments which failed to conform with the formal requirements of the UNMIK Regulation 2003/12 for decisions on petitions for protection orders and emergency protection orders. Failure to conform to these requirements jeopardizes the ability of both petitioners and respondents to know and advocate for the enforcement of their legal rights.

²⁷ Article 8, ECHR. See *Bevacqua and S. v. Bulgaria*, ECtHR judgment, 12 June 2008, paragraphs 64-76. In this case, the ECtHR found that facilitation of reconciliation was unjustified in light of concrete circumstances calling for expedition of the proceedings.

²⁸ UNMIK Regulation 2003/12, Section 10.3(d).

²⁹ See UNMIK Regulation. 2003/12, Section 10.4 and 10.6.

a. Failure to state the timeframe for a protection order

In multiple cases monitored by the OSCE, courts failed to state the timeframe for a protection orders.³⁰ The following case is an example:

On 18 March 2009, a court in the Mitrovicë/Mitrovica region issued a protection order in accordance with the request of the petitioner, a woman who stated that the respondent, her husband, had threatened and beat her. However, instead of stating the duration of the protection order, the court merely reiterated the language of UNMIK Regulation 2003/12, Article 8.3(b), stating that “the duration of the protection order will not exceed twelve months.”

Such ambiguous language could negatively prejudice the rights of either the petitioner or respondent should either wish at a later time to take further action with respect to the protection order.

While some courts left the timeframe of protection orders uncertain by merely quoting the language of UNMIK Regulation 2003/12, others fail to mention the duration of the protection order at all.

On 12 March 2009, a court in the Mitrovicë/Mitrovica region issued a protection order against respondent. The order contained neither reasoning nor the duration of the mandated protection measures.

b. Courts unduly require petitioners to pay court costs

Section 6.5 of UNMIK Regulation 2003/12 exempts petitioners in domestic violence cases from paying court taxes. However, the OSCE has monitored several cases in which courts disregarded this exemption, and required the petitioner for a protection order or an emergency protection order to pay at least part of the court costs associated with the proceeding.

In protection orders issued on behalf of two separate petitioners and against two separate respondents on 18 March 2009 by the court in Mitrovicë/Mitrovica region, the judge ordered the parties to pay their own expenses.

c. Right to appeal not mentioned in judgments

Section 11 of UNMIK Regulation 2003/12 provides that an appeal against a decision on a petition for a protection order or a decision on the confirmation of an emergency protection order shall be filed within eight days from the issuance of such decision. Section 8.3 of the Regulation further requires a protection order itself to state a

³⁰ Section 8.3(a) of UNMIK Regulation 2003/12 requires protection orders to state the duration of the protection order, which is not to exceed 12 months. Section 10.3(b) of the regulation requires that emergency protection orders state the duration of the order, which is to expire at the end of the hearing for the confirmation of the emergency protection order. As per Section 10.3(d), the date of a hearing for the confirmation of the emergency protection order must be within twenty (20) days of the issuance of the emergency protection order.

notification of the right to appeal within eight days from the receipt of such order. However, protection orders issued by Kosovo courts often fail to adequately inform respondents of their right to appeal.

Many courts notified parties as part of the written judgment that the appeal of a protection order does not stay its execution. However, many failed to mention the time limit for appeal. The OSCE has further noted failure to mention the possibility of appeal whatsoever in some judgments issued by some courts in the Prizren, Pejë/Peć, and Mitrovicë/Mitrovica regions.

d. Poor or no reasoning in judgments

As it has noted on previous occasions, the OSCE has once again identified insufficient reasoning in decisions on protection orders in many monitored cases. A reasoned decision is a requirement of both domestic and international law. According to the applicable Law on Contested Procedure (LCP),³¹ a violation of this law always exists when a decision suffers from certain defects, including: a) if the disposition of the decision is incomprehensible or contradictory with the reasoning of the verdict; b) if the verdict contains no reasoning, unclear reasoning, or gives no justification for the final facts; or c) if there are contradictions between the final statement of facts and the verdict, main document, procedural records, or minutes of the proceedings.³²

The ECtHR has also recognized, in its jurisprudence, that the right to a reasoned decision is implied by the right to a fair trial which is guaranteed under ECHR Article 6.³³ Furthermore, a reasoned decision “affords a party the possibility to appeal against it, as well as the possibility of having the decision reviewed by an appellate body.”³⁴ A reasoned decision is necessary for “public scrutiny of the administration of justice;”³⁵ without reasons justifying a decision the appealing party cannot properly challenge the decision of the lower court.

