



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

Department of Human Rights and Rule of Law

***PROPERTY RIGHTS IN KOSOVO
(January 2002)***

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Annex: Property in Kosovo – Historical Overview

Note

The sources of domestic law quoted in this report are unofficial translations. The only official translation of domestic law in Kosovo is to be found in the UNMIK Official Gazette. To date, none of the domestic laws, apart from UNMIK Regulations, on property have been published in the Gazette. Whereas the Gazette has electronically published translations into Albanian and Serbian of all UNMIK Regulations from 1999 and 2000, very few regulations from 2001 and none from 2002 have been officially translated.

I. Executive Summary

Property rights in Kosovo continue to be in crisis. The mechanisms responsible for resolving property disputes are not fully functioning. Since the last OSCE report on property, the property laws still have not been clarified. There is still a lack of guidance on what actions should be taken to ensure a harmonised approach to solve property rights violations. Illegal occupation, lack of equal access to mechanisms for the protection of property rights, strategic sales of Kosovo Serb property and arbitrariness in the judicial system and in municipal structures continue. Additionally, considering the current uncertainty in the law and that the domestic applicable law enacted prior to 1989 was modeled on the needs and interests of a command-economy, it is evident that comprehensive legal reform is essential. The resulting effect from the lack of such reform is a systematic and widespread infringement of housing and property rights.

This Report offers an overview of the progress made by the two main institutions responsible for ensuring effective remedies for property rights violations, the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), and the Regular Courts. In order to place the subject in context, the Report also provides an outline of internationally recognised property rights standards, the legislation issued by United Nations Interim Administration Mission in Kosovo (UNMIK), and the domestic applicable law. In order to address a number of major problems, this report also makes recommendations for action. This report focuses on three main areas:

1) OSCE reported in September 2000 that the lack of clarity in property laws was a key problem, which interfered with the equal enjoyment of property rights in Kosovo. Such lack of clarity reflects an inadequate implementation of the law by authorities exercising state functions. A major improvement in this respect was the adoption of the rules of procedure of the HPD and the HPCC. Nevertheless, the applicable law on property has still not been officially compiled and published, and an authoritative interpretation is lacking. Until this occurs, legal certainty regarding property rights is at stake. A clear example of this is the different interpretations of the hierarchy of laws and the validity of legal acts performed between March 1989 and June 1999. The key recommendations in this report regarding property laws are:

- **Clarification of the law, through authoritative interpretation, as well as the publication of the property law is urgently required.**
- **The law must be made available in a timely manner to the judiciary, legal community and civil servants in all official languages as mandated in UNMIK Regulations.**

2) The HPD and the HPCC has as its mandate, *inter alia*, the resolution of property disputes, the administration of abandoned housing and the provision of guidance on specific issues to UNMIK and other international actors. The institution received a Regulation that enabled it to carry out its mandate after a year during which a legal vacuum existed. In addition, the 5 November 2001 agreement between UNMIK and the Government of the Federal Republic of Yugoslavia made it possible for the HPD to launch claim collection activities in Serbia proper and Montenegro. Despite such developments, the institution is not yet fully functional. The current financial situation of the institution has forced its management to minimise the activities inside Kosovo and focus on claim collection activities in Serbia proper and Montenegro. According to the current financial contingency plan, the institution will gradually close down programmes and will cease all activities by the summer of 2002.

The success of the HPD in fulfilling its mandate is essential to the return and reintegration process for Kosovo's minorities. At present, no connection exists between the programme and/or timetable of IDP returns and reintegration activities, on the one hand, and the property claims assessment and notification or eviction process, on the other.

The key recommendations of this paper regarding the adequate allocation of resources regarding the HPD and the HPCC are:

- **Habitat and UNMIK should give increased prioritisation to the allocation of resources to the HPD and HPCC. Resources must be allocated on a sustainable manner so the institution can fulfil its mandate adequately.**
- **Resources should be administered directly by the HPD. UNMIK should ensure that HPD and HPCC function within the UNMIK institutional framework and examine ways in which co-operation or integration can be enhanced. The HPD and the HPCC cannot fulfil their mandate without support from the other UNMIK branches and bodies.**

There are a number of other issues, which the HPD and the HPCC should address in order to adequately fulfil its mandate, assuming funding will be made available. The key recommendations regarding the HPD and the HPCC are:

- **The institution has to provide guidance on property issues to UNMIK and all institutions under its umbrella.**
- **The institution should improve its efficiency in fulfilling its mandate in particular, speeding the resolution of claims and the enforcement of decisions.**
- **Enhancing co-operation with other bodies and institutions exercising state functions with responsibilities for housing rights, in order to prevent violations of housing rights and would to create a solid basis for the efficient design and functioning of housing policies.**

3) The civil legal system requires a general reform that takes into account the new institutions and social realities in Kosovo and that deals with the effects of the conflict. The first and foremost concrete problem to be addressed is the confusion over jurisdiction between Regular Courts and the HPCC. Second, the large backlog of pending property cases must be adjudicated and, in particular, those pending from the period before 12 June 1999, those whose files were lost or destroyed since the armed conflict, and those in which a institution exercising state functions is a party to the dispute. Finally, access of minorities to mechanisms for the determination of their property rights and obligations remains a main concern of the OSCE in consideration of the information contained in this report. The key recommendations in this report regarding Regular Courts and the overall amelioration of the civil jurisdiction are:

- **An inter-agency steering committee should be established to develop, recommend, promote and draft legislation and other documents aimed at addressing problems identified in this report. Such a working group should have full endorsement from the highest level of the organisations involved.**
- **The relevant procedural laws, including the Code of Civil Procedure, Book of Rules of Regular Courts and the Law on Administrative Procedure should be amended, through Regulation or Administrative Directives to ensure the integration of the HPD and HPCC in the legal system and guarantee the right to due process.**
- **The Supreme Court role in conflicts of jurisdiction should be clarified by the Supreme Court itself through jurisprudence and by the inter-agency working group on conflict of jurisdiction. The outcome should be incorporated to the overall legal reform.**
- **A clear determination should be made in the context of legal reform proposed in this report on the status that should be given to pending cases in court presented before the establishment of UNMIK.**

I. OSCE Mission in Kosovo and Property Rights

One of the primary obligations of the international civil presence under United Nations (UN) Security Council Resolution 1244 is to “promote and protect human rights”.¹ The Secretary General’s report of 12 July 1999 assigned the lead role in human rights to the OSCE, the institution building Pillar within UNMIK. One of the key tasks for the OSCE Mission in Kosovo (OMIK) included in the OSCE Ministerial Council Decision N. 305 is human rights monitoring and capacity building. Paragraph 87 of the Secretary General’s report states that,

*‘UNMIK will have a core of human rights monitors and advisors who will have unhindered access to all parts of Kosovo to investigate human rights abuses and ensure that human rights protection and promotion concerns are addressed through the overall activities of the mission. Human rights monitors will, through the Deputy Special Representative for Institution-building, report their findings to the Special Representative. The findings of human rights monitors will be made public regularly and will be shared, as appropriate, with United Nations human rights mechanisms, in consultation with the Office of the United Nations High Commissioner for Human Rights. UNMIK will provide a co-ordinated reporting and response capacity’*²

The Human Rights Division (HRD) of the Human Rights and Rule of Law Department of the OSCE Mission in Kosovo has focused on property and housing rights, on the right to due process and the right to an effective remedy. These rights include: access to assistance for reconstruction of residential property, access to temporary shelters for homeless persons and access to the mechanisms for resolution of residential and non-residential property disputes (HPCC and Regular Courts). OSCE’s focus also includes monitoring evictions, expropriation, municipal and central administrative procedures and practices and legislative reform affecting property rights.

Since the last report,³ OSCE has monitored the implementation of property legislation and the activities of the HPD, municipal authorities and law enforcement agencies. In addition, OSCE has shared information with HPD for the purpose of co-ordinated action, including the facilitation of claim applications for groups with restricted freedom of movement. Further, it has increased awareness within target groups, including the general public, minorities and civil servants regarding mechanisms available for the purpose of protecting property rights and the ways in which these mechanisms may be accessed. With reference to OSCE’s last report, it may be stated that the recommendations for action by OSCE have been fulfilled, in particular to facilitate full minority access to the mechanisms by assisting the HPD in organising mobile teams, to support public awareness by distributing information leaflets and by training the judiciary. Nevertheless, OSCE is aware of the need to continue conducting such activities. Of course, on-going identification of problems and solutions serve to define OSCE activities and objectives.

OSCE was involved in the process of the creation of an ad hoc institution mandated to solve residential property disputes. OSCE was also involved in providing guidance to UNMIK on property matters i.e. the HPD and the HPCC. In addition, OSCE has participated in the most recent legal developments within UNMIK, monitored the Regular Courts and advocated for a human rights compliant application of policies at the central and municipal level. OSCE has also intervened with authorities exercising state functions when serious allegations of infringement of

¹ UNSCR 1244 par. 11(j)

² S/1999/779 12 July 1999

³ See OSCE Background Report, The Impending Property Crisis in Kosovo (September 2000).

property rights have been brought to its attention. With its partners in the international community and other relevant actors, OSCE will continue actively to promote legal reform. This relates particularly to security of tenure and due process. Furthermore, OSCE's intervention methods are in the process of being formulated into internal standard operating procedures in order to enhance the attainment of systematic, accurate and reliable results. In partnership with other institutions and property stakeholders, OSCE will continue promoting implementation of already applicable legislation. It will also continue to identify areas for reform and promote subsequent legislation, and through co-operation with other OSCE Missions, promote regional approaches and policies with regard to the implementation of property rights.

Finally, OSCE supports the establishment of policies and control mechanisms to ensure that staff members, local and international, working for the international agencies in Kosovo do not obstruct the adequate implementation of property laws. UNMIK and other international agencies present in Kosovo should adopt and implement such mechanisms as the international community did, for instance in Bosnia and Herzegovina. OSCE recalls its own Code of Conduct for mission members: "Members of OSCE Missions are to respect the laws of the countries in which they enjoy privileges and immunities". Disciplinary action may be taken against a staff member for non-compliance with the OSCE Code of Conduct.

II. Introduction to the legal framework in Kosovo

1. UN Security Council Resolution (UNSCR) 1244

UNSCR 1244, paragraph 11 (j), recognizes all international human rights standards as applicable in Kosovo. This protection is further developed in the applicable law.

2. International human rights standards

i. ECHR

The following provisions of the ECHR are relevant to property rights in Kosovo:

- right to property (Article 1 Protocol 1);
- right to a due process (Article 6);
- right to an effective remedy (Article 13);
- prohibition of discrimination (Article 14);
- prohibition of abuse of rights (Article 17).

ii. International Covenant on Economic, Social and Cultural Rights (ICESCR)

The UN Committee of the ICESCR has produced an internationally recognised body of law. The interpretation given by the Committee to the rights listed below is essential to assessing the performance of the authorities exercising state functions in the promotion and protection of human rights.⁴ In addition, it is impossible to assess the fulfilment of property rights (residential and non-residential) in Kosovo without considering housing rights. The following provisions of the Covenant contain a reference to authorities exercising state function obligations regarding housing rights:

- State obligations regarding economic social and cultural rights (article 2);
- Right to adequate housing (article 11).

iii. Other international human rights standards

Given that UNSCR 1244 implies that UNMIK is tasked to promote and protect all internationally recognised standards, including international human rights standards which have strong implications for property and housing rights. For example, the International Covenant on the Elimination of All Forms of Racial Discrimination (CERD), the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), and the Convention on the Rights of the Child (CRC) set standards in relation to property rights for their target groups. UNMIK Regulation 2000/59, of 27 October 2000, on the applicable law, lists the most relevant international instruments and makes them directly applicable in Kosovo.

The Constitutional Framework for Provisional Self-Government in Kosovo, enacted on 15 May 2001 by the SRSB through UNMIK Regulation 2001/9 incorporates the main international human rights standards into the domestic legal framework in Kosovo. OSCE notes, however, that ICESCR is not included in the Constitutional Framework, although it is included in UNMIK Regulation 2000/59, amending UNMIK Regulation 1999/24 on the law applicable in Kosovo and

⁴ See General Comment N. 3 and General Comment N. 7 of the United Nations Committee on Economic, Social and Cultural Rights.

therefore shall be observed by all persons undertaking public duties or holding public office in Kosovo (see below).

3. Applicable law

i. UNMIK Regulation 2000/59, amending UNMIK Regulation 1999/24 on the law applicable in Kosovo

“The applicable law in Kosovo is defined by Regulation 2000/59 amending UNMIK Regulation 1999/24 on the law applicable in Kosovo. According to the Regulation, the applicable law is the regulations promulgated by the SRSG and the law in force in Kosovo on 22 March 1989 (with the regulations taking precedence in cases of conflict).”⁵

ii. UNMIK Regulations establishing the mandate of HPD and HPCC

UNMIK set up the HPD and the HPCC. The HPD has been given exclusive jurisdiction over the most controversial residential property claims, including:

- claims for restitution of property lost through discrimination;
- claims for registration of informal property transactions; and
- claims by refugees and IDPs who have lost possession of their homes and who wish to return or transfer their property.

Jurisdiction over all other property disputes remains with the local courts. The HPD is also to provide overall direction on property matters to UNMIK, including the recommendation of policies and the provision of legal advice on housing and property law. Furthermore, the HPD shall conduct an inventory of abandoned state, private or socially owned property.⁶ The following UNMIK Regulations established the mandate of the HPD and the HPCC and its rules of procedure:

- UNMIK Regulation 1999/23 on the establishment of the HPD and HPCC (15 November 1999);
- UNMIK Regulation 2000/60 on residential property claims and the rules of procedure and evidence of the HPD and HPCC (31 October 2000).

⁵ UNMIK Regulation 2000/59 states that:

“2. If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 3 of the present regulation, the court, body or person shall, as an exception, apply that law.

3. In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards, as reflected in particular in: the Universal Declaration on Human Rights, European Convention on Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, etc...);

4. No person undertaking public duties or holding public office in Kosovo shall discriminate against any person on any ground such as sex, race, colour, language, religion, political or other opinion, natural, ethnic or social origin, association with a national community, property, birth or other status.”

⁶ Socially owned property is defined in N. III of the Preamble of the Constitution of SFRY of 1974. The concept is further defined in the body of the Constitution.

iii. Other relevant UNMIK Regulations for property rights

- UNMIK Regulation 1999/10 on the repeal of discriminatory legislation affecting housing and property rights (13 October 1999);
- UNMIK Regulation 2000/38 on the establishment of the Ombudsperson Institution in Kosovo (30 June 2000);
- UNMIK Regulation 2000/47 on the establishment of the status, privileges and immunities of KFOR⁷ and UNMIK and their personnel in Kosovo (18 August 2000);
- UNMIK Regulation 2000/53 on construction (25 September 2000);
- UNMIK Regulation 2000/54 amending UNMIK Regulation 1999/1 as amended, on the authority of the interim administration in Kosovo (27 September 2000);⁸
- UNMIK Regulation 2001/9 on a Constitutional Framework for Provisional Self -Government in Kosovo (15 May 2001);
- UNMIK Regulation 2001/17 on the registration of contracts for the sale of real property in specific geographical areas of Kosovo (22 August 2001).

iv. Domestic applicable law

There are substantial factors that interfere with the full realisation of property rights. These include ongoing ethnic tension, the current weakness and under-development of the economy as it transforms from a command- to a market-based economy and the results of previously applicable discriminatory laws and policies. However, when one adds to these, the current uncertainty in the law and that the domestic applicable law enacted prior to 1989 was modelled on the needs and interests of a command-economy, one sees that comprehensive legal reform is essential.

