



**Organization for Security and Co-operation in Europe**

**THE DEPARTMENT OF HUMAN RIGHTS,  
DECENTRALIZATION, AND COMMUNITIES  
Legal System Monitoring Section**

**Monthly Report – July 2007**

## **Failure of authorized representative to assist vulnerable crime victims in criminal proceedings violates domestic law**

The OSCE Mission in Kosovo (OSCE) is concerned that in several monitored cases authorized representatives did not provide assistance to vulnerable crime victims as required by law.

The Provisional Criminal Procedure Code of Kosovo (PCPCK)<sup>1</sup> requires the assistance of an authorized representative<sup>2</sup> from the initiation of the criminal proceedings to crime victims belonging to vulnerable groups,<sup>3</sup> such as children, victims of gender or sexual related violence, victims of trafficking in human beings, and victims having a domestic relationship with the defendant.<sup>4</sup>

Under Kosovo law, the authorized representative has the duty to safeguard the rights of the injured party, protect his or her integrity during examinations, and to file and pursue property claims.<sup>5</sup> Furthermore, if the injured party does not engage an authorized representative, the competent authority conducting the proceedings in the pre-trial phase shall appoint *ex officio* an authorized representative at public expense.<sup>6</sup>

Despite these clear legal obligations, the OSCE has monitored cases where the competent authority failed to appoint an authorized representative for a victim belonging to a vulnerable group.

In a criminal case before the ( ) involving alleged ( ) ,<sup>7</sup> on ( ), the injured party gave a statement before the prosecutor without the presence of an authorized

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<sup>1</sup> UNMIK Regulation No. 2003/26 On the Provisional Criminal Procedure Code of Kosovo (PCPCK), 6 July 2003.

<sup>2</sup> According to Art. 81(4) of the PCPCK, victim advocates from the Victim Advocacy Unit shall assist injured parties, including, where appropriate, as authorized representatives. The Unit has been recently replaced by the Victims Assistance and Advocacy Division.

<sup>3</sup> Art. 78 of the PCPCK sets forth the general principle that “the authority conducting the criminal proceedings shall consider the reasonable needs of the injured parties, especially of children, elderly persons, persons with a mental disorder or disability, physically ill persons and victims of sexual or gender related violence.” This provision draws inspiration from the United Nations (UN) General Assembly’s Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, according to which “[t]he responsiveness of judicial and administrative processes to the needs of victims should be facilitated by [...] providing proper assistance to victims throughout the legal process,” UN General Assembly Resolution no. 40/34, 29 November 1985, para. 6.

<sup>4</sup> Art. 82(1), PCPCK.

<sup>5</sup> Art. 81(3), PCPCK.

<sup>6</sup> Art. 82(2), PCPCK.

<sup>7</sup> Art. 139, Provisional Criminal Code of Kosovo (PCCK), UNMIK Regulation No. 2003/25 On the Provisional Criminal Code of Kosovo, 6 July 2003.

representative or a Victim Advocate. The prosecutor failed to appoint one *ex officio*, as required by the law.<sup>8</sup>

In a criminal case before the ( ) Court involving an alleged ( ),<sup>9</sup> neither the juvenile injured party nor her legal representative engaged an authorized representative to assist her during the trial. At the opening hearing of date ( ), the judge failed to appoint one *ex officio*. According to the legal representative of the injured party, she did not need assistance because the injured party “was telling the truth”(sic).

In a case investigated by the ( ) Prosecution involving the alleged crime of ( )<sup>10</sup> committed during a domestic relationship, on date ( ) the prosecutor interrogated the wife of the defendant without appointing *ex officio* an authorized representative.

The failure of the competent authorities to appoint authorized representatives to assist victims in the above examples not only breaches the applicable law,<sup>11</sup> but also does not adequately address the need to protect victims belonging to vulnerable groups.

In light of the above, the OSCE recommends the following:

- In cases involving injured parties belonging to vulnerable groups, prosecutors, judges and other relevant authorities should appoint authorized representatives to assist them as required by law.
- Victims advocates from the Victims Assistance and Advocacy Division should proactively assist and protect vulnerable victims during criminal proceedings.
- The Kosovo Judicial Institute should organize joint training sessions for all relevant actors in criminal proceedings (including judges, prosecutors, victims advocates, defence counsel and psychologist/pedagogues) on the legal rights of vulnerable victims.