3. Protection orders issued against family members who are not respondents

The OSCE has noticed that courts sometimes issue protection orders which limit the conduct not only of the respondent, but also of the respondent’s family members. Domestic violence in Kosovo frequently involves more than two parties. However, protection orders and emergency orders are only effective with respect to individuals specifically named as respondents in the claim. Protection orders which impose restrictions on individuals other than the respondents in the claim go beyond the scope of domestic law, and also infringe on the right of these non-respondents to a fair trial.³⁶ Protection orders should never impose restrictions on the conduct of individuals who are not named respondents in the case.

³¹ Cite section of UNMIK Regulation 2003/12 which says that LCP applies to proceedings.

³² Law on Contested Procedure, Law No. 03/L-006, Article 182.2(n)

³³ See *Van de Hurk v. Netherlands*, ECtHR Judgment of 19 April 1994, paragraph 61.

³⁴ See *Suominen v. Finland*, ECtHR Judgment of 24 July 2003, paragraphs 34-38.

³⁵ *Idem*.

³⁶ See Section 2 of the UNMIK Regulation 2003/12 for a list of measures which a protection order, emergency protection order, or interim emergency protection order may take. Nothing in this

On 14 February 2008, a female petitioner filed in a court in the Prishtinë/Priština region for an emergency protection order against her husband, claiming that she was suffering from psychological pressure and physical violence from her husband and his family. Although divorce proceedings were also ongoing in the court, the petitioner requested the protection order because she feared for her health and safety. On 28 April 2008, the Court issued a protection order forbidding the respondent and his family from committing any kind of domestic violence against the protected party and her children. The parties divorced on 16 October 2008. On 14 January 2009, the protected party submitted a request for an extension of the protection order. The Court granted the request on 25 February 2009, again prohibiting the respondent or his family to “threaten or offend” the protected party and her children, or to commit any other act of domestic violence, and to allow her to use the family property. On 24 March 2009, the respondent filed an appeal. One of the grounds for the appeal was that the members of the family of the respondent were not heard, and the decision was made without reviewing their statements. On 4 June 2009, the District Court rendered a judgment sending the case back to the municipal Court for hearing, on the grounds that the court should have heard the witnesses in order to verify domestic violence. At the retrial hearing, held on 24 July 2009, the parents of the ex-husband of the protected party were heard by the court as witnesses. On the same day, the Court rendered a judgment extending the protection order for a six-month period, starting from 25 February 2009. Although the petitioner never formally amended her claim to include members of respondent’s family, the extension of the protection order was also addressed against respondent and the parents of the ex-husband of the protected party

In a claim received by a court in the Prizren region and dated 30 March 2009, the petitioner requested an emergency protection order, stating that there was grounded suspicion that a criminal offense involving domestic violence had occurred. The only named respondent was the petitioner’s extra-marital partner. However, in the complaint she alleged that violence against her had also been committed by the respondent’s sister and other members of the respondent’s family. On 5 May 2009, the court issued a protection order, forbidding the respondent and “members of his family” from committing any act of domestic violence against the petitioner or relatives of the protected party.

A protection order issued by the court is served only on the respondent.³⁷ Protection orders issued against individuals who are not named as respondents in the case may unlawfully restrict the conduct of these individuals. Conduct which is not treated itself as a criminal one, such as occupation of certain residential premises, could become a criminal act in case committed by a family member against whom a protection order is issued. Therefore, when courts issue protection orders restricting the conduct of individuals who are not named as respondents in the case, those individuals are deprived of their right to a fair hearing in determination of their civil obligations. Furthermore, the violation of a protection order constitutes a per se criminal offense.

section provides for measures to be taken against a non-respondent. However, a protection order may, protect persons other than the petitioner (namely, a person with whom the protected party has a domestic relationship) (see Section 2.1 (p)).

³⁷ UNMIK Regulation 2003/12, Article 8.4.

D. Occasional failure to effectively prosecute domestic violence crimes

In its previous report on domestic violence cases in Kosovo, the OSCE has noted *inter alia* that Kosovo public prosecutors sometimes fail to *ex officio* prosecute domestic violence crimes.³⁸ Of note, this problem is by far not unique to Kosovo, and has been recently identified as a general concern at the European level.³⁹

Since the time of the last reporting progress has been noted in the handling of domestic violence crimes, particularly concerning the interaction and co-operation by various institutional stakeholders. Nonetheless, some of the previously noted problems continue to recur.

In some cases, authorities only issue protection orders under the UNMIK Regulation 2003/12, while failing to also undertake investigative actions to prosecute apparent domestic violence crimes. It should be borne in mind that all public authorities (including civil judges who issue protection orders) have a duty to refer cases involving apparent criminal misconduct to the public prosecutor's office for further investigations.⁴⁰ The issuance of a protection order is not a substitute for criminal prosecution, and incidents involving domestic violence crimes should be investigated and prosecuted effectively and vigorously.