In accordance with UNMIK Regulation 2000/59, amending UNMIK Regulation 1999/24, the domestic applicable law in force on 22 March 1989 in Kosovo is a secondary source of law to UNMIK Regulations. The domestic law in Kosovo after 22 March 1989 is only applicable when the law covers “new grounds” and is “not discriminatory”.

Some of the domestic laws in force in Kosovo on 22 March 1989 which are relevant for property rights are:

- Law on Basic Property Relations (Official Gazette of SFR Yugoslavia, No.6/80);
- Law on Transfer of Real Property (Official Gazette of SAP Kosovo, No. 45/81, 29/86 and 28/88);
- Law on Expropriation (Official Gazette of SAP Kosovo, No. 37 /71);

⁷ "KFOR" means the specially constituted force, composed by the North Atlantic Treaty Organization, including its member States, its subsidiary bodies, its military Headquarters and national elements/units, and non-NATO contributing countries.

⁸ This Regulation grants UNMIK powers to administer socially owned property.

- Law on Land for Construction (Official Gazette of SAP Kosovo, No. 14/80 and 42/86);
- Law on Housing Relations (Official Gazette of SAP Kosovo, No. 11/83, 29/86 and 42/86);
- Law on Co-ownership of an Apartment (Official Gazette of SAP Kosovo, No. 43/80 and 22/87).

In terms of competence, jurisdiction and procedure the following are the most relevant:

- Law on Regular Courts (Official Gazette of SAP Kosovo No. 21/78);
- Code of Civil Procedure (Official Gazette of SFR Yugoslavia No. 4/77, 36/77, 36/80, 69/82, 58/84 and 74/87)⁹.

4. Problems deriving from the current legal framework in Kosovo

i. Hierarchy of laws

UNMIK Regulation 2000/59 has led to some confusion. Firstly, the Regulation states that subsidiary instruments of UNMIK Regulations prevail over the domestic laws. However, the question of what qualifies as “subsidiary instruments” is open to interpretation since it is not defined in the text of Regulation.¹⁰ Secondly, it states that laws in force prior to 22 March 1989 prevail over those enacted between that date and the creation of UNMIK on 12 June 1999. Does this mean that legal acts – for example, the transfer of real property - carried out in accordance with the law in the intervening period are void? This question is expanded on, below. Thirdly, the laws in force after 22 March 1989 are applicable if they cover “new grounds” and are not discriminatory.¹¹ This, again, raises a question of interpretation (what are ‘new grounds’?). Furthermore, we do not have information on any instance where laws enacted after 22 March 1989 have been applied by the authorities other than by parallel structures in the three northern municipalities or in enclaves. Legal acts carried out by parallel structures, in the name of any other authority than UNMIK’s, do not have legal value in the territory of Kosovo.

On 22 March 1989, the Serbian Parliamentary Assembly withdrew the autonomy enjoyed by the Socialist Autonomous Province of Kosovo. After that date legislation of a discriminatory nature was enacted by the Serbian Assembly affecting all ethnic groups in Kosovo. For example, the law on Changes and Supplements on the Limitation of Real Estate Transaction (Official Gazette of the Republic of Serbia No. 22/91) imposed limitations on real estate transactions between individuals of different ethnic groups, regardless of their ethnicity.¹² As a result some laws aiming to promote economic reform affecting residential and non-residential property have been disregarded under UNMIK’s rule with negative repercussions. For example the Law on Housing

⁹ After 1989 the Code of Civil Procedure has been amended in several occasions Official Gazette SFR Yugoslavia No. 57/89, 20/90, 27/90, 35/91, 27/92, 31/93, 24/94, 12/98 and 15/98).

¹⁰ However, Section 2 of UNMIK Regulation 2000/59 states that courts may request clarification from the SRSG in connection with the implementation of the Regulations on the applicable law.

¹¹ See supra 6.

¹² Nevertheless, the Law on Changes and Supplements to the Law on Transfer of Real Property (Official Gazette of SAP Kosovo No. 28/88) amending the Law on Transfer of Real Property (Official Gazette SAP Kosovo No. 45/81 and 29/86) also prohibits the transfer of real estate between citizens of different “nations” from the territory of the Socialist Autonomous Province of Kosovo. Please note that this law was enacted by the Assembly of the Autonomous Province of Kosovo in 1988.

(Official Gazette of the Republic of Serbia No. 50/1992 and No. 45/95), the Enterprise Law (Official Gazette of Federal Republic of Yugoslavia No. 29/96 and 29/97), the Law on Public Survey and Registration of Real Estate Rights (Official Gazette of the Republic of Serbia No. 83/92 and No. 53/93).

Furthermore, there is no independent body interpreting the law and systematically excluding all provisions of a discriminatory nature. The Constitutional Framework on Provisional Self-Government for Kosovo, does not explicitly grant authority to the Special Chamber of the Supreme Court to make such determination and there is no other body mandated to do so.¹³ The result is that each official holding public office is forced to make his/her own interpretation, usually excluding the application of any law passed after 22 March 1989 because it is presumed to be discriminatory. In the absence of a judicial authority deciding this matter, there is no safeguard to ensure that the law is interpreted according to sound legal principles, as opposed to other criteria including political expediency.

ii. Validity of legal acts concluded between 22 March 1989 and 12 June 1999

The only explicit legal recognition given to legal acts performed between 22 March 1989 and 12 June 1999 is in UNMIK Regulation 2000/60 on the rules of procedure of the HPD and HPCC which states that “all property validly acquired at the time of acquisition remains valid notwithstanding the change in the applicable law in Kosovo”.¹⁴ The legal framework as it stands has pernicious results for legal certainty, especially regarding the validity of legal acts completed during the so-called discriminatory period (22 March 1989 and 12 June 1999). OSCE has observed that legal acts performed during that period, such as transfers of property or the denationalisation process, are not always recognised. International and national officials often refuse to recognise the validity of acts performed in that period, regarding them as null and void. This peremptory action is based on a false construction of the applicable law and leads to violations of property rights. For example, Municipal Cadastre Officers have refused to make inscriptions in the cadastre records in light of decisions adopted after March 1989. It has often been observed by OSCE that the refusal is proclaimed orally and that no legal reasoning for the refusal is provided.

¹³ UNMIK Regulation 2001/19 on a Constitutional Framework for Provisional Self-Government in Kosovo states in Chapter 9 Section 4 the competencies of the Special Chamber of the Supreme Court on Constitutional Framework Matters:

“9.4.11 A Special Chamber of the Supreme Court shall decide:

(a) At the request of the President of Kosovo, any member of the Presidency of the Assembly, any Assembly Committee, no fewer than five members of the Assembly, or the Government, whether any law adopted by the Assembly is incompatible with this Constitutional Framework, including the international legal instruments specified in Chapter 3 on Human Rights;

(b) In the event of disputes between or among Provisional Institutions of Self-Government, or between a Provisional Institution of Self-Government and an Assembly Committee, one or more members of the Presidency of the Assembly, or one or more members of the Assembly on the extent of their rights and obligations under this Constitutional Framework;

(c) At the request of any independent body or office referred to in Chapters 10 and 11, whether a decision of a Provisional Institution of Self-Government infringes upon the independence and responsibilities of the relevant independent body or office; and

(d) At the request of the Office of the Public Prosecutor, whether an act by a member of the Assembly, a member of the Government or the President of Kosovo constitutes an official act and as such is covered by immunity under this Constitutional Framework.”

¹⁴ Section 2 Paragraph 1 of UNMIK Regulation 2000/60.

5. Availability of the applicable law in Kosovo

According to the jurisprudence of the ECtHR, law must be accessible, clear and predictable. These three criteria must be met for law to exist.¹⁵ OSCE has assisted the Department of Justice with the distribution of UNMIK Regulations as well as in producing compilations and unofficial translations of the applicable law. Nevertheless, state institutions, both administrative and judicial, often do not physically have the law in their possession. OSCE has often interviewed judges regarding concrete issues on the applicable law (UNMIK Regulations and domestic law) and only obtained vague answers. Often, OSCE has asked for justification in law for a decision and the state official has not been able to provide an authoritative legal basis. This has largely been because he/she does not physically have a copy of the law with which to give an answer. The simple absence of a copy of the law leads to failures in its application.¹⁶

6. Recommendations regarding the applicable law in Kosovo

- **UNMIK should compile and officially publish all property-related laws;**
- **The law must be made available in a timely manner to the judiciary, legal community and civil servants in all official languages as mandated in UNMIK Regulations. This is the responsibility of the Office of the Legal Adviser, the Department of Justice and the Ministries of the provisional institutions of self-government;**
- **UNMIK, should issue a Regulation on the hierarchy of property laws in Kosovo and on the validity of acts performed between March 1989 and June 1999.**

III. HPD and HPCC

1. Background Information

The HPD and HPCC are an institution established by UNMIK Regulation 1999/23 in November 1999. They are mandated to resolve disputes related to residential property resulting from discriminatory legislation applied in Kosovo since 1989 and the armed conflict which ended in June 1999. The massive displacement¹⁷ during and after the conflict led to widespread abuse of residential housing and property rights. The HPD has a broad mandate which includes collecting claims, enforcement of the HPCC's decisions and executing the inventory of abandoned housing in order to resolve, on an interim basis, housing needs of internally displaced persons (IDPs) and refugees. The United Nations Commission for Human Settlements (UNHCS)-Habitat provides technical assistance in supporting the institution.

¹⁵ Accessibility, clarity and predictability are three qualitative requirements that the law must satisfy. These requirements appear in the jurisprudence of the ECHR, more precisely in the following decisions: *Silver and others v. United Kingdom*, A 61 1983 and *Sunday Times v. United Kingdom*, A 30, 1975.

¹⁶ The Administrative Department of Public Services is publishing the Official Gazette of Kosovo that contains UNMIK regulations and administrative directions (cf. note page 4).

¹⁷ According to the Framework for Return (2001) of the Joint Committee on the Return of Kosovo Serbs, 215,104 persons are displaced in Serbia and Montenegro as of January 2001. According to the report on the human rights findings of the OSCE Mission in Kosovo "Kosovo/Kosova: As seen as told Part II" 863,500 people were displaced as a result of the armed conflict as of June 1999.

In October 2000, as a consequence of concerted action from various entities, including OSCE,¹⁸ the SRSG promulgated Regulation No. 2000/60 on Residential Property Claims and the Rules of Procedure and Evidence of the HPD and HPCC.

Chapter 11 Section 1 paragraph (g) of the Constitutional Framework for Provisional Self-Government in Kosovo (UNMIK Regulation 2001/9) grants independence to the HPD and the HPCC from the Provisional Institutions of Self-Government (PISG). The Framework refers to the instruments establishing the HPD and HPCC for its powers, obligation and composition.

Until UNMIK Regulation 2000/60 was promulgated, neither the HPD nor the HPCC had formal procedures in place, though claims over residential property were accepted in their office in Prishtine/Pristina. Due to the lack of procedure, HPCC could not begin to review and settle disputes over residential property nor could the HPD conduct an inventory of unoccupied housing in order to supervise its use for humanitarian purposes on a temporary basis. Prior to this, UNMIK Regulation 1999/23 had taken away the broad scope of the Regular Courts' jurisdiction and that of the municipalities and instead granted it to the HPD and the HPCC, respectively. Thus, Regulation 2000/60 was vital for the process not only of receiving, but also deciding, claims. Notwithstanding their lack of authority, many municipalities had started to allocate vacant residential property according to unlawful criteria and large numbers of individuals were squatting.

Since OSCE issued its last report on property, UNMIK Regulation 2000/60 was enacted by the SRSG and the HPD made progress on its deployment across Kosovo.¹⁹ Today the HPD has four Regional Offices in Prishtine/Pristina, Gjilan/Gnjilane, Mitrovice/Mitrovica and Peje/Pec, nearly all municipalities have been trained in HPD procedures, 7,956 claims have been collected, 936 properties are under administration and 151 permits have been issued. The HPD has enforced eleven administrative eviction decisions in accordance with its mandate under Section 12 of UNMIK Regulation 2000/60 and 26 illegal occupants moved out voluntarily. The mechanism foreseen in UNMIK Regulations 1999/23 and 2000/60 has settled 401 disputes. A dispute can be settled through mediation, i.e., where both parties agree to a solution proposed by the HPD, or through a final decision of the HPCC. Out of the 401 disputes, 159 have been settled through mediation by the HPD and the HPCC has issued 239 decisions. To date only eleven decisions have been enforced and 26 illegal occupants moved out voluntarily. The HPD is staffed with eighteen internationals and 150 local staff out of which 23 are members of national minorities. An agreement was signed on 1 November 2001 between the FRY, the Government of the Republic of Serbia, the Coordination Center for Kosovo and Metohija and UNCHS-Habitat allowing HPD to collect claims in Serbia proper and Montenegro. Consequently, permanent and satellite offices have been opened to perform that function in Serbia, although there is no funding for the offices in Montenegro.

Claims Filed	Claims Settled	Decisions Issued by HPCC	HPCC Decisions Enforced
7,956	401	239	11

Properties under inventory	Properties under administration	Properties allocated	Applications Received
2,267	936	151	Not available

¹⁸ See OSCE Background Report, The Impending Property Crisis in Kosovo (September 2000).

¹⁹ The figures in this section date from 24 January 2001. The HPD provided them to OSCE on 30 January 2002.

Despite the positive developments, the HPD and the HPCC face a number of obstacles to fulfil their mandates. First, the funding granted to the institution will run out by March 2002. Unless, a funding gap of approximately US \$8 million is filled, the HPD will not be able to function properly. In addition, the funds are allocated to certain geographical areas or programmes and not to the overall activities of the institution. Second, the HPD and the HPCC are not receiving enough support from the other structures within UNMIK. The lack of support has adverse effects on the administrative performance of the institution. In addition, UNMIK has not emphasised the importance of the mandate of the HPD in front of the municipalities. For instance, the HPD reported difficulties when requesting authorisation to use premises under UNMIK administration. Third, the lack of administrative support coming from UNCHS-Habitat, pursuant to the letter of agreement dated 14 January 2000, distracts the senior management of the HPD from performing its substantive duties since it has to deal with procurement and logistical issues. Moreover there is a shortage of vehicles, radios and other essential assets, such as office space. According to a representative of the HPD, the institution will not process claims after March 2002 and enforcement will finish by July 2002. The local staff will be reduced by 45 and also some international staff will not have their contracts renewed. Field activity inside Kosovo will be reduced to an absolute minimum. All these circumstances are a major obstacle for the institution's aims and goals as established in its mandate. What is more, it is not acceptable that the institution survives on a non-sustainable day-to-day allocation of resources.