### **Actions by UNMIK and municipal authorities improperly interfere with the independence of the judiciary**

The OSCE is concerned that actions by an UNMIK official and a letter sent by UNMIK and municipal authorities to courts in ( ) regarding the interpretation of a contract interferes with the independence of the judiciary.

The right to an independent court is a fundamental part of the right to a fair trial as recognised in universal and regional human rights treaties and instruments<sup>12</sup> that are

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<sup>8</sup> Art. 82(2), PCPCK.

<sup>9</sup> Art. 195(1), PCCK.

<sup>10</sup> Art. 153, PCCK.

<sup>11</sup> The three categories of crimes mentioned in the examples fall within the scope of Art. 82(1), no. 2 and no. 3, PCPCK.

directly applicable in Kosovo.<sup>13</sup> In interpreting Article 6 of the European Convention on Human Rights (ECHR), the European Court of Human Rights (ECtHR) stressed that an independent court requires that each judge must be free from outside instructions.<sup>14</sup> For example, where the executive branch provides a binding interpretation of legislation, the court is not independent.<sup>15</sup>

Moreover, the principle of separation of powers is a fundamental element of the concept of rule of law.<sup>16</sup> In line with this principle, the Constitutional Framework for Provisional Self-Government in Kosovo provides that the courts and judges shall be “independent and impartial.”<sup>17</sup>

Despite these legal requirements, the OSCE is concerned about recent cases of interference or improper influence over the courts in Kosovo by non-judicial actors.<sup>18</sup>

In the most recent case, after the ( ) Court certified a property transaction contract between a Kosovo ( ) and a Kosovo Albanian regarding a house located in the ( ), on date ( ) an UNMIK official visited the presidents of the ( ) Court and of the ( ) Court of ( ). According to information available to the OSCE, the purpose of the meeting was to discuss the legality of sales of houses in the ( ), which have been reconstructed by donors on the basis of a Tripartite Agreement between the donor, the beneficiary and the municipality.<sup>19</sup>

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<sup>12</sup> For international treaties and instruments, see, e.g., Art. 10, Universal Declaration of Human Rights (UDHR), UN General Assembly Resolution 217A (III), 10 December 1948; Art. 14(1), International Covenant on Civil and Political Rights (ICCPR), UN General Assembly Resolution 2200A (XXI), 16 December 1966. At the regional level, see Art. 6(1), European Convention on Human Rights, 4 November 1950.

<sup>13</sup> Section 1.3, UNMIK Regulation No. 1999/24 On the Law Applicable in Kosovo, 12 December 1999, as amended, and Section 3.2, UNMIK Regulation No. 2001/9 On a Constitutional Framework for Provisional Self-Government in Kosovo, 15 May 2001.

<sup>14</sup> See European Court of Human Rights (ECtHR), *Campbell and Fell v. the United Kingdom*, No. 7819/77; 7878/77, judgment, 28 June 1984, para. 77 - 82; ECtHR, *Sovtransavto Holding v. Ukraine*, No. 48553/99, judgment, 25 July 2002, para. 80.

<sup>15</sup> See ECtHR, *Beaumont v. France*, No. 15287/89, judgment, 24 November 1994, para. 38.

<sup>16</sup> Each branch of the state (executive, legislative and judiciary) has separate and independent powers and areas of responsibility. For a definition of “rule of law”, see Report of the Secretary General, *The rule of law and transitional justice in conflict and post-conflict societies*, UN-Doc. S/2004/616, 23 August 2004, para. 6. The general principle of an independent judiciary is moreover endorsed by the UN General Assembly (see *Basic Principles of the Independence of the Judiciary*, adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 endorsed by General Assembly Resolutions 40/32 of 29 November 1985, and 40/146 of 13 December 1985).

<sup>17</sup> Sections 9.4.3 and 9.4.6, UNMIK Regulation No. 2001/9..

