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PROPERTY RIGHTS IN KOSOVO: A HAUNTING LEGACY OF A SOCIETY IN TRANSITION

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LIST OF ACRONYMS

BiH	Bosnia and Herzegovina
CLO	Court Liaison Office
DCA	Department of Civil Affairs
DOJ	Department of Justice
DPA	Dayton Peace Agreement
DRC	Danish Refugee Council
D/SRSG	Deputy Special Representative of the Secretary-General
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EULEX	European Union Rule of Law Mission in Kosovo
EUPT	European Union Planning Team for Kosovo
ESI	European Stability Initiative
HPCC	Housing Property and Claims Commission
HPD	Housing and Property Directorate
ICR	International Civilian Representative
IDP	Internally Displaced Person
KFOR	Kosovo Force
KPA	Kosovo Property Agency
KPS	Kosovo Police Service
KTA	Kosovo Trust Agency
LDK	Democratic League of Kosovo
MCR	Ministry of Communities and Returns
MWG	Municipal Working Group on Returns
NATO	North Atlantic Treaty Organization
NGO	Non Governmental Organization
OHR	Office of the High Representative
OSCE	Organization for Security and Cooperation in Europe
PCC	Property Claims Commission
PISG	Provisional Institutions of Self-Government
PKK	Kurdish Workers Party
RAE	Roma, Ashkalis and Egyptians
RSG	Representative of the UN Secretary-General on the Human Rights of Displaced Persons
RVRP	Return to Village and Rehabilitation Project
SFRY	Socialist Federal Republic of Yugoslavia
SOE	Socially Owned Enterprise
SRSG	Special Representative of the Secretary General
TMK	Kosovo Protection Corps (or KPC in English)
UCK	Kosovo Liberation Army (or KLA in English)
UNSC	United Nations Security Council
UNHCR	Office of the United Nations High Commissioner for Refugees
UNMIK	United Nations Interim Administration Mission in Kosovo

EXECUTIVE SUMMARY

The issues of property rights and to what extent they are protected are deeply complex ones that affect all communities in Kosovo. They impact all aspects of life in a society that remains profoundly divided along fault lines of ethnicity, identity and class. In the period between the end of the armed conflict in June 1999 and the unilateral declaration of independence on February 17, 2008, those fault lines remained entrenched.

This paper starts with an introduction to the issues at stake. Part II briefly examines the history of Kosovo in relation to tenure. Patterns of behavior inherited from the past act as lines of continuity that we can use to understand present realities. Kosovo was a territory of the Ottoman Empire for centuries. This long occupation left its mark not only on settlement patterns, community identity (through conversion to Islam) and culture, but also on approaches to property rights and ownership.

The crisis of the 1990s essentially meant the breakdown of state authority in the province of Serbia. When the Serbian government revoked the province's autonomy, Kosovo Albanians reacted with protests and civil unrest in an organized mass movement. This civil unrest was often met with police repression, which made the crisis worse. The paper looks at how the breakdown of authority and certain discriminatory laws affecting inter-ethnic sales of property contributed to the rise of non-validated sales of properties.

The armed guerrilla conflict, triggered by members of the so-called Kosovo Liberation Army (KLA or UCK in Albanian), in 1998 and the subsequent NATO intervention between March 24, 1999, and June 10, 1999 were devastating and destructive for all communities in Kosovo. Massive displacement of Kosovo Albanians was followed by their return and the massive displacement of minority communities and the usurpation of their properties after June 10, 1999. The paper reviews the background and causes of the departure of minorities and the usurpation of their properties, with a particular focus on vulnerable groups.

International authorities were faced with an enormous challenge of rebuilding and administering Kosovo after the conflict. Mission planners understood that in the specific context of post-conflict Kosovo, with a growing problem of property usurpation and the expulsion of minorities, it was not possible to rely on the local judicial system to tackle the problem. Furthermore the police and judicial system had largely collapsed. Part III of the paper examines the institutions the international community set up to oversee the administration of justice and deal with property restitution. Some of these, such as the Housing and Property Directorate, the Kosovo Property Agency and the Kosovo Trust Agency, were unique, innovative quasi-international bodies under a special legal regime. These are examined in detail as well as some of the controversy surrounding their work.

Part IV examines the challenges that property conflict and issues of property restitution pose for transitional justice in Kosovo. Currently between 50,000 and 60,000 claims on damaged or illegally occupied property in Kosovo are outstanding, and more than 200,000 people from the country are displaced in Serbia and Montenegro. Indeed, the restitution and returns process has contributed little to bringing Kosovo closer to an integrated, democratic society. The cases of Bosnia and Herzegovina and Turkey are compared with Kosovo to highlight similarities and important differences in the practices of property restitution and bringing displaced people back. The paper examines the challenges to the process of rebuilding civic trust between citizens and the state and among citizens themselves, inherent in some of the realities of Kosovo society.

A number of recommendations are made to improve the effectiveness of the restitution process as part of a search for durable solutions to the problems of the displaced. These recommendations to UNMIK, EULEX and the Kosovo authorities include tackling the cycle of impunity that surrounds property crime, tackling corruption in the judiciary, improving outreach to IDPs, providing them with free legal aid, and preventing the illegal expropriation of IDP properties. Overall, Kosovo and Serbia's political and community leaders should begin the difficult task of taking responsibility for past wrongs.

Cdo njeri eshte mbret ne shtepine e tij.

Every man is king in his own home. –Albanian proverb

I. INTRODUCTION

*“I am writing to you to share my deep concerns about the last and recent attempt of the Municipality of Klina to demolish my house in Klina town where we returned in September 2007. This will leave my family without a roof...”*¹

So begins a letter to the Office of the Police Commissioner from a former displaced person in Klina/e² that expresses the anguish and, in some cases, despair that often surround the issue of property rights in Kosovo. The issues of property rights and to what extent they are protected are deeply complex ones that affect all communities in Kosovo. They impact all aspects of life in a society that remains profoundly divided along fault lines of ethnicity, identity and class. In the period between the end of the armed conflict in June 1999 and the unilateral declaration of independence on February 17, 2008, those fault lines have remained entrenched.

Property rights and the practices surrounding the purchase, sale, registration and use of property since 1999 often overlap with the fault lines. However these issues transcend community divisions and reflect the extent to which rule of law exists and is fairly implemented in Kosovo. While local institutions and international organizations have made some progress in reforming the process, instilling a respect of property rights throughout Kosovo continues to be problematic. This situation can act as a prism through which to understand some of the structural problems that afflict society in Kosovo and hamper its economic and democratic progress.

The unsatisfactory state of property rights in Kosovo continues to have the potential to create conflict not only between the dominant Kosovo Albanian majority and other communities, but also among members of the majority community itself, as class and clan differences are accentuated and a post-conflict elite expands its power. Any attempt at introducing or implementing transitional justice measures in Kosovo must take property rights issues into account. They touch on some of the recognized traditional transitional justice approaches to victims’ reparations, restitution, the right to return, memorials,³ as well as other aspects of inter-community relations. These include demography, settlement and ownership patterns, economic growth, social stability, respect for cultural heritage, and fairness and effectiveness of the court system; all, in part or in whole, affect the direction Kosovo society takes in the future.

¹ Letter to the Office of the Police Commissioner, dated July 1, 2008, from a Kosovo Serb returning to Klina/e.

² UNMIK Regulation No. 2000/43, dated July 27, 2000, governs the names of towns and villages in Kosovo. This regulation officially sets out the names of municipalities in Kosovo in Serbian and Albanian respectively. Since then official UN and OSCE reports use both the official Serbian and Albanian names of towns and villages to avoid any discrimination.

³ Paul van Zyl, “Promoting Transitional Justice in Post-Conflict Societies,” in *Security Governance in Post-Conflict Peacebuilding*, eds. A. Bryden and H. Hanggi, (Geneva: Geneva Centre for the Democratic Control of Armed Forces (DCAF), 2005), 209.

A fair amount of documentation and some studies already exist on the subject of property rights in Kosovo. This paper proposes to approach the subject from a “value-added” perspective, keeping in mind the lessons to be learned from history and the manner in which the international community addressed property rights issues following its intervention in 1999. The paper will first explore the history of the waves of property conflicts between the various communities in Kosovo (primarily between Kosovo Albanians and Serbs) and how certain cultural, political and social factors contributed to the state of property rights. The paper will then evaluate how the international community and local institutions attempted to address property conflicts. Finally the paper concludes with an analysis of the possible consequences of the continuing problem of property conflict. This focuses on the consequences for transitional justice measures and the hope for a gradual move toward reconciliation⁴ in Kosovo society.

Ultimately property conflict raises troubling questions about the right to dignity, freedom, security and acceptance. Kosovo is a small place and remains remarkably traditional and conservative. In this context, the suffering of individual families deprived of their homes or property for years as a result of illegal occupation or the inability to recuperate property that was fraudulently sold or illegally expropriated tears apart the old values of neighbourliness and solidarity that was the bedrock of Kosovo society.⁵ And this raises insurmountable obstacles to reconciliation.

Social peace and development demand a system in which property rights are fully respected, whether one is a Kosovo Albanian, a displaced Kosovo Serb seeking to recuperate his or her property, or a Kosovo Roma precariously living in an informal settlement. Current practices are far from ideal and are in fact increasing the gap between majority and minority communities and among various classes within the majority itself. It is hoped that this paper will make a contribution to a reflection on property rights and help address the legacy of the past. Voices of anguish, as in the excerpt from the letter above, continue to be heard in Kosovo representing the plight of individuals and families. It is incumbent on international and local authorities to not only listen, but effectively work toward a society governed by the rule of law in which “citizens who count as part of their good being reasonable and rational and being seen by others as such are moved by reasons of their good to do what justice requires.”⁶

⁴ Although there is no unanimous definition for reconciliation and its use can be misleading, in this report reconciliation refers to a process of overcoming division in a society. See page 43 for a more precise definition.

⁵ See Dusan Batakovic, *Kosovo I Metohija u srpsko-arbanaskim odnosima* (Pristina: Jedinstvo, 1991) and Noel Malcolm, *Kosovo: A Short History* (New York: New York University Press, 2002), 12.

⁶ John Rawls, *Justice as Fairness* (Cambridge, Mass.: Harvard University Press, 2001), 202.

Bir musibet, yuz tembihden iyidir.

A tribulation is better than a hundred warnings. –Turkish Proverb

II. THE HISTORY OF WAVES OF PROPERTY CONFLICT IN KOSOVO

A. OTTOMAN BACKGROUND

Property conflict in Kosovo encompasses a number of overlapping considerations. Political developments and upheaval in the territory took place in a specific cultural and social context that drew some of its roots from the past. All this taken together affected demography and patterns of settlement over time. Patterns of behaviour inherited from the past act as lines of continuity that we could use to understand present realities, despite the rush of spectacular socio-economic change taking place in Kosovo over the last 20 years.

Kosovo was a territory of the Ottoman Empire for centuries. This long occupation left its mark on settlement patterns, community identity (through conversion to Islam) and culture, as well as approaches to property rights and ownership. Land was not surveyed as such then, and cadastres were a mixture of population and traditional tax roll records.⁷ Property ownership was based on a system of allotment certificates called *tabi*.⁸ The *tabi* identified the owner and residence, and gave a description of the parcel, boundaries and names of adjacent parcel owners. Many elements of the *tabi* system were later incorporated into the laws and regulations of the Kingdom of Serbia (successor to the Ottoman Empire) and later into those of the Kingdom of Yugoslavia.