2. HPCC

i. Mandate and Composition

The mandate of the HPCC is described in Section 2 of UNMIK Regulation 1999/23. The HPCC, independent from HPD, is mandated to “*settle private non-commercial residential property disputes until the SRSG determines that local courts are able to carry out the mandate entrusted to the Commission.*” As an exception to the jurisdiction of local courts, the HPCC has exclusive jurisdiction to settle categories of claims as defined in section 1.2 of Regulation 1999/23. Section 1.2 reads as follows:

As an exception to the jurisdiction of the local courts, the Directorate shall receive and register the following categories of claims concerning residential property including associated property:

- a) Claims by natural persons whose ownership, possession or occupancy rights to residential real property have been revoked subsequent to 23 March 1989 on the basis of legislation which is discriminatory in its application or intent;*
- b) Claims by natural persons who entered into informal transactions of residential real property on the basis of the free will of the parties subsequent to 23 March 1989;*
- c) Claims by natural persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred.²⁰*

²⁰ Hereinafter referred to as Categories A, B and C.

The HPCC may refer specific separate parts of claims to local courts or administrative bodies and it may issue provisional measures of protection. According to the Regulation, final decisions of the HPCC are binding and enforceable and may not be the subject of judicial or administrative review.²¹

The HPCC is composed of two international experts and one Kosovar expert in the field of housing and property law. These experts, known as Commissioners, were appointed by the SRSG for an initial period of one year. Under UNMIK Regulations 1999/23 and 2000/60, the HPCC is entitled to access all records related to the subject matter of its investigation.

ii. Extension of the Deadline to File Claims

On 5 November 2001 the SRSG extended the deadline for submissions of claims from 1 December 2001 until 1 December 2002 in accordance with section 3.2 (a) and (b) of UNMIK Regulation 2000/60.²² The extension of the deadline is part of an agreement reached between the SRSG and the Government of the FRY on the provision of security and other guarantees for the Serb minority in Kosovo.²³

It is important to point out that despite the deadline imposed by the international community, there might be potential claimants who do not file their claims before that date. By no means should such a deadline imply a *de facto* derogation of the right to property of those claimants nor to due process in the determination of their civil rights and obligations. Accordingly, in these circumstances the jurisdiction to resolve those ownership disputes enumerated in Section 1.2 of UNMIK Regulation 1999/23 should be returned to the Regular Courts upon the expiry of the deadline on 1 December 2002.

iii. Claim Collection Activities

The HPD Regional Offices are in charge of collecting claims. The Regional Offices act as first control bodies and examine whether or not the claim comes within the jurisdiction of the HPCC. If the claim does not fall within any of the three categories (listed above), the claimant will be advised to go to the relevant jurisdictional body. The rejection and referral are not given in writing.

If the claim is accepted at the Regional Office, a legal unit in the HPD Headquarters in Pristine/Pristina provides a second intake control and if the claim falls outside the competence of the HPCC it will reject the claim informing the party in writing of other potential remedies. If the claim falls into one of the three categories, it will be registered and scheduled for examination by the HPCC. Notwithstanding these controls, the HPCC may still conclude that the claim does not satisfy any of the three categories and so decide to reject the claim. It should be noted that claims could fall under more than one of the three categories, the most frequent being a mix of Categories B and C. According to the figures provided by the HPD, 7,956 claims have been registered, as of 24 January 2002. By extrapolating the HPCC's recently increased resolution rate

²¹ Section 2.7 of UNMIK Regulation 1999/23 reads: Final decisions of the Commission are final and binding.

²² Section 3.2 of UNMIK Regulation 60 reads: Claim under section 1.2 (a), (b) or (c) of UNMIK Regulation No. 1999/23 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:

- 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.

²³ The agreement aimed to ensure the endorsement of Serbian and Yugoslav authorities of the participation of Kosovo Serbs in the general elections of 17 November 2001.

(228 cases during October and November 2001), it would take 46 years at the current level of resources to settle all disputes if it receives the 63,000 claims it currently estimates may be forthcoming.

HPD representatives recently stated there are not many claims remaining inside Kosovo. It may be true that there are no waiting lists to file claims in the Regional Offices, but without HPD having been present in all parts of the territory, and bearing in mind freedom of movement limitations, systematic efforts should be made to establish that everyone who wishes to make a claim has in fact been given the opportunity to do so.

iv. Resolution of claims

The legal department of HPD is in charge of processing claims and reviewing them before they are examined in front of the HPCC. The HPCC held its 10th Session²⁴ in December 2001. So far, 861 cases are under review. As stated in the introduction, the HPCC has issued 239 decisions. A total of eleven evictions have been enforced as of 16 December 2001. In addition, two occupants moved voluntarily. The HPD is responsible for enforcing the decisions. Unless the decision-making process speeds up substantially in the next sessions of the HPCC, the risk is that its future impact on the returns process will be minimal (see above). 159 claims were settled through mediation prior to its examination by the HPCC. Efforts should be made to improve the efficiency of the mechanism, in particular, the speed in which claims are settled and decisions executed. In this regard all necessary resources, including full security support by law enforcement agencies should be provided to the institutions.

HPCC decisions have not been made public for legal analysis, which constitutes an exception to the principle of court proceedings being public. The primary reason behind the lack of availability of decisions is the need to keep the identities of the parties confidential. This is due to the potential security risks that a decision may entail for the prevailing party. Whereas confidentiality on the identity of parties should be respected for this reason, legal interpretation of the facts and the law by the HPCC should be available to the public.

The mechanism does not request the claimant to state his/her ethnicity, so there is no way to provide an ethnic breakdown. However, there is statistical data available regarding the number of claims falling under each of the three categories of UNMIK Regulation 1999/23. HPD Officials have observed that most of Category C claims are believed to be filed by individuals of Kosovo Serbian ethnicity and other minorities, while Category A claims are mostly filed by individuals of Albanian ethnicity. The percentage of Category A claims is very low in comparison with the percentage of Category C claims filed.

As of 24 January December 2002	Category A	Category B	Category C	Category B+C	Total
No. of claims filed	602	255	7067	32	7,956
% of claims filed	7,5%	3,2%	88,8%	0,5%	100%

²⁴ The HPCC decides on disputes and on additional rules of procedure in plenary sessions, which take place periodically. Decisions are taken by consensus or by majority vote. See Chapter III of Regulation 2000/60 for more details on the rules of procedure of the HPCC.

It is worth considering possible reasons as to why this is the case. A combination of the following scenarios may illustrate some of the reasons.

Reports of forced evictions due to discriminatory treatment against Kosovo Albanians regarding, inter alia, political participation, labour rights and housing were made public during the 1990s, feeding conflict in Kosovo, which can still be seen today. Those Kosovo Albanians who lost their houses or flats under discriminatory measures now have the chance to claim them through the HPCC. Unless the number of Category A claims increases in the near future, the low number of claims may lead to the argument that the levels of discrimination regarding housing rights suffered by the Kosovo Albanian population during the 1990s did not merit an entire mechanism dedicated to redress them.

Furthermore, the low number of Category A claims may be because Kosovo Albanians who lost their housing during the 1990s are illegally occupying other residences since NATO intervened and therefore do not feel any driving need to enter into complex legal processes to regain their occupancy rights. If, as it is believed, a high number of Kosovo Albanians are illegally occupying Kosovo Serb-owned flats or houses, when the HPCC begins issuing large numbers of decisions the claims under Category A could increase substantially.

Also, many Kosovo Albanians did not realistically have access to the process of privatisation of socially owned housing that occurred during the 1990s. Consequently, they have occupancy rights as opposed to a right of full ownership, which may not be perceived as having sufficient value to make the pursuit of a claim worthwhile. Furthermore, many Kosovo Albanians may not even be aware of the possibility to claim occupancy rights lost during the 1990s through the HPCC, wrongly believing that the mechanism is limited to full ownership claims.

Internally displaced Kosovo Serbs file most of Category C claims. It is too early to assess the effects of the restitution of property rights to IDPs. The fact remains that, unless living conditions ameliorate substantially for minorities, there is a real risk that many of the claimants will simply attempt to sell their property.

3. Deployment and activities of the HPD

i. Administration of Abandoned Property and the Allocation Scheme. Delegation of Authority to Municipalities

Section 1.1 of UNMIK Regulation 1999/23 mandates the HPD to conduct an inventory of abandoned private, state and socially owned housing and supervise its utilisation or rental for humanitarian purposes.²⁵ Section 1 of 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”. Section 12 of UNMIK Regulation 2000/60 provides the procedures for the administration and allocation of property, in order to allocate the property on a temporary basis to refugees and IDPs.²⁶ Once the property is placed under the control of the

²⁵ Paragraph 1.1 (b) of Section 1 of UNMIK Regulation 1999/23 “The Directorate shall: Supervise the utilization or rental of such abandoned property on a temporary basis for humanitarian purposes: rental monies of abandoned private and socially owned property shall be recorded in a separate account in trust for the rightful owner, subject to deduction of relevant expenses.”

²⁶ Section 12.1 of UNMIK Regulation 2000/60 states: “The Directorate is authorized to administer abandoned housing for the purpose of providing for the housing needs of internally displaced persons and refugees.”

administration, the HPD has broad powers to evict illegal occupants and allocate property to those qualifying as humanitarian cases. The criterion for assessing humanitarian needs does not appear in the text or the Regulation, only in internal HPD documents.²⁷ The HPD, without any other administrative or judicial control than its own assessment, can decide who is an illegal occupant and who merits a humanitarian permit.

Across Kosovo, excluding Prizren, the HPD launched a number of activities for the administration of vacant housing. The HPD has received 1,279 applications seeking humanitarian housing. In total, the HPD is investigating 2,138 housing units, of which 923 are being administered by the HPD. So far only 138 temporary residence permits have been issued.²⁸ As a result of these activities, the HPD executed seven eviction decisions. These decisions are of an administrative character and distinct from decisions issued by the HPCC. Some permits were issued to families already occupying housing units. The main reason behind the small figure is the lack of resources available to the HPD. In addition, the procedure for administering abandoned housing is designed to protect the rights of citizens and to avoid arbitrariness and therefore is necessarily time consuming. Lastly, the municipal authorities have not co-operated adequately with the institution to make the allocation scheme successful.

Section 15 of UNMIK Regulation 2000/60 authorises the HPD to delegate its exclusive authority to conduct inventories of abandoned housing. Due to the lack of capacity together with an awareness of the need to include the local authorities in the process, the HPD issued an administrative directive foreseeing delegation of authority to the municipalities.²⁹ To date, staff in 30 municipalities have been trained and granted authority to conduct the first stage of the allocation process (inventory). The authority delegated is vested in the municipal administrator

12.2 “The Directorate may make an order placing a property under its administration in any of the following circumstances:

- a) by agreement of the parties in settlement of a claim;
- b) on the request of the claimant, following a decision by the Commission confirming the property right of the claimant;
- c) following eviction of the current occupant, if the claimant fails to repossess the property within 14 days of being notified of the execution of the eviction;
- d) where no claim has been submitted for the property, and the property is either vacant, or the current occupant of the property does not assert any property right to the property; or
- e) where no claim has been submitted for the property, on the request of the owner or occupancy right holder of the property.”

12.3 For as long as a property is under the administration of the Directorate (hereafter “property under administration”), the rights of possession of the owner or occupancy right holder are suspended in the public interest.

12.4 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.

12.5 The Directorate shall establish criteria for the allocation of properties under administration on a temporary humanitarian basis.

12.6 The Directorate may issue an eviction order in relation to a property under administration at any time [...].

²⁷ 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.”

²⁸ These figures date from 24 January 2002. The HPD provided them to OSCE on 30 January 2002.

²⁹ HPD Directive No. 2000/1 on the Execution of the Allocation Scheme in accordance issued in accordance with Section 15 of UNMIK Regulation 2000/60.

after municipal staff members have been trained. The HPD reports that there is hardly any feedback provided by the municipalities, and when there is, as in the case of Gjakove/Djakovica, the information has been gathered so poorly that it is of little practical use. Below we provide a description of the regional activities of the HPD regarding administration of abandoned property and delegation of authority to municipalities.

i.a) Peje/Pec Region

The Regional Director of the HPD arrived in Peje/Pec Region in February 2001 but the office was not fully operational until July 2001. Initially, the office was tasked to cover Peje/Pec Region and to collect claims in Montenegro. At a later stage, the office covered Prizren Region, instead of Montenegro due to the lack of an agreement with the FRY Government. Currently, the HPD has 130 units within its inventory, of which 49 are located in the Gjakove/Djakovica Municipality and nineteen units are under administration.

During the year 2000, the Municipality began executing its own housing policy overruling the HPD's exclusive jurisdiction. These activities resulted in allocation of private residential property according to criteria non-compliant with human rights standards or UNMIK Regulations, for example, allowing so-called war heroes and/or war martyrs to occupy property. This has not been the only case in Kosovo.³⁰ The HPD send a mobile team to Gjakove/Djakovica to begin administering property and to strengthen the authority previously delegated to the Municipality. First, most of the inventory units were built under the auspices of the YU Programme³¹ which delays the process of administration due to the complexity of the ownership issues. However, to place property under administration, the HPD only needs to have evidence that the occupant is illegal or the property is abandoned.³² Second, the Municipality, exercising the delegation of authority (see below) has submitted 23 applications for humanitarian permits. The data contained in the applications is inaccurate and/or incomplete. According to the Regional Director of HPD, civil servants in Gjakove/Djakovica are disregarding the mandate and activities of the HPD.

i.b) Prishtine/Pristina Region

In Prishtine/Pristina Municipality, the HPD has four major ongoing projects, the so-called YU Programme blocks, the so-called University flats, two blocks in Dardania³³ and some ten isolated flats. In other municipalities of the region, the only major project to have been carried out is in Obiliq/Obilic (see below). Recently, a new project was launched in Lipjjan/Lipljane and Fushe Kosove/Kosovo Polje targeting blocks of apartments inhabited by persons belonging to different ethnic groups. In Fushe Kosove/Kosovo Polje, OSCE identified a pattern of harassment towards

³⁰ For example in Ferisaj/Urosevac or Prizren.

³¹ The Program for the implementation of peace, freedom, equality democracy and prosperity of the Socialist Autonomous Province of Kosovo, also known as YU Programme, was approved by the Assembly of the Socialist Republic of Serbia to prevent the rise of Albanian nationalism and to dissuade other ethnic groups from fleeing the province. The YU Programme affected all sectors of society in Kosovo but had especial consequences for property rights, incorporating provisions of discriminatory nature into the legislation.

³² The Law on the Purchase of Apartments for the Professional Personnel and the Return of the Displaced Persons Back to the Autonomous Province of Kosovo and Metohija (FRY Official Gazette 24/94). This law regulates the allocation of apartments built with funds of the YU Programme. The law states in article 10 that only Serbs, Montenegrins, and certain categories of professionals will be entitled to apartments built under the Programme. The law states in article 17 that the apartments "shall be rented for an indefinite period of time and no one can acquire the property right over them, nor can they be exchanged, unless the renter has been living and working in Kosovo and Metohija for at least ten years from the day when such apartment is allocated." After the armed conflict, sales have been conducted over such apartments although the requirements in the law are not met. OSCE does not have the data of the total number of apartments that were built nor the number of informal sales that have taken place.