When criminal investigations into suspected domestic violence crimes are launched, public prosecutors occasionally display a lack of due diligence and fail to undertake all necessary actions with a view to an effective prosecution of the suspect. Incomplete investigations jeopardize the final outcome of the case, even in cases where incriminating evidence may abound.

In a case before the Prishtinë/Priština District Court, a Kosovo Albanian male was accused of having committed in January 2009 the crimes of rape,⁴¹ grave bodily injuries,⁴² and threat⁴³ against his partner with whom he had lived in an extra-marital relationship for almost 20 years and raised together one adoptive child. The defendant had allegedly severely mistreated his partner, both physically and psychologically; beat her repeatedly with various hard objects, inflicting severe injuries; threatened to maim and kill her and her family members; and raped her. When the victim reported to the police, photographs were taken of her injuries and

³⁸ See the OSCE *Report on Domestic Violence Cases* (July 2007), pages 17-19.

³⁹ See the Report "*The State of Human Rights in Europe: The Need To Eradicate Impunity*" of the Committee on Legal Affairs and Human Rights of the Council of Europe, which states in paragraph 53 that violence against women or so-called "honour crimes" often still is not prosecuted with the required severity because of, *inter alia*, archaic cultural attitudes that place values such as the honour of the family or the children's duty of obedience above the right of individual liberty or even the right to life.

⁴⁰ Under Article 197 of the Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments (KCCP), "All public entities have a duty to report criminal offences prosecuted *ex officio* of which they have been informed or which they have learned of in some other manner" and must "undertake steps to preserve evidence of the criminal offence [...]".

⁴¹ Article 193, CCK.

⁴² Article 154, CCK.

⁴³ Article 161, CCK.

one month later a medical expert issued an opinion on the nature of the injured party's injuries based on those photographs. It was four months before the Court ordered a medical exam. By that time, however, the medical expert could only confirm that the victim had suffered light bodily injuries,⁴⁴ and could not corroborate any injuries proving rape or grave bodily injuries. The prosecutor subsequently amended the charge of grave bodily injuries into light bodily injuries. When the court delivered its verdict in May 2009, it had to rely significantly on the victim's testimony and on a partial confession by the defendant. The defendant was found guilty of rape, light bodily injuries and threat, and was sentenced to an aggregated sentence of eight-and-a-half years of imprisonment.

The failure to order an immediate medical examination of the domestic violence victim in the above-mentioned case displays an egregious lack of due diligence on the part of the prosecutor in the conduct of investigations. Such omission may lead to loss of crucial evidence and may endanger the entire course of criminal proceedings. Kosovo public prosecutors should always investigate and prosecute domestic violence crimes effectively and vigorously, as required under domestic⁴⁵ and international law.⁴⁶

It should be further emphasized that domestic violence incidents involving acts of serious violence are not just a private matter, but an issue of public concern, requiring actions from public authorities.⁴⁷ As such, authorities should not over-rely on victim's initiative or co-operation, but should strive to tackle such crimes in a pro-active, independent and effective manner, as mandated by the law.

Recommendations

In view of the above, the following actions are recommended:

- Judges should comply with relevant law and decide on petitions for protection orders and emergency protection orders within the legally mandated deadlines, when deciding on requests for protection orders.
- Judges should ensure the presence of a representative of the CSW in domestic violence proceedings when one of the parties is a juvenile.
- Judges should properly justify decisions in domestic violence cases through clear, reasoned decisions with reference to the facts of the case and their application under the relevant legal provisions.
- Judges should ensure that their decisions on petitions for protection orders and emergency protection orders conform to the requirements of the UNMIK Regulation, clearly stating the timeframe of the protection order, responsibility for court costs in accordance with the law, and appellate rights and procedures.
- All known domestic violence crimes should be referred to the public prosecution office for investigations and, if appropriate, prosecution.

⁴⁴ Article 153, CCK.

⁴⁵ Article 220(1) KCCP.

⁴⁶ See *Opuz v. Turkey*, ECtHR Judgment of 9 June 2009, in particular paragraphs 128-130 and 150.

⁴⁷ See *Bevacqua and S v. Bulgaria*, ECtHR Judgment of 12 June 2008, paragraph 83.

- Public prosecutors should investigate and prosecute domestic violence cases with the required due diligence and thoroughness; in particular, perishable evidence should be collected immediately after the incident and duly recorded.
- The Kosovo Judicial Institute should continue to train candidates for judges and prosecutors, as well as sitting judges and prosecutors, on domestic violence law.