As a result of this system, some segments of the Kosovo Albanian and especially Kosovo Roma population did not register property formally when Yugoslavia conducted full cadastral surveys. The first such survey was conducted in 1923 and ended in 1937; the last one that covered the whole territory of Kosovo took place between 1978 and 1982, but was mostly implemented in urban areas.⁹ Resistance to registering property diminished over time as levels of education and social integration increased, but some resistance still remained. This is partially because of social and cultural reasons. Since some Albanian and Roma families felt marginalized from what they considered to be an “alien” society (i.e., the Yugoslav state), they did not consider it important to have ownership documents for immovable properties. Furthermore many families opted not to formally register their property to avoid paying high registration fees and taxes on property transactions.

The Kosovo Albanians, as bearers of Ottoman state and religious traditions, suddenly found themselves a minority in a Serbian state after the First Balkan War in 1912 and the incorporation of Kosovo into the Kingdom of Serbia.¹⁰ Prior to this event, the preceding five centuries of

⁷ David Stanfield et al., “An Assessment of Property Rights in Kosovo: Final Report,” USAID, 2004.

⁸ Ibid.

⁹ Ibid.

¹⁰ Dusan Batakovic, “Kosovo-Metohija: The Serbo-Albanian Conflict,” Institute for Balkan Studies, Belgrade, 1997.

Ottoman rule had set down a social and economic framework (the *millet* system) that determined rights and obligations on the basis of communal belonging and religious membership. Collective identity and conservative social traditions went hand in hand with social stratification based on religious membership. As Muslims,¹¹ Kosovo Albanians enjoyed in principle a privileged status over the Christian Orthodox Serbs who had the status of *dhimmi* (formally protected non-Muslim subjects who were obliged to pay prescribed taxes to the Muslim authorities). Along with this privileged status, the Kosovo Albanians also enjoyed a relatively high degree of autonomy to live in the mountains under traditional clan and tribal leaders.

The millet system did not preclude class differences within a community. So gradually a class of wealthy, urban Albanians developed, allied with (and often married into) Turkish families in the urban centers of Kosovo. These contrasted with the rural poverty and illiteracy of other traditional Albanian families, despite Ottoman privileges of landholding and the right to bear arms.

The Kosovo Serbs were almost exclusively illiterate peasants working the land of Turkish or Albanian landowners or withdrawing into remote mountainous *mahalas* (traditional settlements) in order to avoid the depredations of taxation imposed by the Muslim elite. They grouped themselves into *zadrugas*, a collection of related patriarchal families sharing agricultural duties and the fruits of labor together. Many of these traditional settlements (although mostly abandoned) can still be seen in the Pomoravlje region of eastern Kosovo today. The Kosovo Serbs were the descendants of a Serb population that had existed in Kosovo since the Middle Ages when it was part of Serbia. Over time, the Ottoman conquest, subsequent revolts and periodical migrations outside of the territory affected the demography of this population.

The five centuries of Ottoman occupation led Serbs and Albanians to be divided by religion; they gradually became two opposed social and political groups.¹² Inter-community hostility increased in Kosovo in the 19th century, when Serbs in the Belgrade *pashaluk*¹³ successfully emancipated themselves from Ottoman rule and sought to recuperate lost territory by establishing a modern nation-state. The Albanians remained a conservative segment of the population, torn between loyalty to the Ottoman state as a guarantor of their privileges and traditional way of life and the need to mobilize on their own to protect their autonomous interests. Albanian Muslims violently resisted the *Tanzimat* reforms of the mid-19th century imposed from Constantinople that threatened their traditional privileges and status in the Ottoman Empire.¹⁴ Toward the end of the

¹¹ There is a small Catholic Albanian community in Kosovo largely centered in Prizren, Klina/e and Djakovica/Djakove. Accurate figures are difficult to find, but there is a general consensus that the Catholic Albanian community represents less than 5 percent of all Albanians living in Kosovo. See, Refki Alija, 'New Cathedral Symbolises Catholic Rebirth in Kosovo', Balkan Investigative Reporting Network (BIRN), September 6, 2007.

¹² Ibid.

¹³ An Ottoman territorial entity.

¹⁴ The *Tanzimat* were a series of reforms in the Ottoman Empire that began in 1839. The reforms attempted to integrate non-Muslims and non-Turks more thoroughly into Ottoman society by enhancing their civil liberties and

19th century, communal violence between Albanians and Serbs in Kosovo also erupted in an atmosphere of lawlessness as the Ottoman rulers' authority began to crumble throughout the Balkans. Some Kosovo Albanian leaders vented their frustration against the Serbian peasantry, whom they began to see as an "alien" population and a potential tool for Serbia's expansion efforts.

B. CRISIS IN THE 1990S

Kosovo entered the 1990s in a polarized context in which, following the revocation of the province's autonomy in 1989,¹⁵ a number of Kosovo Albanian bureaucrats and managers in the Communist Party were dismissed. Officials in Belgrade replaced them with political appointees. Serbs occupied key managerial and political functions in the province, from municipal presidents to directors of socially owned enterprises (SOEs). Other Kosovo Albanians voluntarily withdrew from the state institutions either in protest or in solidarity with the Albanian political movement in Kosovo. This latter movement, although professing to be a peaceful protest, did not articulate a citizen's conception of the future; instead it contested the prevailing political and social order in Kosovo through the language of nationalist grievance and national emancipation. As a consequence of this ideology, Albanian society in the early to mid-1990s suddenly found itself in a gray zone, operating outside state institutions and seeking as little official contact with them as possible.

This withdrawal from state institutions and a legal societal framework had a dramatic effect on the Kosovo residents who lived through the conflict in 1998 and 1999. Informal manners of settling business deals developed, and so did a black market. Smuggling of all kinds increased, particularly in petrol, drugs, alcohol, cigarettes and weapons. Using force to solve problems became an accepted or tolerated practice, and clans re-emerged and grew stronger in the absence of state authority. The practice of concluding informal arrangements outside of the law would have a particularly important impact on property relations following the end of the conflict in 1999. All of these developments reverberate in Kosovo still.

The crisis of the 1990s essentially meant the breakdown of state authority in the province. When the Serbian government revoked Kosovo's autonomy, Kosovo Albanians reacted with protests and civil unrest in an organized mass movement called the Democratic League of Kosovo (LDK in Albanian), led by Ibrahim Rugova. The strikes, protests and other organized actions were met at times with brutal police repression, leading to further instability. However the state authorities purposely turned a blind eye to the informal economy and Kosovo Albanian "parallel institutions" (schools, clinics, etc.), hoping that this would buy them peace with Kosovo

granting them equal rights. The reforms were seen as threats to the traditional feudal and religious privileges of Muslims in the Balkans.

¹⁵ The 1974 Constitution of the Socialist Federal Republic of Yugoslavia established the Serbian provinces of Vojvodina and Kosovo as autonomous.

Albanian elites. So as a result, the corruption and illegal practices that developed around trading—including property—became more entrenched.

The Serbian government passed a series of new laws in 1991 to govern property transactions,¹⁶ in addition to the main law regulating property and property relations in Kosovo under the system of social ownership, the 1980 Law on Basic Property Relations¹⁷ (see explanation two paragraphs below). In a polarized political context marked by a rise in nationalism, carrying out these new laws proved discriminatory. Any property contract between members of different communities had to be approved by a directorate of property rights.¹⁸ This obligation was meant to ensure that no property transaction could take place if, in the eyes of the directorate, it changed the ethnic composition of the population or prompted members of a particular community to leave the country.¹⁹

Many Kosovo Albanians and Serbs ignored the new laws and made contracts that did not comply with legal requirements.²⁰ The growing Albanian population needed more land and housing in urban areas. Many Kosovo Serbs, regardless of the privileges and relief that direct rule of Belgrade brought, sold their properties to Kosovo Albanians on the basis of non-validated contracts. These informal transactions would prove problematic after 1999 as local courts and the international community sought to sort out the real picture of ownership. The large number of informal property transactions opened the door to corruption and manipulation regarding abandoned properties in the post-conflict period.

The status, purchase and sale of apartments or flats in the 1990s were problematic. According to the Law on Basic Property, “no one and everyone” theoretically own property.²¹ The law supported the principle of social ownership, which allowed people to own structures but not land; one could only have user rights to the land. This set up a distinction between possession and ownership, but in actual practice, the two amounted to the same thing. In 1992, the Serbian parliament passed a law that allowed the privatization of residential apartments. However during that process, a number of Kosovo Albanians lost ownership rights over privatized apartments because they had been dismissed from the relevant SOE that owned the flats.

After the conflict, the international community, in the form of the Housing and Property Directorate (HPD), attempted to adjudicate claims from Kosovo Albanians for apartments that were not privatized as a result of the application of 1990’s property legislation of the Serbian

¹⁶ The Law on Changes and Supplements on the Limitation of Real Estate Transactions (Official Gazette of the Republic of Serbia, 22/91 of April 18, 1991); The Law on the Conditions, Ways and Procedures of Granting Farming Land to Citizens Who Wish to Work and Live in the Territory of the Autonomous Province of Kosovo and Metohija (Official Gazette of the Republic of Serbia, 43/91 of July 20, 1991).

¹⁷ Official Gazette of the Socialist Federal Republic of Yugoslavia, no. 6/80, 1980.

¹⁸ A department of the Ministry of Finance of the Republic of Serbia.

¹⁹ OSCE, Mission in Kosovo, “Kosovo – First Review of the Civil Justice System,” Department of Human Rights and Rule of Law, June 2006, 30.

²⁰ Ibid.

²¹ David Stanfield et al., “An Assessment of Property Rights in Kosovo: Final Report,” USAID, 2004, 27.

government. Few succeeded, however, because it is difficult to pass the threshold of being an owner of a property before it is taken away.²² There was a serious problem with the mechanism by which SOE apartments were privatized after the enterprise, which owned the apartments, was itself privatized or became defunct. In some cases, SOEs were privatized without the apartments, resulting in a legal limbo for possessors who wanted to purchase the socially owned apartment they occupied.²³ The inadequate privatization mechanism of socially owned apartments left a lot of discretion to SOE directors, a situation which opened the door to corruption and unreliable deals. For example, some Kosovo Albanians who occupied socially owned apartments were late in buying them because they naively believed the reassuring promises they received from company directors or the directorate of property rights that they had nothing to worry about because they were on a purchase list according to the terms of the law, only to discover later that the SOE was privatized and their apartments ‘sold’ to other employees. Once the armed conflict broke out, sales were halted and employees involved in either contesting privatization decisions or initiating a privatization transaction under the law saw the process interrupted.²⁴

The armed guerrilla conflict, triggered by members of the so-called Kosovo Liberation Army (KLA or UCK in Albanian) in 1998, and the subsequent North Atlantic Treaty Organization (NATO) intervention between March and June of 1999, was devastating and destructive for all communities in Kosovo. During that time, tens of thousands of Kosovo Albanian homes were destroyed either in the course of combat or counter-insurgency operations, or as retaliation by roving bands of Serbian paramilitaries exploiting the state of lawlessness for personal gain. Many public buildings and Kosovo Albanian cultural and religious monuments were also damaged or destroyed.²⁵ Hundreds of thousands of Kosovo Albanians left the province during this period. Serbian forces or the KLA forced some of them out, while others fled from the fighting. The destruction was particularly severe in the Drenica valley and the Peje/Pec region that adjoin the Albanian border, because these areas—considered to be hotbeds of the rebellion—experienced the most intense fighting.