³³ Residential district in Prishtine/Pristina.

the inhabitants of a residential compound, mostly IDPs illegally occupying flats. The HPD is administering other residences scattered throughout the region.

Obiliq/Obilic is the first substantive experience of administration of a large number of apartments and it is worthwhile to give an overview of how it developed. The HPD launched the operation of administration of abandoned property in Obiliq/Obilic in March 2001. The operation involved two blocks of flats in the centre of town inhabited by persons of different ethnicity. Some owned the flats, some were occupancy right holders and some were illegal occupants. Security for Kosovo Serbs had deteriorated due to the growing numbers of sales of Kosovo Serb owned/occupied residential property, widespread illegal occupation, and illegal evictions (flats were occupied by squatters or deemed abandoned if the occupant left for some period of time, even as little as a few hours). OSCE closely monitored the entire process and recorded the changes of flat tenancy/occupancy and shared with KFOR concerns regarding the security situation of Kosovo Serbs. An inter-agency meeting, including, for the first time, the HPD was called to address the problem.

A compromise was reached between UNMIK Police,³⁴ KFOR and the HPD. KFOR and UNMIK Police agreed to control the building entrances to improve the security and freedom of movement of Kosovo Serbs and to prevent additional illegal occupations/evictions. In the meantime, the HPD would conduct an inventory of abandoned housing. All parties agreed that the operation would last 45 days. The HPD put up notice posters on each apartment door. The text on the posters stated that the apartment was currently under HPD administration and invited the occupants to come forward with evidence or reasons for their occupancy. For this purpose, the HPD opened a temporary office at the UNMIK Police station and KFOR provided escorts for non-Albanians who wanted to prove their occupancy and/or ownership rights. Those individuals or families not able to come forward with a lawful title of ownership or occupancy were to be given the chance to apply for a humanitarian permit. Those unable to present evidence of valid title to the HPD and who did not qualify for a humanitarian permit were to be evicted. To avoid large number of evictions, the HPD representatives mentioned that they would assist those individuals or families willing to pay rent to the legal owner or occupancy right holder. OSCE lacks precise information on how the HPD will carry out this scheme but it certainly falls within its mandate as expressed in UNMIK Regulation 1999/23.

By late May 2001 the HPD reported the posting of twenty eviction notices plus four cases of eviction scheduled for early June 2001. By September 2001, OSCE reviewed the status of operations in Obiliq/Obilic and so far only two flats have been allocated to humanitarian cases. The HPD placed twelve properties under its administration and there are seven pending eviction orders. In addition, there are 98 more flats in the process of being inventoried to determine whether or not they meet the criteria to fall within the HPD jurisdiction.

i.c) Mitrovice/Mitrovica Region

In Mitrovice/Mitrovica Region, the Regional Office is inventorying 273 units although the operations are limited to Mitrovice/Mitrovica, Skenderaj/Srbica and Vushtrri/Vucitrn. The HPD has thus far placed 173 units under its administration and 55 permits have been issued. The Director explained the low numbers stating that for the most of 2001, the Regional Office had just one car to cover the entire region. The Office has two internationals and twenty local staff

³⁴ UNMIK Police is constituted by international law enforcement officers that are in Kosovo under the Department of Peacekeeping Operations (DPKO).

members plus another ten local staff hired to work in the three municipalities north of the region in Leposavic/Leposaviq, Zubin Potok/Zubin Potok and Zvecan/Zvečan.

In the Director's opinion, without adequate logistical and administrative support both from the UNCHS-Habitat headquarters in Nairobi and UNMIK, it is extremely difficult to function adequately. In addition, it has been reported to OSCE that the European Agency for Reconstruction (EAR)³⁵ has chosen not to renew its financial support to the office after March 2002. The Mitrovice/Mitrovica office is the most important due to its strategic location and its relative success. If confirmed, OSCE is deeply concerned that the HPD will be left without adequate financing. Lastly, the Director is of the opinion that most of the illegal occupants of apartments located in the north part of town are Kosovo Serbs whose houses were destroyed. Consequently, they cannot return to their residences of origin to reconstruct them and therefore, it would be impossible to carry out evictions. At a later stage, the HPD clearly stated that in any case illegal occupants should be evicted. Despite the argument of the Director, those illegal occupants with resources to pay rent should pay up or suffer eviction. The assessments of needs should be done on a case-by-case basis.

i.d) Gjilan/Gnjilane Region

The Regional Office in Gjilan/Gnjilane was established in November 2000, shortly after UNMIK Regulation 2000/60 was passed. In Gjilan/Gnjilane Municipality, the Regional Office is administering 110 residences, 474 more are scheduled to be inventoried and 28 permits have been issued. The Regional Office has also taken over the permits that parallel municipal authorities issued prior to the HPDs arrival. HPD has assessed the needs of the occupants and has renewed ten permits and cancelled two. Thus far the HPD has executed six eviction orders and the Director expects twenty more in the near future. These numbers correspond to administrative evictions conducted by the HPD and not to disputes adjudicated by the HPCC.

The HPD has also begun implementing the allocation scheme in Viti/Vitina, a municipality located near the FYROM border where approximately 3,000 Kosovo Serbs, 50 Kosovo Croats and 90 Roma live. This ethnic composition makes the municipality an area of high tension where property disputes are common and, in the absence of well-established institutions, the parties often turn to violence. The HPD Regional Office began its operations in the municipality but has not disseminated accurate information on the numbers of property under administration. Reportedly, UNMIK Administration does not have the information and it appears that such information has not been shared by HPD. The same applies for lists of claims, properties under HPD investigation, allocated properties and their distribution.

In Letnica,³⁶ the HPD is conducting an inventory of abandoned housing. Most of the population fled to Croatia in two waves of migration, one in July and October 1992 and the second in August 1999. In March 2001, a committee formed by the remaining inhabitants informed the HPD of approximately 130 vacant houses in the village. A pattern of illegal occupation of the vacant houses was noted by the Kosovo Croats as well as by the OSCE. The illegal occupants were mostly Catholic Kosovo Albanians from the neighbouring villages and Macedonian Albanians fleeing from the conflict in their own country. After conducting the necessary assessments in September 2001, the HPD announced to the remaining inhabitants of the villages, and some who had temporarily returned from Croatia, that between 50 and 60 houses were under the

³⁵ EAR had committed funding for the Mitrovice/Mitrovica Office for two years.

³⁶ Letnica is a village in Viti/Vitina populated by Catholic Croats. HPD considers them as abandoned housing. In addition, Letnica is the seat of one of the most important catholic sanctuaries of the region.

administration of the HPD. Reportedly, the primary reason for the temporary return of those who fled in 1999 was so that they could sell their houses at a fair market price. The HPD representative also announced that 25 evictions would be carried out in the village.

The evictions will mostly affect refugees from FYROM and other illegal occupants who have failed to produce any evidence to legitimise their occupation. When conducting evictions, HPD shares information with all relevant agencies (UN Civil Administration, KFOR, UNMIK Police, UNHCR and OSCE). However, in conducting his work, the Regional Director of the HPD will strictly adhere to the law that relates to property rights and to the obligations derived from the HPD mandate. Accordingly, there is no consideration as to whether a person is a Kosovar or a refugee from FYROM before issuing an eviction order. Whereas HPD informs UNHCR of planned evictions, it does not delay them should UNHCR not be able to find alternative shelter. Representatives from the village stated to OSCE that illegal occupation is occurring and damage to property is being committed by Catholic Kosovo Albanians from neighbouring villages in an attempt to take over as much property as possible. The reason for this is likely the economic interest that the sanctuary presents for the Catholics because of the great numbers of pilgrims who come twice per year.

Gjilan/Gnjilane Region includes five more municipalities, Strpce/Shterpce,³⁷ Novoberde/Novo Brdo, Kamenice/Kamenica, Ferizaj/Urosevac and Kacanik/Kacanik. In Strpce/Shterpce, the HPD has two permanent employees collecting claims. There are no allocation exercises and delegation of authority has not taken place. In Kamenice/Kamenica, the HPD trained and delegated authority to the Kamenice/Kamenica municipality but no allocation exercise has taken place to date. An UNMIK Civil Affairs Officer informed OSCE that despite the fact an inter-departmental team had received training and were ready to start inventorying premises, the President of the Municipal Assembly did not allow the team to start its activities. Allegedly, he proposed to create a committee with members of the Municipal Assembly mandated to start looking into property issues. If confirmed, such an action of the President of the Municipal Assembly would violate UNMIK Regulation 2000/45, since it undermines UNMIK Regulations 1999/23 and 2000/60. On the other hand, it appears that the HPD has not visited the municipality on a regular basis during the reporting period.

³⁷ Strpce/Shterpce is a municipality in the south of Kosovo where Kosovo Serbs are a majority.

Region	No. of Units under inventory	No. of Units under HPD Administration	No. of Humanitarian Permits	No. of Applications for Humanitarian Permits
Peje/Pec	278	229	3	205
Prishtine/Pristina	890	195	54	1,351
Mitrovice/Mitrovica	271	173	55	355
Gjilan/Gnjilane	828	339	39	Not available
Prizren	0	0	0	Not available
Total Kosovo	2,267	936	151	Not available

Region	Administrative Evictions (HPD)		Quasijudicial Evictions (HPCC)	
	Pending	Executed	Pending	Executed
Peje/Pec	0	0	0	0
Prishtine/Pristina	17	4	62	11
Mitrovice/Mitrovica	5	3	0	0
Gjilan/Gnjilane	7	4	0	0
Prizren	0	0	0	0
Total Kosovo	29	11	6	11

ii. Absence of the HPD in Prizren Region

The only region in Kosovo still lacking a permanent presence - due to the lack of funding - is Prizren. Peje/Pec Regional Office is currently covering Prizren Region. No activities related to the administration of property have occurred in the Prizren Region, although training on the mandate of the HPD and its delegation was provided. In spring 2002, a new training will be organised for municipal civil servants with the assistance of OSCE. The training should be addressed to civil servants working in departments of relevance to property and housing issues. The aim is to ensure that the municipalities utilise the authority granted to them (see below). The result is a severely limited access to the legally established mechanism for the protection of property rights in the south of the province, notwithstanding that other HPD offices may collect claims on property located anywhere in Kosovo.

Prizren Region has five municipalities, some of them heavily damaged during the conflict. In the town of Prizren, the former municipal parallel structure registered 2,100 illegal occupations and gave occupancy permits according to criteria of dubious compliance with human rights standards. There is also a large number of minorities who did not have access to HPD services, though this was, to an extent, remedied due to efforts of the HPD, OSCE and the Norwegian Refugee Council.

The opening of an HPD Office in Prizren Region is urgently required. The presence of an institution solely dedicated to housing and property matters will improve the property rights compliance of the municipal administration.

iii. Concerns regarding the administration and allocation of abandoned property

The HPD is authorized to administer abandoned property to IDPs and refugees in need of housing.³⁸ UNMIK Regulation 2000/60 provides a definition for abandoned property which differs significantly from that given by the domestic applicable law. The definition of abandoned property provided by the Regulation is restricted to the scope of the Regulation and therefore the meaning of abandoned property as defined in the domestic applicable law is still valid for other sorts of property such as agricultural or commercial property. The difference between these definitions lies in the expression of the volitional, free will of the owner to abandon the property. The Law on Property Relations³⁹ states that “the property shall be considered abandoned when its owner in an indisputable manner expresses his/her will that he/she does not want to hold it anymore”. Conversely, according to the definition of abandoned property given by UNMIK Regulation 2000/60 the legitimate owner does not need to declare his/her will for the property to be considered abandoned.

The alteration in the legal definition of abandoned property has created confusion amongst civil servants and courts. Domestic applicable law requires an explicit declaration of free will to abandon the property while UNMIK Regulation 2000/60 gives the HPD the capacity to infer whether a property is abandoned or not. In certain cases, civil servants have taken advantage of the definition given by the Regulation and used it to justify expropriations or misuse of property. All property left behind by IDPs and refugees, is considered abandoned notwithstanding the will of the lawful owners. This interpretation leads to potential violation of property rights.

For instance, in those cases where the HPD starts administering what is considered abandoned property (vacant or illegally occupied), legitimate owners or occupancy right holders could be *de facto* left without an effective remedy since HPD’s decisions are not subject to judicial review.

OSCE is concerned about the way in which the HPD will assess the property/occupancy right and the housing needs of the inhabitants of apartments that could potentially fall under its administration. In particular, there is much confusion regarding the character of the so-called YU Programme.⁴⁰ Many Serbs and Montenegrins in Kosovo are living in apartments that were allocated to them according to the procedures and criteria set forward by the Programme and the laws implementing it. Some are selling apartments to Kosovo Albanians creating even more confusion over the ownership rights to them. In accordance with Section 1.1 c) of UNMIK Regulation 1999/23 the HPD should provide guidance to UNMIK, UNMIK Police, KFOR and UNHCR regarding the ownership and occupancy allocation schemes established by the Programme. Such guidance would reassure its beneficiaries and the international agencies of the validity and limitation of the title of its current occupants. This will also serve as a strong message to the Albanian community that the international community will not put validly acquired rights at stake. This is also valid for the Kosovo Serb community in North Mitrovica/Mitrovica. The international community cannot allow groups like the “bridge

³⁸ For the purpose of HPD’s mandate, abandoned property means vacant or illegally occupied. See Section 1 of UNMIK Regulation 2000/60.

³⁹ Article 46 of the Law on Basic Property Relations (Official Gazette 6/80). Translation from Kosovo Law Centre; Compilation Number III “Laws on Real Estate Applicable In Kosovo on 22 March 1989”.

⁴⁰ OSCE has reviewed the terms of the YU Programme. The legal source quoted in almost all contracts over YU Program flats examined by the OSCE is the “ Law and Regulation on Allocation of Accommodation, Building Sites and Loans to the Returnees into Autonomous Province of Kosovo and Metohija”. The law has been submitted to several amendments during the last 7 years.

watchers’ or others to hinder and frustrate the lawful objectives and administration of the civil agencies.

The sensitivity of the YU Programme flats amongst the Kosovo Albanian community is so strong that the Municipal Court of Prishtine/Pristina has issued two evictions orders against two Kosovo Serbs living in the YU Programme flats in Prishtine/Pristina, although it is public knowledge that these premises are under the HPD’s administration. The so-called YU Programme flats in Prishtine/Pristina are considered the only secure environment for Kosovo Serbs in town. KFOR secures the buildings and the HPD has started inventorying the apartments to allocate them to IDPs and refugees. KFOR informed OSCE that only minorities would be allowed to live in the premises. Such a policy affects the rights of those already living there who are not minorities but could qualify for a humanitarian permit and to owners or occupancy right holders who will not be able to occupy, rent out or sell their apartment.⁴¹ According to the jurisprudence of the ECtHR, there is a right to compensation when an individual has been deprived of his/her property.⁴²

iv. Concerns regarding delegation of HPD authority to municipal authorities

OSCE perceives confusion at the municipal level on the meaning of delegation of HPD’s authority to administer abandoned housing. Section 15 of UNMIK Regulation 2000/60 foresees the possibility of delegating such authority to the responsible municipal services in one or more municipalities in Kosovo. The HPD issued a Directive regulating the scope of the delegation to municipalities.⁴³ The Directive did not grant the municipalities the authority to allocate abandoned housing, only to carry out inventories. The ultimate decision to evict an illegal occupant not qualifying for a permit and to allocate housing to a humanitarian case remains with the HPD.