<sup>18</sup> The OSCE has previously reported concerns regarding interference by UNMIK authorities with the judiciary. See the following reports by the OSCE Mission in Kosovo, Department of Human Rights and Rule of Law, Legal System Monitoring Section: Monthly Report, September 2006 (interference by UNMIK with execution of search warrant); Review of the Criminal Justice System September 2001-February 2002, Themes: Independence of the Judiciary, Detention and Mental Health Issues, pages 25-44, available at: [http://www.osce.org/documents/mik/2002/04/965\\_en.pdf](http://www.osce.org/documents/mik/2002/04/965_en.pdf).

<sup>19</sup> According to information available to the OSCE, UNMIK was concerned that sales of houses in the

Even though the court presidents initially supported the view that the Tripartite Agreement would not prohibit such sales (although there had not been any litigation initiated among the parties of the Tripartite Agreement that would allow the courts to interpret the terms of the contract), the presidents of the courts agreed to suspend the certification of such sales. The court presidents suggested that UNMIK provide a written document stating that such sales should be prohibited unless the parties meet specific conditions.

After the ( ) visit by the UNMIK official, the ( ) court president orally ordered the court clerk responsible for the certification of property transaction contracts not to certify any property transaction contract regarding properties located in the ( ).<sup>20</sup> On 14 May 2007, UNMIK and municipal officials sent a letter to the presidents of the courts explaining that one provision in the Tripartite Agreement should be interpreted as prohibiting the sales of the houses without the consent of the three signatories of the Agreement because the beneficiary intended to return and reside in the house. The letter notes:

‘Article 7 paragraph 1 of the Agreement stipulates that “by signing this Agreement, the Beneficiary reaffirms his/her intention to return to and/or continue to reside in the house.” Therefore, the agreement prohibits the sale and disposal of any of the houses without the knowledge and consent of the other signatories prior to the expiration of a certain period indicated in the agreement.’

The OSCE is concerned that the actions of UNMIK and municipal officials – despite the goal of encouraging the return of non-Albanian communities – directly interfered with the independence of the judiciary. According to the applicable law in Kosovo, the certification of property transaction contracts is a function which is allocated to the courts.<sup>21</sup> Therefore, Kosovo courts, not UNMIK or municipality officials, have the responsibility and the power to interpret the terms of a contract or the legality of the proposed certification of a contract.

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( ) might jeopardize the entire ( ) return project. For more information concerning the ( ) return project, see Danish Refugee Council ( ) webpage: <http://www.drc-kosovo.org/>. For more information on property rights and returns, see the OSCE Report *Eight years after. Minority returns and housing and property restitution in Kosovo*, June 2007, available at: [http://www.osce.org/documents/mik/2007/07/25813\\_en.pdf](http://www.osce.org/documents/mik/2007/07/25813_en.pdf).

<sup>20</sup> On 11 May 2007, the Chief Executive Officer (CEO) of ( ) announced in a televised interview that sales of houses in the ( ) were not possible. At the same time, the Kosovo ( ) who had sold his house in the ( ) stated that he repurchased this house as he had been successfully convinced by the CEO to stay.

<sup>21</sup> See Art. 10.1 of the Law on Transfer of Immovable Property, Official Gazette of the Socialist Republic of Serbia, No. 15/74, 13 April 1974, and No. 14/77, 9 April 1977: “[a] contract pursuant to which the right of use of real estate, or the ownership of real estate, is being transferred must be compiled in written form, and the signatures must be certified in the court.” See also Art. 1(1) and Art. 192 of the Law on Non-Contested Procedure (LNCP), Official Gazette of the Socialist Autonomous Province of Kosovo No. 42, 24 October 1986.

UNMIK and municipal officials influenced the courts' decision to stop certifying the property transactions. The visit by the UNMIK official to the presidents of both mentioned courts and the letter sent to them exerted undue influence on the courts. This influence is strengthened by the fact that UNMIK has the authority to appoint and remove judges from office.<sup>22</sup>

Consequently, the actions by UNMIK and municipal officials were inappropriate and violated the principles of separation of powers and independence of the judiciary.

In light of the above, the OSCE recommends that:

- Judges strictly follow the law, resist pressure -- whether verbal or through other forms of communication -- from non-judicial actors in their work, and report cases of interference to the Kosovo Judicial Council.

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<sup>22</sup> UNMIK Regulation No. 2005/52 On the Establishment of the Kosovo Judicial Council, 20 December 2005, Section 1(5).