C. AFTER 1999

The period following the withdrawal of the Yugoslav Army and Serbian security forces in June 1999 was important for the evolution of the issue of property rights and property conflict. As Serbian forces moved out, the KLA spread out across Kosovo, often before NATO Kosovo Force (KFOR) troops arrived. The KLA manned checkpoints and began policing a number of towns, villages and cities. Their activities were illegal under the Kumanovo Agreement and the

²² Ibid.

²³ Ibid.

²⁴ Interview with a senior official from the Kosovo Property Agency, July 27, 2008.

²⁵ The Board of the Islamic Community of Kosovo estimates that 217 mosques were damaged, demolished or destroyed as well as four *Medresses* (traditional Islamic schools) and three *Tekkes* (traditional Sufi prayer halls). Although some of these buildings were damaged in the course of the fighting, it is clear that others were deliberately targeted.

UN Security Council (UNSC) Resolution 1244,²⁶ but KFOR troops did not interfere much at the time. Entire towns and cities lost their minority population in a subsequent campaign of intimidation and terror. In little more than a year after international forces arrived and the United Nations Interim Administration Mission in Kosovo (UNMIK) was established,²⁷ nearly 230,000 Kosovo Serbs, Roma, Goranis and others had fled to Serbia and Montenegro, a number that has essentially remained unchanged until today.²⁸ At the same time, hundreds of thousands of Kosovo Albanians who had fled to the Former Yugoslav Republic of Macedonia and the Republic of Albania returned in a matter of a few months, often in a spontaneous and unorganized fashion.

While the intimidation and terror tactics were clearly directed at expelling non-Albanians from towns and cities, they also were directed at some ethnic Albanians who appeared to be loyal to the Yugoslav state or to belong to a rival political faction. The ethnic cleansing also overlapped with a post-conflict social phenomenon in which large numbers of rural Kosovo Albanians migrated to Kosovo's towns and cities in search of homes and opportunities. Some of these rural Kosovo Albanians had lost their homes during the conflict. This urban migration of tens of thousands of people happened very quickly; within two years after 1999, the population of some of the major towns of Kosovo (Pristina/Prishtine, Peje/Pec, Prizren, Gnjilane/Gjilan, Mitrovica/Mitrovice) had doubled and, in some cases, tripled.

Throughout this early post-conflict period, Kosovo Serbs and Roma, particularly in the towns, were fleeing their homes in the wake of murder and disappearances that took place literally

²⁶ NATO and the Yugoslav Army signed the Kumanovo Agreement on June 9, 1999, which that ended the NATO bombing campaign. The military-technical agreement dictated terms of the withdrawal of the Yugoslav Army and Serbian police, and the deployment and responsibilities of a NATO-dominated peacekeeping force known as 'Kosovo Force' (KFOR).

²⁷ UNMIK was set up by UNSC Resolution 1244 dated June 10, 1999, as a civil administration mission meant to govern the province in the interim and oversee the reconstruction of homes, infrastructure and a functioning administration of government and justice.

²⁸ UNHCR, "Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice," UNHCR, March 2007. A number of other non-Albanian communities also live in Kosovo: Bosniaks, Turks, Croats, Ashkalis and Egyptians. Population figures for each of these small communities are difficult to ascertain because the last census was taken in 1991 (which Kosovo Albanians boycotted). OSCE estimates confirm a decline in numbers since 1999. Many Turks and Bosniaks left for Turkey and Western Europe after 1999, although some fled to Serbia proper or BiH. Ashkalis and Egyptians are grouped with Roma as "gypsies"; all three have had difficult times since the conflict. According to Father Matej Palic, a Croatian community leader, about 1,300 Croats inhabited Kosovo in 1998 in the villages of Letnica/Letnice, Vitina/Viti Municipality, and Janjevo/Janjeve, Lipljan/Lipjan Municipality. Since the conflict's end, about 320 remain, almost exclusively in the village of Janjevo/Janjeve. Many Croats left for Croatia after June 1999 as a result of insecurity and pressure placed on them to sell their homes. Bosniaks initially suffered from the generalized atmosphere of insecurity that followed the end of the conflict. Bosniaks who do not speak Albanian particularly suffer as a result of language discrimination. Turks are a small, well-integrated community that generally have not suffered systematic persecution since the end of the conflict. However, they complain about a disrespect of their language rights, particularly in areas where they exist in concentrated numbers, such as in the Prizren Region, and job discrimination. For the state of the Bosniak and Turkish communities, see Project on Ethnic Relations, "Kosovo Roundtables: Pristina 2001-2005," 2006, and "Shadow Report on the Council of Europe's Framework Convention for the Protection of National Minorities," August 17, 2005.

apartment block by apartment block.²⁹ In rural areas families abandoned their homes and fled in refugee columns toward Serbia. Once abandoned, many of these homes were destroyed. In the towns, squatters and others moved into homes left vacant by fleeing minorities. Gangs affiliated with the KLA acted as “distributors” of flats to fellow clan members or people coming from their region. Sometimes the distributors didn’t charge, but usually they required some unofficial rent payment to a KLA member.³⁰

Practices regarding usurpation of property varied around Kosovo, depending on the demographic specificity of the region. In general, organized takeovers of property by KLA-related members were often seen as legitimate rewards for the contribution they had made in the war effort against Serbia.³¹ Nationalist motivation in the service of an independent Albanian Kosovo mingled with a profit motive and the need for homes for rural migrants. Many KLA members assumed control of multiple flats and homes, which they would eventually sell for profit on the basis of fraudulent title or through fraudulent powers of attorney. Legitimate ethnic Albanian buyers, seeking out the original ethnic Serbian owner, would sometimes become victims of extortion by the illegal occupant and have to pay protection money in order to be allowed to buy the property. Before 1999, a number of homes had changed hands several times without any valid paperwork; this process continued in the post-war period under the KLA’s tutelage.³² A number of former KLA leaders went into politics, business or government administration, while continuing to illegally occupy properties.

Along with residential apartments in towns and cities, tens of thousands of businesses, shops and agricultural properties were also seized in this manner. The illegal seizures involved property that belonged to minorities or the state, although there were a few instances of property that belonged to Kosovo Albanians. Taking residential, commercial and agricultural property was part of the system of “power in the shadows” set up by various clans and clan leaders connected to KLA networks. As the international community proceeded to set up new administrative and governmental structures at the municipal and central level in Kosovo, this power often undermined the reforms and rendered the institutions ineffective. Intimidation and loyalty within clans acted as powerful forces to keep people from challenging the new centers of power. Kosovo Albanians seeking to buy or rent shops that had been owned by minorities were compelled to pay a “patriotic tax” (a practice akin to racketeering) in order to remain in business.

²⁹ For a particularly riveting account of this campaign of terror in Pristina/Prishtine in June 1999, see “Driven from Kosovo,” an interview Jared Israel conducted with Cedomir Prlincevic, leader of the Jewish community in Pristina/Prishtine and former chief archivist of Kosovo, August 30, 1999.

³⁰ Later transformed into the Kosovo Protection Corps (KPC or TMK in Albanian). The KPC was meant to be a civil protection corps, but in reality the core of the organization retained the membership, structure and ideology of the KLA. See also UNMIK Regulation No. 1999/8, “On the Establishment of the Kosovo Protection Corps,” September 20, 1999.

³¹ Interview with a senior official of UNMIK, July 22, 2008.

³² Eleanor Beardsley, “Who Owns What? UN Tackles Kosovo Housing Tangle,” *Christian Science Monitor*, January 10, 2002.

The last wave of post-conflict violence against minorities occurred during the riots that began on March 17, 2004. The extent and scope of the riots took the international community by surprise, exposing glaring inadequacies in the structure and policies of UNMIK Police, KFOR and the local Kosovo Police Service (KPS).³³ On the basis of false reports that Serbs were responsible for drowning three Albanian children in the Ibar River, Albanian rioters targeted Serb, Roma and Ashkali settlements throughout Kosovo.³⁴ The attacks were both well organized and spontaneous; buses transported rioters to minority settlements, while locals directed the rioters to the homes of minorities.³⁵ After two days of mayhem, 19 people were killed, nearly 800 Kosovo Serb, Roma and Ashkali homes were burned and destroyed, 33 Serbian Orthodox churches and monasteries were burned, and 4,100 people were displaced.³⁶

The riots were a blow to normalization and reconciliation. Most of the destroyed homes were eventually reconstructed over the next two years, but some internally displaced persons (IDPs) chose not to return and sold their properties.³⁷ The Council of Europe, the Government of Serbia, the Serbian Orthodox Church and the Provisional Authorities of Self-Government (PISG) in Kosovo signed a protocol in 2005 to oversee the reconstruction of the destroyed churches and monasteries.

D. MONUMENTS

Seizures of residential, commercial and agricultural property were not the only generators of property conflict in the post-conflict period. In all of Kosovo's towns and cities, monuments and heritage sites of minority communities, mostly Kosovo Serbian, were vandalized or destroyed. Since 1999, the destruction has ravaged 155 churches and monasteries of the Serbian Orthodox church,³⁸ as well as statues of literary and public figures, Kosovo Serbian graveyards and World War II memorials. At the same time, local residents affiliated with the KLA seized public land so they could construct monuments to the KLA war effort and KLA fighters who perished in the

³³ Human Rights Watch, "Failure to Protect: Anti-Minority Violence in Kosovo, March 2004," Volume 16, no. 6(d), July 2004.

³⁴ About 51,000 Kosovo Albanians participated in the anti-minority riots over three days. See Human Rights Watch, "Failure to Protect: Anti-Minority Violence in Kosovo, March 2004," July 25, 2004.

³⁵ *Ibid.* The Human Rights Watch Report provides a detailed analysis of the unfolding of the riots through different towns and villages in Kosovo, explaining how well-organized extremist local groups directed crowds of Kosovo Albanians who had gathered spontaneously to attack minorities and their homes: "Both the spontaneous and organized elements behind the violence acted with a common purpose: to get rid of remaining ethnic Serb and other minority communities in Kosovo. Once the violence began, it swept throughout Kosovo with almost clinical precision: after two days of rioting, *every single* Serb, Roma or Ashkali home had been burned in most of the communities affected by the violence, but neighbouring ethnic Albanian homes were left untouched."

³⁶ *Ibid.*

³⁷ In the end, only a relatively small number of IDPs returned to Kosovo. The case of the village of Svinjare, near Mitrovica, is a good example of this. All Serb homes there were destroyed in the riots, despite the presence of a nearby French KFOR base. Eventually, up to 72 people returned after some of the homes were rebuilt. However, after a series of thefts and break-ins, all but four people left again, never to return. The trauma of the riots had severely tested their trust in the international security forces and their ethnic Albanian neighbours. Consequently, Serb residents of Svinjare began to gradually put their properties for sale.

³⁸ Website of the Diocese of Rasko-Prizren of the Serbian Orthodox Church, 2008.

conflict. These monuments and memorials now dot Kosovo's landscape; in some cases they stand on controversial sites near minority communities.³⁹ Construction of these KLA memorials on public land or expropriated land continues today. The existence of these KLA memorials and the almost total absence of monuments of other cultures in towns and cities (with the exception of north Mitrovica/Mitrovice) have made many minority community members to feel excluded from public life.