It has been reported that some municipal civil servants believe they are employed by the HPD itself. In other cases, when the municipal staff understand that they do not have any executive capacity, they stop inventories and/or collecting requests. Other municipalities have expressed their unwillingness to receive any training or delegated authority, denying reports of major housing or property problems in their territory. Most of the municipalities in Kosovo have been delegated authority in accordance with the terms of the administrative directive of the HPD but so far it has not yielded any tangible results.

Meanwhile, there are a large number of cases of illegal occupation, unlawful allocation and examples of authorities acting beyond their powers regarding residential property. For instance, the UNMIK Municipal Administrator of Prizren signed in July 2000 an allocation of 41 flats to the KPC (Kosovo Protection Corps) upon a recommendation of the pre-electoral Administrative Board.⁴⁴ These flats were built under the auspices of the YU Programme and were already illegally occupied by members of the KPC, Kosovo Liberation Army (KLA) veterans and “martyrs’ families”. The flats were located in a compound together with other flats owned or lawfully occupied by other institutions or individuals. Some individuals were evicted and became

⁴¹ No beneficiary of the program could sell the apartment until ten years of occupation have passed. See article 17 of Law and Regulation on allocation of accommodation, building sites and loans to the returnees into autonomous province of Kosovo and Metohija.

⁴² *Lithgow v. UK* A 102 (1986). See also, *Law of the European Convention on Human Rights*; page 532; DJ Harris, M O’Boyle and C Warbrick; Butterworths: London, Dublin, Edinburgh (1995).

⁴³ See *Supra* 26.

⁴⁴ In accordance with the so-called “12 December Agreement” and “UNMIK Regulations 1999/14 on the appointment of Regional and Municipal Administrators” and “UNMIK Regulation 2000/1 on the approval of the Joint Interim Administrative Structure”, Municipal Administrative Boards were appointed to fulfill interim administrative functions until elections could take place.

IDPs during summer 1999 and others have reported to OSCE and UN Civil Administration that they had received threats to vacate the flats. An early warning report by OSCE to UN Civil Administration and UNMIK Police stopped the illegal eviction. Also HPD addressed a letter to the UNMIK Municipal Administrator explaining the lack of legal foundations for the decision to allocate apartments to the KPC. Finally, the Board of Directors of Prizren Municipality declared the decision of the pre-electoral Administrative Board null and void. Dozens of commercial premises located in the first floor of the building have been illegally occupied since 1999 and so far the authorities have taken no remedial action. It should be noted that Prizren Municipality enjoys delegated authority from the HPD.

In Gjakove/Djakovica and Decan/Decani, the municipalities have allocated residential abandoned property to families of “war martyrs” and to ex-KLA soldiers. The HPD has established a temporary presence in Gjakove/Djakovica to work with the municipal officials who have received training. So far the HPD Director has not been able to allocate any housing to the beneficiaries selected by the civil servants due to lack of compliance with the criteria for receiving a permit. In Prishtine/Pristina, the municipality has tried to start an inventory of abandoned housing and housing formerly belonging to the municipality for the purpose of hosting social cases, but intimidation directed at civil servants conducting the inventory has stopped the process. In any event, the HPD halted the process stating that the municipality does not have any competence to allocate residential property.

The Municipal Assembly of Fushe Kosovo/Kosovo Polje attempted to create a municipal commission with competencies which exceeded the delegation of authority granted by the HPD. OSCE brought the project to the attention of the municipal administrator and the HPD, which took action to prevent it. Nevertheless, in a later case the President of the Assembly instructed a Kosovo Albanian family to evict a Kosovo Serb family based on a Court decision over ownership. Again, OSCE reported the case to UNMIK Police who prevented the eviction. In Ferizaj/Urosevac, the municipality started allocating property after the HPD delegated authority. Although these are the most obvious cases, OSCE has received reports of other misinterpretations of the role of the HPD and the authority delegated to the municipalities.

It is not clear if the delegation of authority to the municipalities refers to the power to conduct inventories and preliminary assessments of abandoned housing under the authority vested in the Directorate by Section 12.2(d), or if it only refers to section 12.2 subsections a, b, c, or e.⁴⁵ However, it is clear that under the delegated authority the municipalities do not have executive power and can only gather information. They cannot allocate property or conduct evictions. Nevertheless, municipal civil servants tend to believe that once they are granted delegation they are competent to overrule the HPDs jurisdiction and become competent to conduct evictions and allocate property. In the current state of affairs OSCE perceives more drawbacks than benefits in those cases where authority has been delegated.

OSCE believes the allocation scheme could be a very useful mechanism to bring standardised procedures to municipalities dealing with housing issues. In order to achieve this, common understanding on what constitutes delegation of authority is essential. Apparently, the municipalities are sending trainees working in departments unrelated to property issues, or members of the Municipal Assemblies, to receive training. The Local Administration Department of the Ministry of Public Services, should become more involved in the process requiring UNMIK Municipal Administrators to implement the delegation of authority of the HPD. The HPD should request that the municipal directorates with responsibilities on property issues and

⁴⁵ See supra 23.

their staff are trained and that the training is compulsory. This should happen all across Kosovo particularly now that the HPD has four operational offices in the territory. The HPD should develop an operational relationship with those departments. Periodic reports of activities should be submitted to the HPD. The Department of Local Administration should ensure, through an administrative instruction, that the delegation of authority and the relationship of the municipal departments and the HPD are clarified and formalised. UNMIK Municipal Administrators should not only be proactive in looking for solutions for the housing and property problems in their municipalities but also exercise their authority in accordance with UNMIK Regulation 2000/45 on self government of municipalities in Kosovo.

v. Access of minorities and other vulnerable groups in Kosovo to the HPD

The first groups affected by the lack of resources of the HPD are minorities. Regional Offices are located in urban areas generally inhabited by the Albanian population. For example, Kosovo Serbs or Romas do not have adequate access to the appropriate mechanism to file a claim or to request humanitarian housing, due to security concerns. The HPD, being aware of this difficulty, has provided satellite offices and mobile teams to make their services available to vulnerable groups and minorities. However, there is reason to believe that, due to operational limitations, the HPD mobile teams do not appear frequently enough and thus potential claimants find it difficult to file their claims.

In Gjilan/Gnjilane, the HPD mobile team's visits to minority areas are rare and usually the population is unaware of the visits in advance. The reasons for this are two-fold. Firstly, the territory of Gjilan/Gnjilane Region is too large for a single office to carry out claim collection, housing administration and training of municipal civil servants with just one vehicle. The relative isolation of the HPD from the rest of UNMIK makes it difficult to organise co-operation to cover all enclaves. On the other hand, good co-operation between the HPD Regional Office Peje/Pec, OSCE, UNMIK Local Community Officers and Norwegian Refugee Council have facilitated access of minorities to HPD services in the areas of Prizren Region which are inhabited by ethnic minorities (Zhupa Valley, Rahovec/Orahovac and Dragash/Dragas).

For most persons belonging to national minorities it is not safe to travel freely throughout Kosovo to file a claim. In Mitrovica/Mitrovica, the HPD office has two separate entrances, one for Kosovo Serb claimants coming from the north side of town, and one for Kosovo Albanians and other claimants arriving from the south. French KFOR provides protection for those coming from the north. The construction of a slip road has allowed greatly improved access to the HPD by the Kosovo Serb population in Mitrovica/Mitrovica. Still, cases of intimidation in the north side of town against those filing claims have been reported.

vi. Deployment of the HPD outside Kosovo: Serbia proper, Montenegro and FYROM

According to the figures published in the Framework for Return (2001), UNHCR has registered 187,000 IDPs in Serbia proper and 28,104 in Montenegro.⁴⁶ Although the HPD Offices collect claims for property located anywhere in Kosovo it is extremely difficult, if not impossible, for IDPs to come to Kosovo to file a claim. As well as logistical limitations, the lack of security experienced by IDPs (which has been extensively reported by OSCE), severely impacts on the freedom of movement of IDPs. This discourages IDPs from exercising their right to claim their property. In addition, the knowledge and awareness of HPD and HPCC and their complex legal machinery is likely to be very poor among the IDP and refugee populations.

⁴⁶ Framework for Return 2001-Joint Committee for the Return of Kosovo Serbs.

The Co-operation Agreement reached on 5 November 2001 between the FRY and UNMIK includes a substantive provision on property rights, which committed UNMIK to open offices in Serbia proper by the end of 2001 and in Montenegro in early 2002. The agency sponsoring HPD, UNCHS-Habitat, has also reached an agreement with the FRY setting the basis for opening offices in Serbia proper and Montenegro. HPD stated to OSCE that mobile teams are operating from Mitrovice/Mitrovica in Novi Pazar, from Prishtine/Pristina in Kursumlja and from Gjilan/Gnjilane in Vranje. Before the end of 2001, HPD opened offices in Kraljevo, Niš and in Belgrade. This rapid deployment for collection of claims outside Kosovo contrasts with lack of funding of the institution in other respects, in particular for the claim processing and the HPCC sessions.⁴⁷ The progress made in Serbia proper by the HPD is reflected on the chart below. The figures correspond to the number of claims collected by each permanent office in Serbia proper and the mobile teams deployed from offices located in Kosovo.⁴⁸

Region/Office	Total	A	B	C
Mitrovice/Mitrovica Novi Pazar	696	0	0	696
Prishtine/Pristina Kursumlja	268	0	0	268
Gjilan/Gnjilane Vranje	114	0	0	114
Belgrade	100	0	0	100
Kraljevo	610	0	0	610
Niš	130	0	0	130
Total	1,918	0	0	1,918

Skopje and Podgorica are second ranked priorities for the HPD operations considering that the number of IDPs/Refugees is much smaller in the territory covered by potential offices in those locations. Discussions between the HPD and UNHCR were directed towards exploring the best way to facilitate access to HPD/HPCC mechanisms by refugees in fYROM, who are almost all Roma. These refugees cannot enter Kosovo to file a claim in any of the current HPD offices because they will not risk losing their refugee status in the eyes of the fYROM authorities. Mobile teams for collection of claims have been considered with the support of UNMIK or UNHCR offices in fYROM although to date there has been no action taken. HPD officials have stated that the Podgorica Office will be the last to open.

⁴⁷ The HPD has stated that funding has been transferred from the offices inside Kosovo and no new staff has been hired to carry out operations in Serbia proper. Furthermore, the HPD stated that national and international staff have advanced money to pay for the premises in Serbia proper accepting to be reimbursed by UNCHS-Habitat at some later date.

⁴⁸ The statistics on claim collection carried out by mobile teams deployed from offices in Kosovo dates from 16 December 2001 and were provided to OSCE on 18 January 2002.

vii. Legal and Judicial co-operation among administrations in the region: UNMIK, FRY and FYROM

Normalisation and harmonisation of relations among the legitimate administrations in the area will be needed for the HPD to conduct operations. This reasoning is based on the fact that the HPD/HPCC may take decisions over property located in Kosovo with civil legal effects on parties and patrimonies under jurisdiction of Yugoslav laws and organs. This problem is not limited to residential property but to all the activities carried out in the Kosovo territory by the PISG. For example, a decision must be made regarding the properties owned by the Yugoslav Army which were allegedly privatised, before and after 12 June 1999. UNMIK was established on 12 June 1999 so the right of the Yugoslav Army to privatise after that date is highly questionable. In any case, current legitimate and illegitimate owners of such apartments continue selling them to third parties increasing the problem. The Memorandum of Understanding signed between the Government of FRY, the Government of the Republic of Serbia and the Co-ordination Centre for Kosovo and Metohija and UNCHS-Habitat lists among its objectives implementation of technical co-operation and the establishment of HPD offices throughout the territory of FRY. The permanent presence of the HPD in Serbia proper and Montenegro could counter balance the lack of equilibrium at the legislative and judicial level between the international and Yugoslav administrations. A harmonisation of the relations between both administrative structures is of particular importance to ownership disputes since a great number of ownership records and other relevant documents were taken to Serbia proper at the end of the armed conflict in June 1999. OSCE could play an important role facilitating legislative harmonisation.

viii. Evictions and the Right to Adequate Housing⁴⁹

The OSCE is also concerned with the respondent's (current occupant's) right to housing, since UNMIK Regulation 2000/60 does not establish any criteria when deciding to delay or not the execution of a decision on eviction issued by the HPCC.⁵⁰ The lack of criteria in the text of the Regulation leaves the HPD a broad element of discretion in deciding whether a respondent is in need of housing or not. This is of particular concern given that decisions of the HPCC are final, binding and not subject to review by any judicial or administrative body.⁵¹

These concerns over clarity extend to illegal occupant's housing rights when the HPD issues an administrative eviction decision based on the power granted to it in Section 12 of UNMIK Regulation 2000/60. Again, there are no criteria in the Regulation defining the meaning of "housing needs" for the HPD. Since the criteria for assessing housing needs are not defined in the law, both illegal occupants and those applying for a humanitarian permit might argue such decisions are arbitrary. In contradistinction to HPCC decisions, the Regulation does not preclude review by an independent judicial body. Accordingly, the applicable law on administrative procedure should apply.

⁴⁹ ICESCR General comment 7. "16. Evictions should not result in individuals being rendered homeless or vulnerable to the violation of other human rights. Where those affected are unable to provide for themselves, the State party must take all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land, as the case may be, is available."

⁵⁰ UNMIK Regulation 60, Section 13.2 states "the Directorate may, at its discretion, delay execution of eviction order for up to 6 months, pending resolution of the housing needs of the current occupant, or under circumstances that the Directorate deems fit".

⁵¹ UNMIK Regulation 1999/23, Section 2.7 states "Final decisions of the Commission are binding and enforceable, and are not subject to review by any other judicial or administrative authority in Kosovo."

The HPD will soon have a very large administrative mechanism covering a broad territory and a significant number of claims and potential evictions. OSCE believes there is a need for more precise legal instruments of an administrative character allowing for reconsideration of eviction decisions and providing precise criteria for what is considered an adequate standard of housing in Kosovo. It is essential that there is a process by which those facing eviction can be re-housed. Otherwise, with the current process in place, they might either be left homeless, or might resort to illegally occupying other property. Adequate flow of information and well established relations between the UNMIK bodies with responsibilities on housing rights (HPD, the Ministry of Finance and Economy, the Ministry of Labor and Social Welfare and the Ministry of Public Services) are essential to avoid violations of the right to adequate housing. General Comment No. 7 should, in light of General Comment No. 3 of the United Nations Economic, Social and Cultural Rights Committee, gives an accurate indication on how the authorities exercising state functions should honour their obligations towards human rights in the field of housing.

ix. Involvement of the Law Enforcement Authorities in Evictions

During the execution of eviction orders, it is the responsibility of the law enforcement authorities, in particular the police, to remove any person who fails to obey an instruction of the responsible officer to leave the premises.⁵² HPD representatives reported lack of police support when conducting evictions during spring 2001. A Memorandum of Understanding (MOU) signed between the HPD and UNMIK Police in September 2001 solved these problems by setting out the tasks to be undertaken by the police during an eviction ordered by the HPD. However, the way in which UNMIK Police support evictions ordered by the HPD, on the one hand, and those ordered by the courts or the municipalities, on the other, are not harmonised. Both, courts and municipalities can issue eviction orders. For example, a municipality could issue an eviction order when vacating a temporary community shelter. Furthermore, a court could issue an eviction order to solve a dispute over residential property if it is outside the three categories falling under the exclusive jurisdiction of the HPCC. Unless, the standard operating procedures are harmonised, confusion over evictions might result in violations of housing rights. The MOU provides a solid basis for a harmonisation of eviction procedures although the low numbers of eviction decisions enforced by the HPD to date do not allow to draw any conclusions on its efficiency.

Further detailed instructions should be sent to all UNMIK Police station commanders explaining the HPD eviction procedures and training for UNMIK Police officers in eviction processes should take place.

⁵² UNMIK Regulation 60, Section 13.5 states: "During the execution of an eviction order, any person who fails to obey an instruction of the responsible officer to leave the premises may be removed by the law enforcement authorities. In the event that movable property is also removed, the Directorate shall make reasonable efforts to minimize the risk of damage to or loss of such property. The Directorate shall bear no responsibility for any damage to or loss of removed property."

4. Recommendations

Regarding resources allocated to the HPD and the HPCC:

- **Increased prioritisation should be given by Habitat and UNMIK to the allocation of resources to the HPD and HPCC. Resources must be allocated on a sustainable manner so the institution can fulfil its mandate adequately. According to HPD's own estimation, funding in the order of US \$ 8,5 million will be needed to do so. As of January 2001, the HPD stated that only 27% of the budget for 2002 is secured.**
- **Resources should be administered directly by the HPD. Donors should be flexible in their approach and not insist on funding certain geographical areas or programmes within the HPD in order to ensure consistency of approach.**
- **UNMIK should ensure that HPD and HPCC function within the UNMIK institutional framework and examine ways in which co-operation or integration can be enhanced. The HPD and the HPCC cannot fulfil their mandate in isolation from the other UNMIK branches and bodies.**

Regarding the activities of the HPCC:

- **The HPCC should endeavour to increase the number of decisions per session and increase the number of sessions. An acceleration of the decision-making process should not be detrimental to the rights of the parties to due process.**
- **Decisions of the HPCC should be transparent, public and available. Whereas confidentiality on the identity of parties should be respected, legal interpretation of the facts and the law by the HPCC should be available to the public. Commentaries on the jurisprudence of the HPCC would be welcome.**
- **OSCE considers that in-take of claims is subject to a certain level of arbitrariness since the HPD does not decline jurisdiction over a claim in writing. The decision over claim intake should not be left to an administrative employee. Whenever a claimant is refused at the intake level, the refusal should be made in writing, stating the reasons, time, date and place where it was refused.**

Regarding the overall deployment and activities of the HPD:

- **HPD Offices opened in Serbia proper and Montenegro to collect claims have to meet the requirements of the co-operation agreement signed on 5 November 2001 between UNMIK and FRY. Resources should be allocated accordingly.**
- **An office in Prizren Region, which will be essential for the normalisation of housing and property rights in southern Kosovo, should be opened as soon as practicable.**
- **An information campaign on the HPD activities on the benefits of administration and allocation of housing for lawful owners or occupancy rights holders should be undertaken. Such a campaign should also target relevant decision making actors after the electoral process. OSCE and UN Civil Administration should look for opportunities**

to provide assistance. HPD should ensure that information regarding administration of abandoned housing is available at the municipal level.

- An analysis of the reasons behind the low numbers of Category A claims is needed. A primary reason behind the creation of the HPD and the HPCC is to redress discrimination regarding property rights, which occurred during the 1990s.
- A review of the rules of procedure of the HPD through the adoption of further administrative directives or other practical measures should be carried out in order to fill existing legal vacuums, especially to avoid arbitrariness in the in-take of claims and on the criteria and procedure for allocation of abandoned housing.
- Evictions should be carried out in compliance with international human rights standards, in particular article 6 and article 8 of ECHR, and article 11 of the ICESCR.
- UNMIK Police should ensure that all stations are aware of and are able to implement the agreement reached with the HPD regarding evictions and of the mandate of the Regular Courts on the matter.
- A unified eviction procedure for decisions on eviction falling within the mandate of the Regular Courts and the HPD/HP CC should be regulated.

Regarding the delegation of HPD authority to municipalities:

- All concerned Departments and Ministries at the central level (Department of Local Administration of the Ministry of Public Services and HPD) should have a uniform understanding of the delegation of authority and its implementation. Clear administrative instructions should be issued to UNMIK Municipal Administrators and municipal civil servants competent on housing and property issues by all Departments and Ministries with responsibilities on residential property.
- All municipalities should create a housing cell. The composition, competencies and terms of reference of each cell should be clear and uniform across Kosovo. To avoid duplication, existing departments or commissions should be tasked with responsibilities in the housing field. Such cells should provide periodic reports of activities. Training for responsible civil servants should be compulsory.
- Accountability of municipal civil servants responsible for housing matters should be established.
- Unlawful activities such as illegal occupation and illegal allocation of buildings by municipalities are in excess of the authority delegated to them by HPD and should give rise to direct liability of the municipalities entailing responsibility to indemnify or compensate those persons whose property rights have been violated.
- In order to avoid confusion over controversial cases such as the flats known as the YU Programme or the flats owned by the Yugoslav Army, the HPD should clarify the legal regime governing these premises. This will avoid actions taken by municipal officials that tend to declare such flats municipal property and then allocate them to individuals not qualifying under the HPD criteria for humanitarian housing.

III. Regular Courts in Kosovo: Adjudication of Property Rights and the Right to Due Process

1. Mandate of the Provisional Institutions of Self-Government in the Constitutional Framework regarding Judicial Affairs.

Chapter 5 Section 3 of the Constitutional Framework lists the obligations that the Provisional Institutions have in the field of judicial affairs.⁵³ In Kosovo, the existing Regular Courts and the HPD and HPCC are the bodies assigned to resolve property disputes. These institutions also conduct other administrative and judicial activities. This section analyses the compliance of the activities of the Regular Courts in Kosovo with the right to property and the right to due process.

2. Jurisdiction of the Regular Courts in the applicable law regarding property

The applicable law grants Regular Courts a broad mandate to adjudicate property matters. The Law on Regular Courts⁵⁴ states in Articles 26, 29 and 31 the competencies of Municipal, District and Supreme Court regarding property.⁵⁵ According to the applicable law, the HPCC has exclusive jurisdiction to resolve certain categories of residential property disputes.⁵⁶ Decisions issued by a Regular Court on claims which fall under any of these categories are therefore null and void. Nevertheless, the Commission may refer “*specific separate parts of such claims to the local courts or administrative organs*”.⁵⁷

⁵³ Chapter 5.3 b) of the Constitutional Framework reads: “The Provisional Institutions of Self Government shall also have the following responsibilities in the field of judicial affairs: [...] Exercising responsibilities regarding the organization and proper functioning of the courts, within existing court structures [...]”

⁵⁴ Official Gazette of SAPK 21/78.

⁵⁵ Municipal Courts (Article 26 of the Law on Regular Courts):

“6) To try disputes on property-legal requests, when value of the dispute does not exceed 100.000 Dinars (now DM), if this law does not prescribe the competence of other regular court.

11) To try disputes regarding disturbance of the possession;

13) Premises and also the disputes regarding housing relations, if they are under the competence of the regular courts;

14) To decide on the procedure of inheritance, procedure of execution, procedure of registration of rights upon the real estate, in cases of physical division, regulating the issue of boundaries, verification of transcripts, manuscripts and signatures, as well as in other out-of-court issues which are, by the law, placed under the court jurisdiction;

16) To exercise affairs of legal aid;

District Courts (Article 29 of the Law on Regular Courts):

1) to decide on the appeals against the decisions of the municipal courts pronounced in the first instance;

2) to try in the first instance: disputes concerning legal-property requests, when value of the dispute exceeds the value of 100.000 Dinars, and disputes for compensation of the damage to unjustifiably convicted persons and for persons who are without any reason deprived of freedom, regardless of the value.

9) to decide on the conflict of jurisdiction among the municipal courts in their regions;

10) to exercise other affairs prescribed by the law.

The Supreme Court of Kosovo decides, in the frames of the competence prescribed by the law, on the appeal against the verdicts and other decisions of the courts in territory of the Socialist Autonomous Province of Kosovo;

6) gives instructions to the courts on the manner of keeping records, study of court practice and social relations and events which are noticed in the work of the courts;

7) determines principled attitudes and legal opinions on the issues which are relevant for the unique application by the courts in the territory of the Province;

8) resolves the conflicts of jurisdiction between regular courts, conflicts of jurisdiction between regular courts and courts of the associated labor and conflicts between regular courts and other self-management courts in the territory of the Province;

9) resolves other issues, when it is prescribed by the law;

10) exercises other works prescribed by the law”.

⁵⁶ See Sections 1.2 (a), (b) and (c) of UNMIK Regulation 1999/23.

⁵⁷ Section 2.5 of UNMIK Regulation 1999/23.

3. Conflict of Jurisdiction⁵⁸ between the HPCC and the Regular Courts

The HPCC is a quasi-judicial body created to ensure that certain categories of disputes are resolved by a mechanism meeting the requirements of due process in accordance with international human rights standards. The introduction of a foreign institution to the domestic legal system did not foresee the potential conflicts of jurisdiction and how they should be addressed. UNMIK Regulations 1999/23 and 2000/60 do not give any indication on how they relate to the local judiciary. To date, there is no formal co-operation between the Regular Courts and the HPCC. This situation that might lead to a violation of due process since the determination of individual property might suffer unnecessary delays or be determined by a body which by law is not competent to adjudicate such claims.

i. Regulation of Conflicts of Jurisdiction in the Domestic Applicable Law

Domestic applicable law regulates conflicts of jurisdiction but for obvious reasons there is no reference to the HPCC. Chapter 2 of the Code of Civil Procedure (Official Gazette 69/82-1596) regulates the jurisdiction and composition of the courts. Article 15⁵⁹ obliges a court to assess its competence upon receipt of the pleadings and Article 16⁶⁰ states that a court should declare itself not competent when the case falls within the jurisdiction of another body. Article 21 obliges the court to assign the case to another court if jurisdiction is refused although the proceedings already conducted are considered valid.⁶¹ Article 301 allows a party to challenge the competency of the court (this includes a broad variety of rationales) and the court must include in the judgement a reasoned decision on the acceptance or refusal of the pledge made by the party.⁶² According to Article 282⁶³ of the Code of Civil Procedure, the parties are entitled to obtain a written order from the judge declaring the court not competent to try the case. It also guarantees that in a case where the party appeals a decision of a Municipal Court concerning a property dispute (for instance on grounds that the case was within the jurisdiction of the HPD), the court's decision must include a

⁵⁸ The term: 'Conflict of Jurisdiction' is not used as a legal term in the sense of a disagreement between HPCC and the regular courts on a point of law. Rather, the term expresses a de facto conflict resulting from interference by the Regular Courts in the legitimate jurisdiction of the HPCC, due to confusion vis-à-vis the applicable law.

⁵⁹ Article 15 of the Code of Civil procedure reads: "Immediately upon receipt of the pleadings, the Court shall ex-officio assess whether it is competent to judge that particular case, and in which composition. [...]"

⁶⁰ Article 16 of the Code of Civil Procedure reads that "... when the case falls within the jurisdiction of other domestic or foreign body, the court shall declare itself non-competent...".

⁶¹ Article 21 of the Code of Civil Procedure states that "after the entry into force of the decision whereby the court pronounces itself non-competent (articles 16-20) the court shall assign the case to the competent court."

⁶² Article 301 of the Civil procedure Code reads: "If a party makes a plea stating that the passing of judgement on the claim does not fall within the jurisdiction of the court, that the court is not substantially or territorially competent, that there is a suit pending elsewhere (ius pendens), that a final judgement has already been passed on the issue, that a settlement in court has already been reached in that matter, or that the plaintiff has renounced his claim, the court shall decide whether to dispose of this separately or together with the principal issue [...] If the court does not accept an objection from paragraph 1 of this article which has been considered together with the principal issue, or if the court, after separate consideration of the objection comes to decision not to accept the objection and decides to continue with the main proceedings immediately, the decision on the objection shall be included in the decision on the principal issue."

⁶³ Article 282 of the Code of Civil Procedure reads: "After preliminary examination of statement of claims, the President of the Panel is authorised to pass decisions described under article 278 of this code, unless the issues in question are such by their nature or under provisions of this Code the decision can be passed only at same larger stage in the proceedings."

statement that this occurred. Furthermore, the decision of the court must be reasoned and in writing.⁶⁴

The Book of Rules of Regular Courts contains several provisions which regulate communications with other bodies and parties, submission of documents and communications *inter se* and with administrative bodies.⁶⁵ One of the principles contained in the Book of Rules is that the Courts should never cause the parties unnecessary harm, such as avoidable delay.⁶⁶ From the text of the domestic law, it appears that the provisions to address conflicts of jurisdiction are adequately regulated for the pre-existing institutions in Kosovo. Therefore, failures are most likely due to lack of administration and implementation.

ii. OSCE findings regarding Conflicts of Jurisdiction between the HPCC and the Regular Courts

OSCE conducted a survey in September 2001 among Municipal Judges dealing with property issues to understand how and whether they are applying the applicable law in practice. On some occasions, OSCE interviewed the President of the Court directly while in others, an ordinary judge. The survey was conducted in practically all municipalities of Kosovo with Municipal Courts. In addition (and also due) to the inherent problems derived from the inorganic transplantation of the HPCC into the legal system, certain municipal judges do not seem to be aware of the provisions regulating competence and jurisdiction. The OSCE findings on this matter are as follows:

- There is great disparity among the answers of Municipal Judges regarding the legal provisions applicable in cases for which the court has no competence. Answers were often not specific and simply referred to the applicable law prior to 23 March 1989 or to UNMIK Regulations 1999/23 and 2000/60 on the mandate of the HPD/HPCC, but infrequently to specific provisions of the Code on Civil Procedure or the Law on Regular Courts;

⁶⁴ Article 338 of the Code on Civil procedure reads: “[...] The enacting terms of the judgement shall contain the decision of the court on accepting or dismissing particular claims and decision on existence or non-existence of the claims laid out for the purpose of offsetting debts”.