E. ILLEGAL CONSTRUCTION

In the absence of effectively functioning municipal agencies and law enforcement, the phenomenon of illegal construction has exploded across Kosovo. Rural-urban migration, organized crime and the rise of corruption have also contributed to the problem. In some instances the properties of IDPs have been replaced with anew buildings, usually for commercial purposes. Homes—many unfinished—are constructed on public or agricultural land, or in cluttered fashion on the periphery of urban areas. Tens of thousands of such illegal buildings have been built since 1999.⁴⁰ Businesses ranging from little kebab shops to countless petrol stations and large supermarkets also went up with no regard for zoning regulations or permits.

Combating this problem took a deadly turn in Pristina/Prishtine, where most people were moving to shortly after the conflict ended. The city's urban planner, Rexhep Luci, was gunned down in September 2000 following the launch of an initiative to tackle the problem of illegal construction.⁴¹ His murder has never been solved, and it firmly established an atmosphere of impunity in which illegal construction of all kinds could take place.

The phenomenon of illegal construction continues to plague Kosovo society and reflects the weakness of government institutions. Illegal construction has led to the seizure of IDPs' properties, which often leaves them unable to get their property back or receive compensation for it. Such construction also seriously threatens society with problems of pollution and public health due to the lack of potable water and proper sewer drainage. Infrastructure was severely damaged during the conflict; the addition of numerous illegal settlements and businesses places an enormous strain on a poor society already struggling to expand its infrastructure of roads, water delivery, sewage, health clinics and schools.⁴²

³⁹ Two cases typify this type of property issue. In Djakovica/Djakove, the municipality took a portion of land that belonged to the Serbian Orthodox church on which a church once stood; the building was damaged in 1999 and finally levelled on March 17, 2004. On December 31, 2005, the municipality built a monument to KLA "War Heroes" on the land. In the municipality of Kamenica/Kamenice, a monument to the KLA was raised in the center of town next to the last remaining Serb settlement on June 18, 2000, even though UNMIK had prohibited the construction. Many similar cases exist, most notably in Pristina/Prishtine, Novo Brdo/Novoberde and Strpce/Shtrepece.

⁴⁰ David Stanfield et al., "An Assessment of Property Rights in Kosovo: Final Report," USAID, 2004, 29.

⁴¹ See European Stability Initiative (ESI), "Utopian Visions: Governance Failures in Kosovo's Capital," Discussion Paper, June 8, 2006.

⁴² Ibid.

Another problem associated with illegal construction is the rapid disappearance of agricultural land in favor of commercial enterprises.⁴³ These buildings are almost exclusively built along main roads on rich farmland previously owned and inhabited by Kosovo Serbs. A Yugoslav-era law prohibiting the construction of commercial structures on agricultural land next to roads is valid, but not applied. This threatens the development of Kosovo's agricultural sector. Needless to say, the blight of illegal construction in Kosovo reflects the prevailing corruption in municipal practices and the influence of powerful interests behind the development projects, since institutions are weak and urban zoning regulations are not enforced.⁴⁴

F. ILLEGAL EXPROPRIATION

Municipalities in Kosovo that use irregular expropriation practices contribute to property conflict by victimizing individual families. In some cases, the profit motive overlaps with ideological considerations in the dispossession of minorities through illegal expropriation. In many other cases, the victims are Kosovo Albanian families with little recourse to obtain justice once their property is expropriated and their homes have been demolished to make way for new development. Since June 1999, many expropriations in Kosovo have violated victims' property and human rights.⁴⁵

Kosovo's Law on Expropriation governs how public authorities expropriate property.⁴⁶ The law imposes four steps that a municipality must take before it can expropriate property. First, preparatory work must be done to determine whether a parcel of land is suitable for development before even considering the issue of common interest.⁴⁷ Second, the authorities must decide whether a particular project fulfills the criteria of common interest as a justification for expropriation; property may be expropriated "when necessary for the construction of economic housing, communal health, and other objects in the common interest."⁴⁸ If the project is deemed to be in the common interest, then a proposal for expropriation is submitted to the competent municipal authority for the third stage. The proposal must be submitted within two years of the "Determination of Common Interest" for approval and the issuance of a decision on expropriation.⁴⁹ Fourth, a municipal evaluation commission decides how much compensation should be paid and by whom. Indeed, the proposal for expropriation needs to demonstrate that

⁴³ Interview with a senior official of the Kosovo Property Agency, July 27, 2008.

⁴⁴ Ibid.

⁴⁵ OSCE – Mission in Kosovo, "Expropriations in Kosovo," Department of Human Rights and Rule of Law, December 2006.

⁴⁶ Law on Expropriation, Official Gazette of the Socialist Autonomous Province of Kosovo, 46/86, 1986.

⁴⁷ Article 7 of the Law on Expropriation.

⁴⁸ Article 2 of the Law on Expropriation.

⁴⁹ OSCE – Mission in Kosovo, "Expropriation in Kosovo," Department of Human Rights and Rule of Law, December 2006.

the means for compensation exist.⁵⁰ Compensation could also be determined in granting property rights over another immovable property.⁵¹

The reality however is that many expropriations have occurred and continue to occur without any adherence to the law. Often municipalities begin demolishing private homes and subsequent construction without initiating any expropriation procedures.⁵² Many homeowners are left without any remedy when faced with a *fait accompli* and are offered little, if any, compensation.⁵³ In the case of property of IDPs, municipalities make very little effort to track down the owners—often displaced in Serbia or Montenegro—before expropriating their property. In other cases, such as in Klina/Kline town, people returning to their homes are threatened with expropriation in order to make way for lucrative residential apartment blocks in prime locations.⁵⁴ The determination of “common interest” in these cases and elsewhere does not follow the law and is decided arbitrarily for the purpose of private development projects. The destruction of IDPs’ properties in this manner means they have nowhere to return to.

Some municipal authorities attempt to circumvent expropriation procedures by “persuading” property holders to donate their possessions to the municipality without any compensation or for an arbitrarily fixed sum of compensation that is often much lower than market value and not in conformity with the law.⁵⁵ Certain municipalities have been known to compensate expropriated property by exchanging the latter for socially owned property or property owned by a SOE that the Kosovo Trust Agency (KTA) oversees.⁵⁶ The disposition of the assets of public or state owned enterprises, including SOEs, are strictly within the purview of UNMIK. Since these assets technically belonged or were a part of the Serbian state, UNSC Resolution 1244 transferred to UNMIK the right to provisionally administer the province, including exclusive oversight of SOEs, public enterprises and immovable property. Since Kosovo was not a state and did not have the attributes of a state, it could not by law expropriate immovable property.⁵⁷ Matters however have become more complicated since the unilateral declaration of independence on February 17, 2008, and the closure of the Kosovo Trust Agency in June, after the adoption of the new Kosovo Constitution. UNSC Resolution 1244 remains in force and UNMIK continues to

⁵⁰ Ibid.

⁵¹ Ibid. This in essence means that compensation would take the form of recognition of property rights rather than financial compensation.

⁵² There are numerous examples that typify municipal practice, particularly in the municipalities of Lipjan/Lipljan, Obilic/Obiliq, Podujevo/Poduje, Dragas/Dragash, Istok/Istog, Stimlje/Shtime and Suva Reka/Suhareke. These examples are highlighted in the OSCE report on expropriations in Kosovo (see above).

⁵³ An interesting case indicative of this problem, as well as the issue of illegal memorials, concerns a monument to KLA fighters in Dragas/Dragash Municipality where the Gorani community lives. Local self-appointed authorities expropriated seven properties illegally in 2000 to construct this memorial and to enlarge part of the road in the village of Zapluzje/Zapluxhe. See OSCE – Mission in Kosovo, “Expropriations in Kosovo,” Department of Human Rights and Rule of Law, December 2006, 10.

⁵⁴ Interview with a senior official of UNMIK, July 22, 2008.

⁵⁵ OSCE – Mission in Kosovo, “Expropriations in Kosovo,” Department of Human Rights and Rule of Law, December 2006, 19.

⁵⁶ Ibid., 9.

⁵⁷ Ibid., 9.

exist, but the government of Kosovo now declares that it is fully sovereign on its territory, and can determine the assets of any SOE or public enterprise according to Kosovo law.

G. VULNERABLE GROUPS

i. Displaced Kosovo Serbs

Displaced Serbs from Kosovo are a vulnerable group now approaching their 10th year away from their homes and property. They share similar problems with the Serbs still in Kosovo: discrimination, freedom of movement, and lack of employment opportunities, security and access to basic services. However, the displaced Serbs' problems are compounded by their status. More than 200,000 Kosovo Serbs are now in Serbia proper.⁵⁸ Many of them face a daily struggle for life with no job opportunities or prospects and no adequate housing. More than 30,000 live in appalling conditions in collective centers run by the Serbian State Secretariat for Refugees; that agency intends to close the collective centers this year.

The return of these IDPs to their homes remains uncertain, given the fragile political situation surrounding Kosovo's final status, and the unsatisfactory measures that exist surrounding property restitution or return. The IDPs face problems in Kosovo in registering residences in the relevant cadastral offices because they lack documentation.⁵⁹ Due to lack of resources and a perceived fear of the security situation, some IDPs have difficulties traveling to Kosovo and accessing services or requesting in person important personal documents from Kosovo institutions. In many instances, because of a combination of security problems and a lack of economic means, IDPs have great difficulty in getting their property in Kosovo, which often has been destroyed or usurped. Most IDPs have to rely on organized visits that NGOs conduct.

Many of the municipal and central cadastral records in Kosovo were taken to Serbia proper at the height of the conflict in 1999. The property records left behind, particularly those registered after 1994, are incomplete. Since the cadastral bodies in Serbia proper and Kosovo do not cooperate with each other, there is no exchange of records or mutual recognition of issued documents.⁶⁰ Under these circumstances ownership certificates taken from property registers are not always authentic and may not contain updated information.⁶¹

These certificates are necessary to initiate court or administrative proceedings in Kosovo. Given that Kosovo authorities do not recognize official documents (cadastral record, judgements, contracts, etc.) issued or verified by Serbian administrative bodies or courts from Kosovo that were moved to Serbia proper, this poses a severe challenge to IDPs.⁶² Many of these IDPs rely

⁵⁸ UNHCR, "Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice," March 2007.

⁵⁹ *Ibid.*, 11.

⁶⁰ *Ibid.*, 28.

⁶¹ *Ibid.*, 28.

⁶² *Ibid.*, 28. Following the end of the armed conflict in June 1999, the Serbian authorities relocated Kosovo's administrative agencies to different sites in Serbia proper. For example, the Secretariat for Internal Affairs

on the relevant local or international institution to help them maintain their property rights, or gradually abandon all hope of recovering their property. Their vulnerable status often renders them voiceless in Kosovo and provides them with little recourse. “IDPs are not well represented in Kosovo institutions,” argued a senior officer of the Kosovo Property Agency. “No one is playing a proactive role in defending their interests after a decision is made [in property cases]. It is very difficult to change a decision after it is made.”⁶³

ii. Roma, Ashkalis, Egyptians (RAE)

Roma, Ashkali and Egyptian (RAE) communities rank as the most vulnerable and socially marginalized communities in Kosovo. All three are essentially members of the same community (commonly identified as “gypsies” by both Kosovo Serbs and Albanians), but they differentiate themselves on the basis of origin, caste and language. The RAE communities suffered as a result of the conflict. About 300 were killed or disappeared after 1999 because local Kosovo Albanians or the KLA accused them of collaborating with Serbian forces.⁶⁴ According to the UN High Commissioner for Refugees (UNHCR), only 22,000 RAE are registered as IDPs in Serbia proper; but many were displaced to Montenegro and the Former Yugoslav Republic of Macedonia.⁶⁵ Estimates say that up to 50,000 RAE are displaced and remain unregistered.⁶⁶ These IDPs live in deplorable conditions often below the level of human dignity. In towns throughout central and southern Serbia, the displaced RAE live in informal settlements without access to basic utilities and clean drinking water. Their homes are shacks made of corrugated metal or cardboard or converted warehouses and abandoned barracks. Children face difficulties in school as a result of discrimination and the language barrier, and often quickly drop out, receiving no encouragement from parents who experienced a similar cycle of poverty and discrimination.

Many of the RAE IDPs remain unregistered and live in dire poverty not only due to poor levels of education, but also because they do not have personal documents.⁶⁷ This goes back

(Sekretariat Unutrasnjih Poslova or SUP in Serbian) for the region of Gnjilane/Gjilan is located in the southern Serbian town of Vranje, the SUP for the region of Mitrovica/Mitrovice is located in the central Serbian town of Kraljevo, and so on. Serb citizens who were born in Kosovo or who have a permanent place of residence there must go to these offices to get official civil documentation, such as birth certificates, national ID cards, passports, driver’s licenses, death certificates, title documents, etc. Kosovo Serbs, Roma, Goranis, Turks and also many Albanians use these offices also.

⁶³ Interview with a senior official of the Kosovo Property Agency, July 27, 2008.

⁶⁴ Interview with a Roma community leader, February 23, 2009. It is important to note that the number 300 is an estimate, as most Roma, Ashkali and Egyptians have names that sound Albanian and have not been identified by their ethnicity in the International Committee of the Red Cross (ICRC)’s list of missing persons).

⁶⁵ UNHCR, “Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice,” March 2007.

⁶⁶ *Ibid.* Most of the IDPs in Serbia proper are in fact Roma. Roma distinguish themselves from Ashkalis and Egyptians by having Romani as their mother tongue and Serbian as their language of education. They are either Muslim or Orthodox. Ashkalis and Egyptians are wholly Muslim, tend to have Albanian names and family names, and speak Albanian as their mother tongue.

⁶⁷ UNHCR, “Analysis of the Situation of Internally Displaced Persons from Kosovo in Serbia: Law and Practice,” March 2007.

generations in a number of RAE families from Kosovo in a phenomenon called “chronic un-registration.” The inability to obtain personal documents passes from one generation to the next when one cannot prove that their parents were citizens of the Republic of Serbia (including Kosovo). In other instances RAE families lost their documents while fleeing Kosovo. The end result is that many families are unable to obtain accommodation, social assistance or health cards.

The RAE IDPs face the same problems in Kosovo as described above for Serb IDPs, but these problems are compounded by a more pronounced racism and grinding poverty that leaves these people with little representation or assistance.

Between 35,000 and 40,000 RAE remain in Kosovo. Many traditional communities and settlements were irrevocably destroyed, most notably the well-established urban Roma communities of Pristina/Prishtine, Mitrovica/Mitrovice and Gnjilane/Gjilan.⁶⁸ The largest community of remaining RAE are in the Djakovica/Gjakova and Prizren regions; they are mostly Egyptians and Ashkalis who live alongside the Albanian community. Some Roma in Kosovo live alongside Serbs in large enclaves such as Gracanica (outside of Pristina/Prishtine), Priluzje/Prelluzhe (Obilic/Obiliq Municipality) and north of the Ibar River. Many RAE live in informal settlements that were never registered in cadastral records; some of these settlements date back to Ottoman times.

RAE face discrimination and disempowerment at all levels of Kosovo society and suffer the highest rate of unemployment of all communities. Community leaders are worried that the already high level of unemployment and poverty will only get worse once the forced repatriation of failed RAE asylum-seekers in Western Europe accelerates. Up to 40,000 RAE now in Western Europe will probably be forcibly repatriated to Kosovo.⁶⁹ The government there has no reintegration policy and no capacity in terms of jobs, housing and health and education services to absorb this population. Many of their homes have been destroyed or expropriated, and they lack personal documentation and title records for their homes.

The plight of the Roma of Roma Mahala is a good case in point, indicative of a systemic failure of both Kosovo and the international community to deal with the plight of the Roma. The Roma Mahala was a Roma settlement in Mitrovica of some 7,000 people before the conflict. Families here lived in privately owned homes and participated in the local economy, most notably in commerce and the sale of imported textiles. At the end of the conflict in 1999, the Roma were

⁶⁸ Kosovo Roma and Ashkali Forum, “Our Position Paper 2006,” January 2006.

⁶⁹ *Ibid.*, 20. In its “Position Paper on the Continued International Protection Needs of Individuals from Kosovo,” dated June 2006, the UNHCR has officially advised governments not to return people who belong to groups at risk in Kosovo. These groups include Serbs, Roma and Albanians in a minority situation north of the Ibar River. The paper is more nuanced when it comes to the Ashkali community. Nevertheless, the unilateral declaration of Kosovo’s independence on February 17, 2008—and its recognition by most Western European states—coupled with recent worrying economic trends lead many to fear that Western governments will take advantage of the new diplomatic reality to accelerate the return asylum-seekers from Kosovo.

accused of collaborating with Serbian authorities and were expelled. Following the expulsion, Roma Mahala was destroyed.

The Roma fled to various locations. More than 700 of them went to temporary camps in Leposavic/Leposaviq, Zvecan and in the vicinity of the Trepca mine in North Mitrovica/Mitrovica on a site contaminated by lead. The families that stayed at this site eventually suffered from lead poisoning. The international community and local Kosovo institutions finally attempted to find a solution for these Roma after the scandal of the lead poisoning broke out. UNMIK and the UNCHR made a proposal to move some of the families to a former French KFOR base called “Osterode” and to construct housing in the Roma Mahala.

Roma leaders severely criticized the Roma Mahala returns project.⁷⁰ They argued that building an apartment block to house the IDPs instead of individual houses was done without extensively consulting the people themselves and was not sensitive to Roma cultural tradition. They also criticized the absence of outreach to Roma living abroad in the Diaspora.⁷¹ Matters were further complicated when Albanian authorities in the municipality of Mitrovica/Mitrovica devised alternative plans to build a recreational center and shopping complex on the site of the Mahala by expropriating the properties of the former Roma inhabitants (some of whom did not have registered titles to their homes).⁷² The Roma Mahala saga returns project highlights a number of the difficulties RAE community members faced in securing their property rights, most notably in terms of discrimination, lack of representation, and illegal expropriation based on a lack of documents.

iii. Women

Women in Kosovo represent another vulnerable social group. Modernity and dynamic social change overlap with entrenched conservative traditions when it comes to the status of women. The subordinate status of women in all aspects of life generally crosses ethnic lines, although it affects Kosovo Albanian and RAE women more severely. Access to property rights and property ownership are two among many social indicators of progress and equality for women. Kosovo law guarantees equality of rights for men and women, but the weight of culture and tradition and the destructive influence of poverty and poor education work against any effective equality. In terms of property rights and actual ownership of property, women fare particularly poorly.

Statistical data bear out this inequity through inadequate access to resources. Girls consistently drop out of school earlier than boys, and less frequently attend secondary and post-secondary education. Illiteracy rates are higher for women, particularly in rural areas (up to 26 percent of women from 16 to 19 years old).⁷³ Reproductive health lags behind neighbouring countries.

⁷⁰ Kosovo Roma and Ashkali Forum, “Our Position 2006,” January 2006.

⁷¹ Ibid., 23. Also, interview with Bashkim Ibizi, advisor to the prime minister of Kosovo on community affairs and a Roma community leader, September 4, 2008.

⁷² Ibid., 23.

⁷³ Maddalena Pezzotti, “Equal in All Walks of Life,” Focus Kosovo, UNMIK, Office of Gender Affairs.

Kosovo has the region's highest infant mortality rate, and women here suffer the highest rate of death at birth—more than 21 per 100,000 deliveries.⁷⁴ Contraception, although available on sale, is not used much; in 2000, fewer than 20 percent of women reported using any form of birth control.⁷⁵

Some 70 percent of all women in Kosovo are unemployed.⁷⁶ The unemployment rate for rural women who finished high school rises to 99.3 percent, according to labor market indicators. This statistic refers only to remunerated work and does not cover the unpaid work that women generally carry out on family farms. Despite the presence of women in some senior and managerial positions, including in government, women are generally powerless in a patriarchal society.

Inheritance of property and other elements of family law are heavily influenced by the traditional Albanian notions of law incorporated into the *Kanun* (or “*Leke Dukagjini*”). In some remote, mountainous areas of Pec/Peje region, the *Kanun* is applied in criminal law as well.⁷⁷ It is based on customary oral tradition premised heavily on patriarchal notions of clan and honor. The *Kanun* imposes the obligation of a blood feud in response to murder. This acts as a method for regulating relations within and between clans when controlling violence in the society.

Within this traditional code, women's rights are severely restricted. The *Kanun* is explicit in a number of places about the subordinate role of women and details the fact that women cannot inherit property.⁷⁸ In many Albanian families throughout Kosovo (particularly those that are poor or rural), women cannot inherit property upon the death of their fathers or husbands. In most cases, in the absence of a brother or a son, the property goes to the dead man's closest male relative. Women are dependent on male relatives, regardless if the relationship is abusive.

As a result of this practice many Kosovo Albanian women cannot get needed collateral to secure bank loans.⁷⁹ This means that they are deprived of the ability to act independently of men in the economy.⁸⁰ Indeed, when some women attempt to exercise their right to inherit property under the law, the weight of tradition and family interferes to effectively block any benefit they could gain by doing so. One example from Decani/Deqan Municipality in southwest Kosovo eloquently illustrates this point. A woman from the village of Istinic/Isnig returned from the

⁷⁴ Ibid.

⁷⁵ Ibid.

⁷⁶ Ibid. More than 60 percent of the women who are gainfully employed are unskilled laborers.

⁷⁷ See “Le Kanun de Leke Dukagjini,” translated by Christian Gut. (Dukagjini Press, 2000). Particularly illuminating of this world view are paragraphs 597, 598 and 600 of Article 95 of the *Kanun*: “Pour l’honneur pris, il n’y a pas d’amende. L’honneur pris ne se pardonne jamais”; “L’honneur pris ne se compense pas par de l’argent mais par du sang versé ou par un pardon généreux (par l’intermédiaire de gens de bon vouloir)”; and “Celui à qui l’on a pris l’honneur est considéré comme mort par le *Kanun*.”

⁷⁸ Ibid. See Article 29 of the *Kanun*, “La femme est une outre qui doit tout supporter” or Article 33, paragraph 58, “Le mari a droit: a) de conseiller et de corriger sa femme; b) de la battre et de l’enchaîner quand elle en vient à mépriser ses ordres”; or Article 36, paragraph 88, “Le Kanun reconnaît comme héritier le fait et non la fille.”

⁷⁹ Maddalena Pezzotti, “Equal in All Walks of Life?” UNMIK, Office of Gender Affairs, Focus Kosovo.

⁸⁰ Ibid.