⁶⁵ The following articles of the Book of Rules of Internal Activities of the Courts state:

Article 85. President of the court will communicate, as rule, with other bodies and organisations. In procedure for a particular case judge who is working on particular case will communicate directly with other bodies and organisations when he has an authorisation to do so. Communication with our embassy’s in foreign countries and foreign embassies in the country, court will perform through the Provincial Secretariat, if international treaties and provisions on force don’t predict something else.

Article 109. The president of the court or the judge replacing him should sign all the judicial administrative acts.

Article 158. The worker that takes into delivery official documents directly or from a party, can not refuse to take into delivery the official document that is addressed to the court. If the official document contains a formal defect (it is not signed, doesn’t have the appendix, etc.) or the court does not have the competence to act in relation with that, the worker will warn the party that official document is not complete and has defects and will explain to the party how to correct them, respectively to send him to the competent body. If the party insists that the official document has to be taken into delivery, the worker will take it writing down on it with red pencil what is the irregularity and that he has warned the party. With request of the party, the authorized worker for taking into delivery can issue the party a certificate for taking into delivery.

⁶⁶ Article 3 of the Rules of Internal activities of the Courts 7/81:

Internal activity in the court shall be organized in a manner court realise its activity legally, on time and efficiently, and to facilitate for parties to execute duties in court and to make possible for them to fulfil duties predicted by law on time and with the minimum of expenses.

- OSCE has observed a higher degree of precision in the knowledge showed by judges working in larger towns than in the rural areas;
- OSCE has observed that several copies of the compilations of legal texts published by the Kosovo Law Centre (published in English, Serbian and Albanian) were unused in a Municipal Court;
- Despite the previous point, when a case is refused on grounds of lack of jurisdiction a decision is generally issued in writing to the claimant. The decision tends to be inadequately reasoned, failing to deal with the basis for the decision and the particular facts of the case. Often it declines ex-officio jurisdiction in favour of the HPD or the HPCC. The parties are then instructed, sometimes orally or via a written decision, to bring their claim to HPD or the HPCC. Some judges have stated they referred the case ex-officio to HPD/HPCC but the file was refused. According to the HPD, eventually the courts have addressed letters requesting a determination of the court's mandate in residential property disputes but there is no record of ex-officio referral of cases. Regardless, the HPD stated that claimants must file a formal claim to be considered in the HPD procedures. It has been impossible for the OSCE to determine how many cases were refused by the Regular Courts based on the grounds of lack of jurisdiction since no statistics have been collected on this matter.

iii. Cases of confusion and conflict between the jurisdiction of the HPCC and Regular Courts

When conducting the above-mentioned survey among the judiciary, OSCE asked Municipal Court judges if they had ever issued a decision that later conflicted with an HPD/HPCC decision or proceeding. The judges, who were interviewed by OSCE denied such cases have occurred. Nevertheless, in Prishtine/Pristina the Court issued eviction decisions over premises which were already under the administration of the HPD. Allegedly, a Kosovo Serb sold an apartment to a Kosovo Albanian located in a building, which was being protected by KFOR because individuals belonging to national minorities were living there. The building was subject to a special law which granted housing for non-Albanians during the 1990s. A condition to receive an apartment in that building was that it could not be sold until the expiry of ten years of uninterrupted occupancy. The Kosovo Albanian found that the apartment he purchased was occupied by a third Kosovo Serb and initiated proceedings for eviction orders from the court. The court, without considering whether the conditions to conduct a sale had been met or not issued an eviction order. KFOR, alleging security concerns, prevented the eviction. The Kosovo Serb who sold the house then filed a claim with HPD to recover possession of his apartment.

Another case illustrative of the problems arising from negative conflict of jurisdiction between HPCC and the Regular Courts is currently taking place in Suhareke/Suva Reka. The management of a company (formerly socially owned) privatised nine apartments in the 1990s in favour of Kosovo Serbs. The management had taken over the company after the Kosovo Albanians workers were dismissed in 1990. The privatisation took place during the Milosevic regime but there is no information to determine whether or not the privatisation process itself was discriminatory or unlawful. Nevertheless, since all Kosovo Albanian workers were dismissed in 1990 they could not participate in the privatisation process which mostly targeted those workers employed in the factory. In 1999, the people claiming to be the pre-1989 management team of the socially owned company took back control. The management, which was legitimised by UNMIK, decided unilaterally that the privatisation of the nine currently illegally occupied apartments was null and void and brought a claim to court seeking repossession. The court declined jurisdiction in favour of the HPCC but the decision lacked any reasoning. In the decision the court included the

possibility of appeal to the District Court within 15 days. The socially owned company appealed and the District Court referred the case back to the Municipal Court. The District Court decided that according to UNMIK Regulation 1999/23 legal persons cannot file claims with the HPCC, therefore the Municipal Court is competent. The case was referred to the Municipal Court which again has refused jurisdiction on the case in favour of the HPCC. After an appeal the case is again pending in the District Court.

Another interesting case to illustrate the existing confusion over the jurisdiction of the HPCC took place between private parties and the Orthodox Monastery in Decan/Decani. The former directors of socially owned property which was allegedly granted to the Orthodox Monastery during the 1990s brought a claim to the Municipal Court. According to the information received, the Municipal Court referred the case *ex-officio* to the District Court and to the HPD, but the case was referred back by the District Court. Additionally, the former SRSG, Bernard Kouchner, wrote a letter stating that the dispute should be solved by the HPD in due time, even though this had the effect of infringing on the independence of the judiciary and did not give due consideration to the exclusive jurisdiction of the HPCC over certain categories of claims on residential property. The property in question is not residential and a physical person did not file the claim so the HPCC is not competent to look into the case. In addition, the inadequate application of the mandate of the HPCC has caused an unnecessary delay in the proceedings.

From all of the above examples it appears that the civil procedure and its subsidiary legal instruments within domestic applicable law provide adequate and consistent rules for the prevention of conflict of jurisdiction. In order to ensure that the courts do not interfere with the competence and jurisdiction of the HPCC, UNMIK should amend those rules in order to include the HPCC in the system and avoid legal vacuum. The HPCC is a foreign body in the Kosovo civil legal system. Due to the exceptional character of the HPCC mandate, OSCE does not believe that analogy should be applied to procedural rules engaging HPCC. In other words, article 21 of the Code of Civil Procedure as it stands should not bind the HPCC or the system will be overloaded with referrals. On the other hand, the law and practice of the courts in Kosovo must be considered when looking for solutions and the HPCC cannot remain isolated from the legal and procedural reality otherwise, there will be a growing number of conflict of jurisdiction, both positive and negative. Establishing a procedure for referral of cases between the institutions should be sought. From the cases that have come to the attention of OSCE, conflict will result in serious problems for the system if not resolved adequately. In summary, structural and trans-institutional deficiencies are causing violations of the right to due process.

In addition to the inherent problems in the system, the judiciary must ensure implementation the applicable law as it stands. The Code of Civil Procedure and the Book of Rules set very clear rules for competence, jurisdiction and administration of cases that come to Court. At this stage of the development of the judiciary it is hardly understandable why a judge would refer a claim over non-residential property to the HPCC. Generally, the HPCC becomes the scapegoat and the party is forced to wait a longer time than needed to see its property rights determined in front of an impartial tribunal.

iv. Initiatives to solve the problem

The SRSG issued a Clarification on the jurisdiction of the HPCC and the Regular Courts in April 2001.⁶⁷ Although the intention of the Clarification is to provide guidance, there is no reference to concrete procedures to avoid conflict between HPCC and the Regular Courts. In the clarification there is no reference to the domestic applicable law on administrative or civil procedure and how judicial or administrative acts or decisions should be processed. In the event that the HPCC or the Regular Courts find a provision of the applicable law to be ambiguous or unclear, the HPCC or the Regular Courts may refer to the Clarification in determining the true intent of the “legislator”. The Clarification is not itself binding.

The former Administrative Department of Justice has taken the initiative to form a working group to deal with the matter. The first meeting was attended by representatives of the DoJ, the Department of Public Services, the HPD, the Supreme Court and OSCE on 28 September 2001. The initiative is welcomed but it is too early to expect any results. The working group will look into the nature and volume of the problems since accurate information is still scarce. Together with the local judiciary and the HPD, the working group will try to develop and formalise co-operation between the two institutions and draft a legal mechanism to fill the void which emerged from the creation of the HPCC.

OSCE believes the solution to the problem requires a legislative and operational approach. Although, the HPCC is a new body its mandate may evolve to enable it to function alongside the domestic legal system. Furthermore, according to UNMIK Regulation 2000/59, subsidiary instruments prevail over the domestic applicable law, thus the way for procedural law reform is open. Therefore, the SRSG could enact a Regulation or an Administrative Directive⁶⁸ enabling the system to absorb the new institutions and have a civil system respectful of the right to due process. Developing effective and modern communication procedures between the two bodies is also essential. Still, such efforts have limited value if the judiciary does not demonstrate the ability to implement the law according to the legal system.

The Kosovo Judicial Institute has organised training sessions with the HPD on the exclusive jurisdiction of the HPCC, but these were restricted to a formal explanation of the categories of exclusive jurisdiction of the HPCC. No reference was made to practicalities such as the following:

- What legal provisions does a judge apply when he/she lacks jurisdiction?
- How does he/she refer the case to a body that is not contemplated by the legislation and which there is no formalised relation?

OSCE believes that there is a need to explore and explain the formal mechanisms foreseen by the applicable law to decline competence or to request clarification from higher bodies regarding the jurisdiction over a particular case. Additional training in the results of the working group mentioned in the last paragraph will also be needed.

⁶⁷ See Clarification of the SRSG of UNMIK Regulation 2000/60 dated 12 April 2001.

⁶⁸ According to UNMIK Regulation 2000/60, Section 27 on Implementation: “The Special Representative of the Secretary-General may issue administrative directions for the implementation of the present regulation.”

4. Backlog of property disputes in front of the Regular Court in Kosovo

Article 6 of the ECHR requires that “In the determination of his civil rights and obligations [...] everyone is entitled to a fair and public hearing within a reasonable time.” The concept of “reasonable time in access to a fair and public trial” depends on many factors. The ECtHR does not consider a state is violating the right to due process because there is a great backlog of cases as it can be time-consuming to obtain a determination of one’s rights and obligations. The jurisprudence of the Court examines the circumstances in each particular case to determine whether or not the right to due process has been violated.

However, collection of the necessary information on concrete cases to determine whether or not there is a systematic violation of the right to due process has not been undertaken. OSCE has attempted to gather information on the overall numbers of property disputes brought before the Municipal Courts in Kosovo. To that effect, OSCE has interviewed staff members of Municipal Courts in Kosovo (Presidents of the Courts, civil judges and legal clerks). Being aware of the problems that could arise when trying to gather this information, OSCE restricted its questions to very general issues and time periods. No information has been gathered on the number of disputes pending in District Courts. In addition, the system of registry books does not allow for accurate statistics. For instance, Prishtine/Pristina Municipal Court, which also covers the municipalities of Fushe Kosove/Kosovo Polje and Obiliq/Obilic, has not provided any data to OSCE explaining that gathering that kind of information is difficult and time consuming. Nevertheless, it may be said that some cases have been pending (or ignored) for many years, especially those commenced before 1999.

First, OSCE asked for the number of property-related cases filed prior to UNMIK’s establishment in June 1999. Surprisingly, in some municipalities, there are no disputes pending from that time (Gjilan/Gnjilane and Mitrovice/Mitrovica), others stated they did not have such data and few (all Municipal Courts in the Prizren Region) recognised that there are large numbers of property cases pending before the arrival of UNMIK.⁶⁹

The courts were able to provide information on the number of property disputes between private parties received since 1999 (or since the courts started working in civil cases approximately in spring 2000). It is particularly interesting that the numbers of disputes in the Prizren Region received since 1999 is 600⁷⁰ while in Gjilan/Gnjilane only 360, 271 in Peje/Pec and 171 in Mitrovice/Mitrovica.⁷¹ OSCE has hardly any figures available for Prishtine/Pristina Region.⁷²

OSCE also inquired about the number of cases where an institution exercising state functions is a party. The total number of such disputes is 358, although not all Municipal Courts were

⁶⁹ In Prishtine/Pristina Region, Lipjan/Lipljane declared 15 pending cases and Stimje, 1. The Municipal Court in Podujeve/Podujevo stated there are no cases pending from before June 1999. In Prizren the court declared that approximately 1,000 cases are pending, in Suhareke/Suva Reka 41, in Dragas/Drageash 30 and in Rahovec/Orahovec 326. Lastly in Peje/Pec Region, the only data available regarding this time period comes from the Municipal and District Court from Peje/Pec, 134 and 131, respectively.

⁷⁰ In Prizren Region, the courts received 3,916 civil cases of which approximately 15% are property related. Almost 3,000 of these cases were filed in the Prizren Municipal Court.

⁷¹ This figure does not include Mitrovice/Mitrovica, Zvecan, Zubin Potok and Leposavic.

⁷² The courts in Lipjane/Lipljan received 15 cases and in Podujeve/Podujevo 9 cases.

covered.⁷³ An issue that affects pre- and post-June 1999 disputes between private parties, is the absence of a Public Advocate. By law, the Public Advocate defends the interest of the state at the municipal and provincial levels. Despite UNMIK Regulation 2000/45, which grants municipalities legal personality and the capacity to sue and to be sued in court,⁷⁴ UNMIK has not systematically appointed Public Advocates. According to the law, these are the only civil servants mandated to defend the public interest in a court of law. This gives the courts two options: to refuse to proceed if the public interest is not adequately represented, therefore violating the right of the parties to a trial within a reasonable time, or to proceed by broadly interpreting the law and accepting anybody granted authority by the authorities exercising state functions. The absence of a well-defined Kosovo-wide policy regarding this matter is causing unreasonable delays in the justice system in addition to the lack of a consistent approach among municipalities.

Regarding the number of solved property disputes, at least 119 cases have been concluded.⁷⁵ OSCE is not aware of how many more have been solved after appeals have been filed to the District Court or Supreme Court. This number is limited to the information gathered in certain municipalities.

Variations between regions of reported numbers of backlogged cases pending from before June 1999 raises concern that property cases may not be receiving adequate attention and as a consequence human rights may be violated. Regarding the disputes pending since the arrival of UNMIK, sometimes the judiciary informed OSCE that there are no pending cases from that period, or that the Regular Courts will not acknowledge such cases since they only began working in the early part of the year 2000. Other courts have acknowledged that there are cases pending from the previous judiciary and are indeed trying to complete them. In OSCE's opinion, cases pending from before UNMIK's arrival must be resolved, despite their public or private nature. This violates the rights of individuals who sought to determine their property rights and obligations via judicial proceedings before that date. Thus, this pattern violates fundamental principles of civil law and human rights law. Pending cases prior to June 1999 should remain open and be adjudicated on in accordance with applicable law. Furthermore, issues regarding succession of state responsibility should be clarified through Regulation, in particular the current validity of obligations towards individuals assumed by the pre-UNMIK state institutions. This requires an interpretation of UNMIK's status and its relation to previous conduct of the administration, an issue OSCE has not dealt with thus far.