United States to discover that a male cousin had been given land that she had rightfully inherited to settle a blood feud. Although her name as the heir had been duly registered in the possession lists, she was not able to take possession of the land nor could she sell it because the cousin would block such actions.⁸¹

The problem of the limits on property rights is interconnected with other realities such as domestic abuse. Kosovo has one of the highest levels of domestic abuse of women in the region. The massive urban migration of rural Kosovo Albanians has caused tremendous dislocation within patriarchal family structures in which roles were governed by strict rules of custom and tradition. City life, often in small, cramped apartments, has contributed to the breakdown of the traditional Kosovo Albanian family structure, creating a growing anonymity in Kosovo society that did not exist before the conflict.⁸² And ironically, this leaves women more vulnerable to abuse as the mechanisms of protection inherent in the extended family disappear.

Clearly a social problem of wide scope, the rights of women, particularly with regard to inheriting property and the right to participate as equals in the economy, pose an ongoing challenge to the development of Kosovo society. Laws and institutions are in place to oversee and ensure gender equality, but using these mechanisms in the face of entrenched custom, tradition and poverty continues to be a struggle.

iv. Kosovo Albanians north of the Ibar River

The last vulnerable category of people victimized by the conflict is the Kosovo Albanians who have lost property north of the Ibar River and who continue to wait for their property rights to be restored. The territory north of the river is contiguous with Serbia proper and comprises the municipalities of Leposavic/Leposaviq, Zvecan, Zubin Potok and North Mitrovica/Mitrovice. Kosovo Serbs were in the majority before the conflict.

After the Yugoslav Army and Serbian police withdrew from the region, residents organized self-defence groups known as the Bridge Watchers; these stood guard next to the bridge over the Ibar that separated the north and south portions of Mitrovica/Mitrovice to keep the KLA out. Simultaneously an influx of Kosovo Serb IDPs from the rest of Kosovo created a tense atmosphere in which some IDPs, vigilante groups and others intimidated and/or expelled many of the Kosovo Albanian residents. Their properties were then occupied or usurped by the IDPs, who had lost their homes elsewhere in Kosovo, or by others linked to the self-defense groups.

Many of the Kosovo Albanians were forced to find and pay for their own accommodation in the southern portion of the city or moved in with relatives in other parts of Kosovo. Few have had access to their properties since 1999, although some informal contact does exist between former neighbours, facilitating informal arrangements of rent or occupation. Very few of the destroyed

⁸¹ Interview with a senior official of UNMIK, July 22, 2008.

⁸² Tracy Wilkinson, "Kosovo's Women Await Freedom," *Los Angeles Times*, March 10, 2008.

properties have been rebuilt. There are about 1,200 claims on properties in the north, but very few people have repossessed their properties because police are reluctant to assist in evictions in this area due to security considerations.⁸³ The long wait and relative inaction of the relevant institutions meant to deal with property restitution has prompted a number of Kosovo Albanians to sell their properties, sometimes to the families occupying them. The remainder continues to hope that they'll get their property back, but this remains a challenge considering the wide political divide that the Ibar River bridge represents.

⁸³ See European Stability Initiative (ESI), "People or Territory? A Proposal for Mitrovica," February 16, 2004.

Nashti zhas vorta po drom o bango.

You cannot walk straight when the road is bent. –Roma proverb

III. THE APPROACH OF INTERNATIONAL AND LOCAL INSTITUTIONS TO THE ISSUE OF PROPERTY RESTITUTION IN KOSOVO

A. BACKGROUND

In the wake of the armed conflict hundreds of thousands of Kosovo Albanians returned to Kosovo, many to properties that had been damaged or destroyed. The security situation led to the departure or expulsion of hundreds of thousands of Kosovo Serbs, Roma and others. Homes in the countryside that belonged to minorities were destroyed, while in towns and cities such residences were occupied illegally. A number of SOEs and public buildings were looted and pillaged. Economic activity, with the exceptions of trafficking, informal trade and commerce, largely came to a halt. Equally desolate was the picture of Kosovo's collapsed administrative and judicial institutions.

After minority communities were forced out, a flurry of illegal construction projects ensued, a blight that continues to this day. Weak institutions, poor resources, corruption, intimidation and the unregulated flow of money from uncertain sources contribute to this phenomenon. The proliferation of illegal petrol stations, hotel bars often frequented by prostitutes, and other commercial structures has led the UN police to conclude that a number of these places serve as instruments for money laundering.⁸⁴

Illegal construction and property seizures have prompted a number of people behind these illegal activities to attempt to legalize their situation by obtaining documents confirming their ownership rights through the new institutions that UNMIK gradually established after 1999. To do this, they often used dubious methods: fake title documents and IDs (sometimes from dead people) to carry out a fraudulent sale of an IDP's property; false powers of attorney registered either in a local municipal court or one in Montenegro; intimidation or corruption of judicial or municipal officials to validate a property title; illegal expropriations of property for the benefit of well-connected developers and corrupt municipal officials; and manipulation of cadastral records to change the ownership of certain properties.⁸⁵

Given this context, the international community faced enormous challenges in addressing the issue of property rights and property restitution in post-conflict Kosovo. The UNSC Resolution 1244 was vague on the subject of the right of property restitution,⁸⁶ not explicitly mentioning the

⁸⁴ Ilir Deda, "Kosovo/UNMIK Administered," in Nations in Transit Report, Freedom House, 2008, 319, and see Rob Gowland, "Kosovo Gangsters, Playboys and Posh Sandwiches," *The Guardian*, May 17, 2006.

⁸⁵ For a number of fascinating examples of all the above practices see OSCE – Mission in Kosovo, "Kosovo. First Review of the Civil Justice System," Department of Human Rights and Rule of Law, June 2006.

⁸⁶ It seems that those drafting UNSC Resolution 1244 considered only Kosovo Albanians displaced both within and outside of Kosovo until June 1999 when integrating a concept of returns and reconstruction in the document. Very

latter in its provisions.⁸⁷ On two occasions, in Article 9 (c) and Article 11 (k), the resolution merely emphasized the importance of the new civil administration mission to establish “a secure environment in which refugees and displaced persons can return home in safety...”⁸⁸ Although international law does not provide a standard model of claim mechanism, there is a growing consensus that restitution and compensation of properties is a vital component of any peace-building process.⁸⁹ Mission planners understood that in the specific context of post-conflict Kosovo, with a growing problem of property usurpation and the expulsion of minorities, it was not possible to rely on the local judicial system to come to grips with the problem. Furthermore the judicial and police system had largely collapsed after the conflict and needed time to be rebuilt.

The international community established a number of institutions to play a key role in solving Kosovo’s property crisis and in addressing the pressing issue of restitution. Some of the institutions, such as reformed local courts and the police, were meant to be permanent, while others were meant to be temporary, ad hoc, administrative entities dominated by the international community. All the relevant institutions described below have played and continue to play a key role in property restitution issues. However, an important point to bear in mind throughout this description is the relative absence of a coordinated, cooperative approach to the issue of property restitution.

B. HOUSING AND PROPERTY DIRECTORATE (HPD)

The international community created the HPD as the international body that would resolve residential property claims fairly and efficiently. The HPD was an independent body established by UN-Habitat based in Nairobi, Kenya. It got funds from state donors, primarily the Swiss and Norwegian governments, and did not depend on the overall UNMIK budget. Within the HPD, the Housing Property Claims Commission (HPCC) was established as a quasi-judicial body that would make decisions about claims. The HPCC, composed of panels of one local and two international commissioners, reviewed the evidence and heard claims in closed sessions.

The HPD managed the overall process. The legal framework for the HPD/HPCC was set down through UNMIK Regulation 1999/23 and UNMIK Regulation 2000/60. The latter defined the

little—if any—thought appears to have gone into evaluating the displacement of non-Albanian communities after June 1999 and problems stemming from that, such as property restitution.

⁸⁷ In contrast, the Dayton Peace Agreement for Bosnia and Herzegovina explicitly integrated the right to restitution in the text. Annex 7, Chapter 1, Article I(I) reads, “All refugees and displaced persons have the right freely to return to their homes of origin. They shall have the right to have restored to them property of which they were deprived in the course of hostilities since 1991 and to be compensated for any property that cannot be restored to them.”

⁸⁸ UNSC Resolution 1244, June 10, 1999.

⁸⁹ See the United Nations Principles on Housing and Property Restitution for Refugees and Displaced Persons, “The Pinheiro Principles.” Principle 29(2) states, “Competent authorities have the duty and the responsibility to assist returned or resettled Internally Displaced Persons to recover to the extent possible their property and possessions, which they left behind or were dispossessed of upon their displacement. When recovery of such property and possessions is not possible, competent authorities shall provide or assist these persons in obtaining appropriate compensation or another form of just reparation.”

HPCC's exclusive jurisdiction over three types of claims: Category A claims concerning property rights lost due to the discriminatory application of certain laws in the period between 1989 and 1999 (a category almost exclusively involving former Kosovo Albanian state employees); Category B claims concerning informal property transactions of residential property during the same period; and Category C claims concerning the loss of residential property during or after 1999 (overwhelmingly involving minorities, mostly Kosovo Serbs).⁹⁰

The HPD exclusively focused on residential property and paid no particular attention until 2005 to commercial and agricultural property, which was left out of the scope of its mandate. The HPD had a number of innovative instruments at its disposal to settle claims. Residential properties could be put under the HPD's administration if the rightful owner was unwilling or unable to return and take possession of the property. The HPD then could rent out the property and forward the rent to the owner, so that IDPs could benefit from their property. The HPD, with the agreement of the rightful owner, could also offer the use of a flat under its administration for humanitarian purposes to families or squatters who had no homes. The HPD had exclusive jurisdiction to evict people illegally occupying property and ensure their removal. Toward this end, the HPD signed a memorandum of understanding (MoU) with the UNMIK Police and the Kosovo Police Service to obtain their assistance during evictions. Finally the relevant regulations established that HPCC decisions were final, enforceable and could not be appealed or reversed by any another court.⁹¹

The HPD's first years were marred by lack of funds, difficulty in management and staffing, and poor coordination with other concerned agencies, most notably municipal authorities and the central Kosovo Cadastral Agency. The HPD also took time to fully establish itself in the field, particularly with regard to reaching out to IDP communities; evictions did not begin in earnest until almost three years after the HPD began.

Nevertheless once the HPD was fully staffed and had a functioning MoU with the police, it gradually succeeded in taking claims from all categories and adjudicating them. By 2007 the HPD/HPCC had made 28,828 decisions concerning residential property (98.9 percent of the total caseload of 29,160 claims).⁹² Ninety percent of all residential property claims came from minorities, mostly Kosovo Serbs.⁹³

⁹⁰ See UNMIK Regulation 1999/23, "On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission," Nov. 15, 1999, and UNMIK Regulation 2000/60, "On Residential Property Claims and the Rules of Procedure of the Housing and Property Directorate and the Housing and Property Claims Commission," October 31, 2000.

⁹¹ See UNMIK Regulation 1999/23, which states that final decisions of the HPCC are binding and enforceable, and are not subject to review by any other judicial or administrative body in Kosovo.

⁹² OSCE – Mission Kosovo, "Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo," Department of Human Rights, Decentralization and Communities, June 2007.

⁹³ Dan Bilefsky, "As Kosovo Rebuilds, U.N. Hurries to Return Property," *New York Times*, February 16, 2008. See also Kosovo Property Agency (KPA) website (<http://kpaonline.org>).