OSCE is aware of allegations of violations committed by authorities exercising state functions at present. In disputes between a private party and such authorities, the procedural guarantees established by Article 6 of the ECHR must also be met. In Kosovo, there are a number of property disputes pending in court where an authority exercising state functions is a party. There is no accurate information available at this point in time on the exact number and nature of

⁷³ In Mitrovica/Mitrovica 106 (information available only from Skenderaj/Srbica and Glogovc/Glogovac), Gjilan/Gnjilane 45 (information available only from Gjilan/Gnjilane and Kamenice/Kamenica), Prizren 162 (information available only from Rahovec/Orahovac, Malishev/Malishevo and Dragas/Drageash). In Peje/Pec Region, 45 cases (information only from Decani and Gjakova/Gjakovica).

⁷⁴ Section paragraph 4 of UNMIK Regulation 2000/45 reads: "Each municipality shall have its own legal status, the right to own and manage property, the capacity to sue and be sued in the courts, the right to enter into contracts and the right to engage staff."

⁷⁵ In the Mitrovica/Mitrovica Region, the court in Vushtrri/Vucitrn has closed 60 cases, Skenderaj/Srbica 42 and Glogovac three. In the Gjilan/Gnjilane Region, 20 cases were closed in Gjilan/Gnjilane Municipality, Kacanik/Kacanik closed eight, and Viti/Vitina 18. There is no data available for any municipality of Pristine/Pristina Region.

disputes dated before and after UNSCR 1244 granted overall administration of Kosovo to UNMIK.

Another obscure issue regarding court administration refers to the files of cases which have disappeared or were destroyed during the conflict. The lack of a file in the court cannot amount to a *de facto* accepted denial of justice.

In order to enhance the implementation and enforcement of law it is necessary to gather accurate information on the number of cases brought in front of the court, which are pending and which are already completed. The elaboration of accurate statistics is a valuable tool to judicial reform to improve and monitor the legal system. Improving the civil system by providing effective remedy should ensure a more human rights compliant justice system and a decrease in resorting to unlawful measures to solve disputes.

5. Access of Minorities to Regular Courts seeking determination of property rights

The right to peaceful enjoyment of property is essential to resolve the issues affecting minorities in Kosovo. On a daily basis, members of minorities bring complaints to OSCE regarding violations of their property rights. An analysis of the violations of the property rights of members of minorities should be done in light of the link between the right to property and the right to due process. In this regard, one must distinguish between a private party who has interfered with the property rights of a member of a minority and a authority exercising state functions that is violating Article 1, Protocol 1 of the ECHR. Furthermore, it is important to keep in mind that not all minorities suffer the same level of violations of their property rights in the various regions of Kosovo, yet it may be said that, by volume, Kosovo Serbs are the most adversely affected. In its last report,⁷⁶ OSCE recommended that it must be ensured that minorities have full access to the HPD and the HPCC. Efforts also have been made to ensure that minorities in Kosovo can file claims with these mechanisms. On the other hand, equal access and treatment of minorities before the Regular Courts in the determination of their civil rights and obligations regarding property rights remains a serious concern of OSCE.

Due to the short life of the provisional institutions of self-government it is still not possible to assess to what degree the courts of justice have complied with the guarantees of Article 6 (due process) and Article 14 (non-discrimination) (see page 7) when reviewing disputes between individuals or groups belonging to a minority and an authority exercising state functions. Of course, the provisions of international human rights law quoted in this paragraph apply to all citizens whatever their ethnicity but the rights of minorities are more vulnerable before the state authorities. In these cases, the proceedings have often not exhausted all administrative remedies;⁷⁷ thus few cases have reached the courts. However, this does not mean that the authorities do not

⁷⁶ See OSCE Background Report, The Impending Property Crisis in Kosovo (September 2000).

⁷⁷ Section 35 of UNMIK Regulation 2000/45 on self-government of municipalities reads: "Complaints. A person may file a complaint about an administrative decision of a municipality if he or she claims that his or her rights have been infringed by the decision. Complaints must be submitted in writing to the Chief Executive Officer or made in person at the office of the Chief Executive Officer." Section 33 of the same UNMIK Regulation reads: "Principle of Legality. 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".

have to comply with their obligations under Article 6 regarding fair proceedings when interfering with property rights of individuals. In these circumstances, OSCE continues its efforts with national and international authorities to prevent potential human rights violations.

When looking at private disputes where a minority is a party, the access of individuals to an independent and impartial tribunal to determine civil rights and obligations of parties is at stake. Article 6 of the ECHR provides specific requirements that a trial must meet in order to comply with human rights standards.

The accessibility of minorities to court depends on the particular minority and geographical location and always on the circumstances of the case. Kosovo Serbs enjoy relatively unhindered access to the Municipal Court only in Kamenice/Kamenica, Viti/Vitina, Gjilan/Gnjilane and Mitrovice/Mitrovica. In the rest of Kosovo, security conditions affect freedom of movement of the Kosovo Serbs in situations where they want to approach a court. Interestingly, when a property sale between a Kosovo Serb as vendor and a Kosovo Albanian as purchaser takes place, both the parties and their legal representative enjoy access to court to fulfil the formalities despite their differing ethnicity. In the three municipalities of North Mitrovice/Mitrovica Region and in Strpce/Shterpece there are illegitimate parallel courts. Of course, decisions issued by these courts cannot be considered valid in Kosovo.

Other minorities across Kosovo enjoy access to court with the exception of Roma in Prishtine/Pristina (including Fushe Kosovo/Kosove Polje and Obiliq/Obilic) and Lipjan/Lipljane. This particular minority group does not go to the courts to file a claim, to respond to a summons, to testify, or otherwise participate in the system due to security concerns.

The lack of unhindered access of minorities to the courts adversely affects their right to request a court's determination of their rights and obligations. It also adversely affects their right to a fair hearing when other parties filed the lawsuit, since they might not be able to take part in the process leading up to the decision of the court. Again, there are serious inconsistencies among the various courts across Kosovo in this matter. Some Regular Courts will not proceed with a trial if the summons has been unsuccessful no matter what the reason. Other courts will proceed if the summons has been delivered to the person concerned but was rejected twice or if the person cannot be found. UNMIK Police plays a very important role in the access of minorities to court, since escorts are often needed. For instance, there does not seem to be a uniform policy across Kosovo on escorts for parties in civil cases belonging to minority groups. In some municipalities the UNMIK Police provide adequate escort while others systematically refuse. The applicable law needs to be clarified regarding hearings in absentia, summoning, and the role of the police to provide escort to court for parties in civil cases,

The creation of a Unit within the Department of Justice dedicated to issues related to minorities and the justice system in Kosovo is a step forward in addressing the problems faced by these populations. Additionally, OSCE would like to emphasize that this minority unit should ensure that it avoids segregated court structures in enclaves or minority judges dealing only with minority cases. OSCE believes that the key is integration of all ethnic groups in the justice system.

6. Recommendations regarding property rights and the right to due process in the Regular Courts in Kosovo

On general reform of the civil legal system, including substantive and procedural matters:

- An inter-agency steering committee should be established to develop, recommend, promote and draft legislation and other documents aimed at addressing problems identified in this chapter.
- Such a working group should have full support from the highest level of the organisations involved.
- The steering committee should include representatives of the four UNMIK Pillars, the Independent Agencies with competencies on property matters, in particular HPD and Kosovo Cadastral Agency (KCA) and representatives from the PISG. The steering committee should create working groups composed of relevant actors. These working groups should identify problems and formulate solutions and policies in relation to property rights and due process.

On conflicts of jurisdiction between the courts and HPCC:

- The judiciary should acknowledge and respect the HPCC mandate. The Judicial Inspection Unit and the Kosovo Judicial and Prosecutorial Council should ensure this is the case.
- The relevant procedural laws, including the Code of Civil Procedure, Book of Rules of Regular Courts and the Law on Administrative Procedure should be amended, through Regulation or Administrative Directives to ensure the integration of the HPD and HPCC in the legal system and guarantee the right to due process.
- The HPCC should adopt additional rules and the SRSG should issue administrative directives to harmonise procedures with domestic applicable law.
- The judiciary should be adequately informed of all amendments of the domestic applicable law and further developments of UNMIK Regulations and subsidiary instruments, and trained accordingly.
- The Supreme Court role in conflicts of jurisdiction should be clarified by the Supreme Court itself through jurisprudence and by the inter-agency working group on conflict of jurisdiction. The outcome should be incorporated to the overall legal reform.

On the backlog of pending property cases:

- An adequate system for gathering statistics should be implemented by the Ministry of Public Services in co-ordination with the DoJ.
- In accordance with their mandate regarding judicial affairs, the PISG should formulate recommendations for the creation of categories of cases, particularly those pending prior to 12 June 1999 and destroyed during the conflict. Appropriate legislation should follow thereon.

- **The Law on the Public Advocate should be updated by the SRSG to meet present day needs: legal representation of the municipalities in accordance with UNMIK Regulation 2000/45 and, therefore, alleviate the backlog of cases where the municipalities are a party. This need extends to the legal representation of the PISG.**
- **A clear determination should be made in the context of legal reform proposed in this report on the status that should be given to pending cases in court presented before the establishment of UNMIK. In particular, it is important to clarify if proceedings interrupted by the armed conflict should be resumed, bearing in mind the consequences that the interested parties might encounter.**
- **OSCE suggests that in all cases pending before the end of hostilities for which there are no records, interested parties are informed of the status of the proceedings, that evidence is re-examined and solutions should be found, under strict conditions according to the law.**

On minority access to Court:

- **The Judicial Integration Section should have adequate resources to fulfil its mandate.**
- **The Judicial Integration Section should give sufficient attention to civil jurisdiction.**
- **Clarity and uniformity should be ensured regarding trials in absentia, summoning of witnesses and parties, and the law enforcement authority's obligations to provide adequate escort to minorities when necessary.**

GLOSSARY

<i>CEDAW</i>	<i>Convention on the Elimination of All Forms of Discrimination against Women</i>
<i>CERD</i>	<i>Convention for the Elimination of All Forms of Racial Discrimination</i>
<i>CRC</i>	<i>Convention on the Rights of the Child</i>
<i>DoJ</i>	<i>Department of Justice</i>
<i>EAR</i>	<i>European Agency for Reconstruction</i>
<i>ECHR</i>	<i>European Convention for the Protection of Human Rights and Fundamental Freedoms</i>
<i>ECtHR</i>	<i>European Court of Human Rights</i>
<i>FRY</i>	<i>Federal Republic of Yugoslavia</i>
<i>fyROM</i>	<i>Former Yugoslav Republic of Macedonia</i>
<i>HPD</i>	<i>Housing and Property Directorate</i>
<i>HPCC</i>	<i>Housing and Property Claims Commission</i>
<i>HRD</i>	<i>Human Rights Division of OMiK</i>
<i>ICCPR</i>	<i>International Covenant on Civil and Political Rights</i>
<i>ICESCR</i>	<i>International Covenant on Economic Social And Cultural Rights</i>
<i>IDP</i>	<i>Internally Displaced Person</i>
<i>KFOR</i>	<i>Kosovo Force</i>
<i>KLA</i>	<i>Kosovo Liberation Army</i>
<i>OSCE</i>	<i>Organization for Security and Cooperation in Europe</i>
<i>OMiK</i>	<i>OSCE Mission in Kosovo</i>

<i>SFRY</i>	<i>Socialist Federal Republic of Yugoslavia</i>
<i>SAPK</i>	<i>Socialist Autonomous Province of Kosovo</i>
<i>SRSG</i>	<i>Special Representative of the Secretary-General</i>
<i>UNMIK</i>	<i>United Nations Interim Administration Mission in Kosovo</i>
<i>UNCHS</i>	<i>United Nations Commission for Human Settlement</i>
<i>UNSCR</i>	<i>United Nations Security Council Resolution</i>

Annex: Property in Kosovo – Historical Overview

The lack of clarity regarding the ownership of property in Kosovo is compounded by the numerous incidents of mass confiscation of property that has taken place this century, whether for ethnic reasons, or for political and social reasons. This in itself would have created sufficient problems that would have taken years to resolve, as in other post-socialist countries. However, the situation in Kosovo, since 1989, has left a legacy of property problems:

The property system began to collapse as of 1989, when the Belgrade regime instituted increasingly discriminatory property laws on the population. As a result, significant numbers of Kosovo Albanians lost their occupancy rights to socially owned properties which, occasionally in some instances, were reallocated to Kosovo Serbs or Croatian Serb refugees. As a consequence, most property transactions amongst different ethnic groups during this time were carried out informally (i.e. without legal records) which led to the property and cadastral records, the key to any functioning property system, losing most of their value as accurate documentation.

The property system was finally destroyed as a consequence of events after 1998. The destruction and removal by the FRY authorities of most of the property records have made proving ownership of property an increasingly difficult task. The war, followed by the NATO bombing, led to a massive destruction of property, and in 1999, the mass evacuation of the Albanian population. Since the arrival of UNMIK and KFOR, the situation has further deteriorated with the flight of large numbers of the ethnic minorities (Kosovo Serbs, Roma⁷⁸, Slavic Muslims) leaving behind an abandoned property. In many cases this property was then destroyed or occupied.⁷⁹

With the lack of official municipal authorities in Kosovo following the departure of the FRY authorities in 1999, the emergence of parallel ‘governments’ further complicated the situation. These self-styled authorities, which were largely tolerated by the international community until the creation of the JIAS structure in January 2000, often set up their own ‘Property Commissions’ which in instances carried out further (illegal) evictions and installed illegal occupiers with the support of illegal ‘police’ forces.

In November 1999 UNMIK created the Housing and Property Directorate and the Housing and Property Claims Commission and institution mandated to efficiently resolve claims concerning residential property. It took one year to UNMIK to enact the Rules of Procedure of these institutions. Without such rules the institution could not exercise its mandate and claims over residential property were left unresolved. In November 2001, the SRSG enacted the Rules of Procedure and Evidence of the Housing and Property Directorate and Claims Commission providing the legal framework for the institution to operate. During the year following the adoption of its rules the HPD opened offices in four regions of Kosovo, collected most of the claims inside the province and a number of residential properties were put under administration. Meanwhile, the HPCC started issuing decisions. Despite the progress achieved during this period the mechanism is far from being fully functional leaving the protection of residential property rights. In January 2002, the institution is facing a deep financial crisis and most of its activities in Kosovo will cease.

⁷⁸ Including Ashkali and Egyptians.

⁷⁹ In some cases, Kosovo Albanians alleged that departing minorities had destroyed the property themselves, to prevent anyone from moving in. The evidence, however, suggests that while there were examples of damage or destruction by departing minorities, such cases were far less common than destruction by other, generally unidentified, individuals.

Kosovo was left with much destroyed and abandoned property. Many properties have multiple claimants to ownership, and proving ownership of a property is exceptionally difficult. Given the legal and institutional vacuum, it is hardly surprising that illegal occupations and constructions are widespread. In these circumstances, without a functioning mechanism for the protection of residential property rights, return of IDPs in Serbia proper and Montenegro is unlikely.