However, this did not mean that people repossessed their properties and/or returned to Kosovo. “Implementation” is an administrative term that covers a number of the following scenarios:

- a) The claimant (more often than not a Kosovo Serb) has settled privately and sold the property.
- b) The property is destroyed and cannot be administered by HPD (official figures show that 10,108 minority properties claimed before the HPCC was established were destroyed and therefore the HPD/HPCC could not offer any remedy. In these cases, the HPCC issues a declaratory statement merely establishing the claimant’s lawful possession.⁹⁴
- c) The HPD is the administrator of the property in the absence of the rightful owner.
- d) The HPD dismisses the case for lack of evidence.
- e) The rightful owner has indeed repossessed the property.⁹⁵ Owners who were minorities subsequently sold many of the residential properties that they’d repossessed in urban centers, because security problems and economic conditions kept them from returning.

Aside from long delays in issuing final decisions, the HPD faced an additional challenge when illegal occupant(s) moved back into properties after eviction. In such cases, the owners had no effective recourse to repossess their properties. Regulation 2000/60 made it clear that upon eviction of an illegal occupant, HPD would seal a property and hand over the keys to the rightful owner. Once this was completed, HPD’s jurisdiction ended and the case would be closed.

IDPs faced with such a problem must contact the police or file a complaint with a local court. Despite the fact that Article 13.6 of UNMIK Regulation 2000/60 stipulated that the police had the power to act *ex officio* and remove illegal occupants,⁹⁶ they often refused to act without a local prosecutor’s order. Even though occupying property illegally was a crime under the Provisional Criminal Code of Kosovo,⁹⁷ the police were reluctant to press any charges or arrest the culprits. This basically denied returning IDPS and others their rights to repossess their property because prosecutors rarely, if ever, pursued cases against illegal occupants of IDP properties or ordered the police to remove them.

The cases involving politicians, officials and institutions that illegally take minority properties are particularly troubling. The HPD carried out several campaigns to inform the public about

⁹⁴ OSCE – Mission in Kosovo, “Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo,” Department of Human Rights, Decentralization and Communities, June 2007, 27.

⁹⁵ *Ibid.*, 25.

⁹⁶ See Article 13.6 of UNMIK Regulation 2000/60, “On Residential Property Claims and the Rules of Procedure of the Housing and Property Directorate and the Housing and Property Claims Commission,” Oct. 31, 2000. The Article states, “The Directorate shall notify the claimant of the scheduled date of the eviction. Following the execution of an eviction, if the claimant or temporary occupant is not present to take immediate possession of the property, the responsible officer shall seal the property, and notify the claimant. Any person who, without lawful excuse, enters a property by breaking a seal may be subject to removal from the property by the law enforcement authorities.”

⁹⁷ See Articles 259 and 166 of the Provisional Criminal Code of Kosovo.

issues surrounding property rights in an attempt to dissuade Kosovo residents from perceiving property usurpation as an acceptable practice. However, this message of respect for the rule of law was undermined by cases in which ministers, members of the Kosovo and municipal assemblies, judges, police officers and others possessed properties illegally.

A number of high profile cases involving very powerful former KLA members made headlines and created serious problems for the HPD,⁹⁸ but the more numerous cases involving lesser-known officials are more indicative of the problem. These are particularly more acute in regions where IDPs have not sold their properties nor shown an inclination to sell until now. A few brief examples highlight this point.⁹⁹

In Klina/Kline municipality in Peje/Pec region, the municipality took the home of Vinka and Sasa Radosavljevic, a local Serb couple who fled from Kosovo in 1999, and turned it into a youth center. The couple won their claim before the HPCC, but the municipality refused to hand over the property and vacate the premises. After persistent pressure and intervention from UNMIK, HPD and other international political actors, the municipality reluctantly returned the home to the Radosavljevics. They returned in September 2007. Then the municipality decided to illegally expropriate the property and threatened the family with the demolition of their home. The municipality has offered 10,000 Euros in compensation in a process that has not respected the procedures of the Law on Expropriation.

Radmila Vulicevic, a Serb IDP, has a flat in a lucrative part of Pristina/Prishtine that was usurped by a former minister of transport and telecommunications; she's been waiting for years to get her property back. In the city of Peje/Pec, the Kosovo Red Cross was occupying the home of a Serb IDP. In the town of Istok/Istog, the Post and Telegraph Agency of Kosovo (PTK) was finally evicted from the home of another Serb IDP.

And in the town of Decani/Deqan, the municipality has unilaterally changed the possession lists of the municipal cadastre to remove the Serbian Orthodox Monastery of Visoki Decani as the owners of two parcels of land, which the Serb government had returned to the monastery (in the absence of a Law on Restitution) through a Deed of Gift in 1997. On May 17, 2008, the Special Representative of the Secretary-General (SRSG)—employing his executive authority under UNSC 1244—ordered the municipality to restore the possession lists in the cadastre to their

⁹⁸ Three such cases concerning lucrative properties in Pristina/Prishtine involve former senior commanders of the KLA: Sami Lushtaku, Remi Mustafa and the brother of Prime Minister Hashim Thaci. In all three cases, the HPD successfully ruled in favor of the rightful owners, but evictions were painful processes involving UNMIK Police and the mediation of Senior UNMIK civil administration officials. In one of the cases, the Kosovo Serb owner eventually had to sell his property at below market price. See UNMIK, "Cutting Back the Property Jungle," *Focus Magazine*, October 2, 2002.

⁹⁹ The examples came from an interview with a senior UNMIK official on July 22, 2008; a letter Mrs. Radmila Vulicevic sent to the Office of the Police Commissioner on September 11, 2008; and an interview with a senior cleric of the Visoki Decani Serbian Orthodox Monastery on July 17, 2008.

rightful state, pending any eventual judicial adjudication of ownership rights, but the municipality has refused to comply.¹⁰⁰

These and numerous other examples seem to reflect a troubling lack of respect for the principle of property rights in one segment of Kosovo society. The fact that some officials and community leaders illegally occupied minority properties complicated the HPD's efforts to restore property rights, undermined the fundamental thrust of the message of the importance of respect for the rule of law, and highlighted serious flaws in Kosovo society in this regard.

C. KOSOVO PROPERTY AGENCY (KPA)

The growing gap between the adjudication of residential property claims by the HPD/HPCC and the absence of any action on commercial and agricultural property was becoming too large to ignore. This problem was highlighted in the October 2005 report of the Special Envoy of the U.N. Secretary-General on Kosovo, Kai Eide.¹⁰¹ The report was meant to be an assessment of whether conditions were in place to begin the political process of determining Kosovo's future status. Eide identified illegal occupation of commercial and agricultural property as one of the major factors keeping IDPs from returning to Kosovo; therefore it was a serious obstacle to future economic development.¹⁰²

A debate ensued within the international community on how best to address the challenge. In an advisory opinion, UNMIK's Department of Justice (DOJ) counselled against modifying the HPD's mandate or setting up a new international body¹⁰³ and lobbied in favor of transferring jurisdiction to local courts. DOJ argued that the HPD was an exceptional measure considering the institutional vacuum and humanitarian emergency of 1999. But the time had come for the courts to take full responsibility over property rights cases because of the need for transparency and due process, the lower standard of qualification of HPD staff, the absence of remedies after HPCC decisions, and the HPD's poor ability to carry out its mandate.¹⁰⁴ Despite some valid

¹⁰⁰ See UNMIK Executive Decision No. 2008/21, "Further to Executive Decision no. 2008/16 Temporarily Setting Aside Entries Relating to Certain Land Parcels in the Cadastre of Decan/Decani Municipality," May 17, 2008.

¹⁰¹ Kai Eide, Special Envoy of the U.N. Secretary-General, "A Comprehensive Review of the Situation in Kosovo," U.N. Security Council, October 7, 2005.

¹⁰² *Ibid.* Paragraph 49 states: "A great number of agricultural and commercial properties remain illegally occupied. This represents a serious obstacle to returns and sustainable livelihood. Although most residential property claims have been adjudicated, less than half of the decisions have been implemented. Local courts have a serious backlog of property-related cases amounting to tens of thousands. It is a situation that cannot be allowed to continue. The Government and the international community must urgently address this issue and find alternative ways to solve outstanding cases and to implement the decisions which have been made."

¹⁰³ See DOJ internal advisory memo, "Should it be HPD instead of the Courts?" UNMIK – Department of Justice, 2006.

¹⁰⁴ *Ibid.*

concerns about the local courts, DOJ contended that removing the courts from the equation sent a poor message about the court system's ability to manage property cases fairly.¹⁰⁵

On March 4, 2006, the international community replaced the HPD with the Kosovo Property Agency (KPA) as an independent, local agency charged with resolving all outstanding residential, commercial and agricultural immovable property disputes related to the conflict.¹⁰⁶ The KPA consists of an executive secretariat responsible for managing the claims process, a supervisory board that provides the executive secretariat with administrative oversight and policy guidance, and finally an independent Property Claims Commission (PCC), a quasi-judicial body that adjudicates claims referred by the executive secretariat.¹⁰⁷ The PCC has, through its rules of procedure and evidence, a special (*sui generis*) regime, "equipping it with the necessary tools to handle its voluminous caseload in an efficient manner."¹⁰⁸

The Kosovo government, through the prime minister, appoints two of the supervisory board members; the remaining member is an international official. The PCC has the authority to reach decisions on claimed property in relation to title, property-user rights and lawful possession rights.¹⁰⁹ Unlike the HPD/HCC system, PCC decisions can be appealed to the Supreme Court of Kosovo, which is a special panel of three judges (two internationals and one local).¹¹⁰ Most importantly, PCC decisions constitute title determinations and should allow people who successfully make their claims to register ownership or right of use in the Kosovo Immovable Property Rights Register.¹¹¹

The KPA assumed the HPD/HPCC's responsibility in administering residential properties, particularly properties deemed to be abandoned.¹¹² According to the KPA, as of April 2008, some 4,457 properties were under its administration, and 3,848 of those were rented out on behalf of IDPs.¹¹³ The KPA also had to complete 721 HPCC decisions pending implementation, on the basis of requests from successful claimants to repossess their property.¹¹⁴

¹⁰⁵ Ibid. See particularly page 1: "Property is the most significant issue for most ethnic Serbians who have been displaced to Serbia proper. A fair and transparent process by the courts will assist in building their confidence in the Kosovo court system and the other institutions."

¹⁰⁶ See UNMIK Regulation 2006/10, "On the Resolution of Claims Relating to Private Immovable Property, including Agricultural and Commercial Property, as Superseded by UNMIK Regulation 2006/50," March 4, 2006.

¹⁰⁷ See Knut Rosandhaug, Kosovo Property Agency yearly report, "KPA 2007: In Brief," December 2007.

¹⁰⁸ Ibid.

¹⁰⁹ OSCE – Mission in Kosovo, "Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo," Department of Human Rights and Rule of Law, June 2007.

¹¹⁰ Ibid.

¹¹¹ Ibid.

¹¹² See UNMIK Regulation 2000/60, Section 1. Abandoned is "any property which the owner or lawful possessor and the members of his/her family have permanently or temporarily, other than for an occasional absence, ceased to use and which is either vacant or illegally occupied."

¹¹³ See Knut Rosandhaug, Kosovo Property Agency Yearly Report, "KPA 2007: In Brief", December 2007.

¹¹⁴ Ibid.

The KPA started working under difficult circumstances. By July 27, 2007, it had collected about 40,000 claims and made decisions in 11,168.¹¹⁵ However none of those 11,168 claims have in fact been acted on because the Supreme Court panel designated to hear appeals still is not established.¹¹⁶

The KPA also had budget problems that hampered its ability to do its job. The UNMIK and Kosovo Consolidated Budget funds (amounting to 32 percent of the KPA's budget needs) were not sufficient enough to cover operations, and the KPA struggled to get money from donors. This financial shortfall seriously affected the KPA's ability to keep qualified staff members. Lack of funds also meant that the KPA's ability to carry out evictions and communication activities for IDPs was limited. So in some cases, the KPA was unable to serve any of the PCC decisions on the parties to a claim.¹¹⁷

The financial problems and other difficulties have hurt the KPA's overall ability to carry out its mandate and delayed the adjudication process. The delays in turn have led many people with claims—mostly IDPs—to lose trust in the process and all hope that justice will be served in their cases.

The KPA also faced other institutional challenges. The Kosovo Cadastral Agency refuses to give the KPA access to its mapping data, which would greatly accelerate the verification process of individual claims.¹¹⁸ In August 2007, the SRSG, suspended implementation activities because of the Kosovo government's lack of support for the enforcement process.

On June 13, 2008, the Kosovo Assembly adopted a law that transferred UNMIK's authority and responsibility concerning the KPA to the European Union's International Civilian Representative (ICR).¹¹⁹ Given the Serbian government's stated policy of not recognizing the legality of the ICR's mandate, the new law raises serious concerns about the future cooperation between Serb authorities and the KPA. The Serbian government announced that the KPA's offices in Serbia were suspended, claiming that the agency had not effectively dealt with the issue of protecting the property rights of Serbian citizens whose properties were occupied illegally in Kosovo.¹²⁰ This has made it nearly impossible for the KPA to verify documents in Serbia, contact claimants for additional information, communicate to the parties the results of the adjudication process, or obtain corroborative evidence. Despite the suspension of the KPA offices in Serbia, UNMIK Regulation 2006/50 remained in force, and an UNMIK-appointed KPA executive director and management team co-existed with those the ICR appointed.

¹¹⁵ Ibid.

¹¹⁶ OSCE – Mission in Kosovo, “Human Rights, Ethnic Relations and Democracy in Kosovo,” Background Report, 2008.

¹¹⁷ Ibid.

¹¹⁸ Ibid.

¹¹⁹ Law No. 03/L-079, amending UNMK Regulation 2006/50, “On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property,” June 13, 2008.

¹²⁰ OSCE – Mission in Kosovo, “Human Rights, Ethnic Relations and Democracy in Kosovo,” Background Report, 2008.

On December 23, 2008, UNMIK Regulation 2006/50 expired, thus ending UNMIK's involvement with the KPA. Prior to this, the government of Serbia was negotiating with UNMIK about extending this regulation as a pre-condition to re-opening the KPA's offices. The negotiations took place within the framework of the U.N. Secretary-General's proposed Six-Point Plan for Kosovo presented to the Security Council on November 24, 2008.¹²¹ As this report was being written, the U.N. and the Serbian government were negotiating the property issue in an attempt to find ways of circumventing the obstacles that exist, particularly the presence of the International Civilian Office structure within the KPA that neither Serbia nor UNMIK formally recognize. A number of relevant organizations, most notably the Organization for the Security and Cooperation in Europe (OSCE), support extending UNMIK Regulation 2006/50, which, aside from the practical consideration of the re-opening the KPA offices in Serbia, contains legal mechanisms that are more suitable to address individual property rights than the Kosovo legislation adopted in June 2008.¹²² There are serious concerns that the Kosovo legislation does not adequately address the issues of evicting illegal occupants and rental schemes, nor does it contain clear, binding language about implementing the latter.¹²³

Currently the KPA continues adjudicating cases, particularly with regard to the 30,000 out of 41,000 cases in which no other contesting claims exist. However implementation remains relatively poor. All observers agree that closing the KPA offices in Serbia has slowed down the agency's work and that displaced property claimants now face serious obstacles in fulfilling their due process rights.¹²⁴

D. POLICE

As hinted above, the police play an important institutional role in the issue of property rights; the HPD and the KPA have relied on the police to assist in carrying out evictions and to prevent the further illegal occupation of properties. Their role is crucial in upholding and enforcing the law with regard to property rights. The actions of the police in this regard have been mixed and once again reflect the fragility of rule of law institutions in Kosovo.

After Serbian police left in June 1999, there was no police service in Kosovo. UNMIK immediately started recruiting police officers from various countries to establish an international civilian police presence, "UNMIK Police." The recruitment, deployment and structuring of UNMIK Police took place from 1999 to 2001. UNMIK Police fell under the leadership of an international police commissioner and the Deputy Special Representative of the Secretary-General (D/SRSG) for police and justice (so-called UNMIK Pillar I as from 2001). They had full executive authority under the UNSC Resolution 1244 to carry out all matters of policing. At the

¹²¹ See "Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo," November 24, 2008, 4.

¹²² Interview with a senior official of the OSCE, January 26, 2009.

¹²³ Ibid.

¹²⁴ Ibid.

same time, UNMIK hurriedly worked on plans to recruit, train and establish a local Kosovo Police Force (KPS),¹²⁵ a project that took place almost literally from scratch.

Much of the property destruction and usurpation occurred during this period. UNMIK Police was often overwhelmed and unprepared to deal with the problem. There was confusion about the applicable law in matters of usurpation and eviction. UNMIK Police officers came from different countries and had different levels of competence and different approaches to policing. This institutional lack of unity affected the force's ability to address challenges in a coherent, unified manner. Furthermore the force suffered from rapid turnover among officers and commanders, because the latter operated on the basis of fixed rotations from their national contingents. This meant there was little continuity in policy and leadership. New officers would lose precious time in familiarizing themselves with their tasks and the realities of Kosovo. Ongoing investigations often simply faded away as a particular officer conducting one investigation was rotated out of the mission.

In this early context, UNMIK Police officers acted in an ad hoc and improvised manner in dealing with property issues. Some officers took a proactive approach and expelled illegal occupiers on their own initiative, by conducting an investigation and physically removing the people themselves. Other officers refused to get involved in property issues and referred people to local courts. Once the HPD was fully operational, some UNMIK Police officers stopped dealing with property issues entirely and left the matter in the hands of the directorate.

The role of UNMIK Police was limited to enforcing the law on preventing trespasses and illegal occupation, and eventually in assisting the HPD with evictions. However the extent of the problem of illegal occupation, combined with some of the internal handicaps of UNMIK Police described above, ensured that UNMIK Police were not effective in preventing property usurpations.

UNMIK made the KPS a priority. And in cooperation with the International Organization for Migration, UNMIK created a program that focused on recruiting former KLA fighters into the KPS. Officers were recruited often haphazardly in the early phase, since the main goal was to set up the KPS as fast as possible. Training took place in the Kosovo Police Service School in Vucitrn/Vushtrri that the OSCE Mission established on the site of the previous police academy. Training was basic at first, amounting to a six-week course and subsequent training with an UNMIK Police mentor. UNMIK made efforts to recruit as many non-Albanians as possible. KPS officers acted under the authority of UNMIK Police until 2005 when individual police stations and regions began to be transferred entirely to the KPS.

¹²⁵ Following the promulgation of the Law on Police of the Kosovo Assembly, Nr. 03/L-035, on June 15, 2008, the name of the force was officially designated as "Kosovo Police" (KP). The abbreviation "KPS," however, is used throughout this text for the sake of consistency.

The KPS is often presented as one of the rare success stories of the international mission in Kosovo. In some regards, this is accurate. UNMIK and the OSCE created a new police service and provided training and policies based on the best of modern, democratic policing standards under very difficult circumstances. Until the recent unilateral declaration of independence, the KPS was also one of the most multiethnic institutions in Kosovo.¹²⁶ However certain structural challenges exist that limit the KPS's ability to be a fully functional, effective police force, and they affect the approach the KPS adopts in the area of protecting property rights.

As an institution, the KPS is not immune from the prevailing opinions and worldviews that exist in the society in which it operates; indeed, at times it reflects them. The fact that many Kosovo Albanian KPS officers are former KLA guerrillas reinforces the presence of the KLA's nationalist ideology and the negative opinion of minorities many in the force have. KLA networks continue to exist parallel to official institutions, and these networks influence the attitudes and loyalties of former members, including those in the KPS. UNMIK Police officers often joke about the reality of the police chain of command versus the reality of the food chain in Kosovo society, referring to centers of power and wealth that no one in Kosovo can afford to ignore. The reality of parallel sources of power that are linked either by loyalty to clans or former KLA networks makes matters particularly difficult for KPS officers wishing to diligently carry out their duties in small towns and communities. In the latter there is no anonymity, everyone knows each other and family ties are particularly strong, leading some KPS officers to avoid any activity that could antagonize certain powerful members of the community or even place themselves or their family in danger.

The force also does not have enough qualified cadres, and that often translates into relatively weak leadership and a lack of initiative and proactive approaches to policing. These structural difficulties were most evident during the March 2004 riots. With the exception of some officers who showed great courage and dedication, the KPS, along with UNMIK Police and KFOR, failed to protect people and their properties. Since then, minorities do not think the force is trustworthy or credible.¹²⁷ In contrast, the majority of Kosovo Albanians have relatively positive opinions of a police force they see as theirs.

In matters of property rights, the KPS signed a memorandum of understanding with the KPA establishing a protocol of cooperation with regard to evicting illegal occupants. The KPS drafted

¹²⁶ Following the unilateral declaration of independence on February 17, 2008, the majority of Kosovo Serb KPS officers, in protest at the declaration and in line with their own government's policy, withdrew from the KPS. The KPS suspended them with pay, which has exacerbated tensions. UNMIK is mediating the negotiations to bring these Kosovo Serb officers back to the KPS.

¹²⁷ A recent survey of attitudes of Kosovo Serbs in the enclave of Gracanica/Gracanice about the KPS was conducted by a local NGO following the withdrawal of Serbs from the KPS. The results give an interesting insight into the perception that some Kosovo Serbs have of the police in this new period. Most of the perception of the KPS remains negative. See Center for Peace and Tolerance, "Conference on Security and Freedom of Movement of the Serbian Community in Kosovo and Metohia: Change of the Ethnic Composition in the Gracanica Police Station and its Consequences," June 13, 2008.

a Standard Operating Procedure (SOP—an internal document instructing officers on how to conduct themselves during evictions) on the basis of the MoU.¹²⁸ In general, the KPS has done a satisfactory job in cooperating with and assisting the KPA during evictions. This has been a difficult task for some Kosovo Albanian officers, given the mindset inherited from the conflict and the fact that the vast majority of illegal occupants are Kosovo Albanians.¹²⁹

However the KPS has been lax on re-evictions. Properties are often re-occupied after the initial eviction, leaving rightful owners unable to take possession of their property. In many instances, the KPS has not applied the valid provisions of the criminal code against people who illegally trespass on private property and unlawfully seize such properties, by routinely not charging them.

On some occasions police do not take action against people who, after eviction, return to the property and change the locks. The KPS has in the past refused to take action to ensure that they access the property and remove the illegal occupant in such cases. In other instances, the illegal occupant returns to the property with his belongings and leaves them there. Once again, this becomes an obstacle for rightful minority owners to repossess their property because most of them are afraid or unable to remove those belongings. The DOJ drafted operational directions for police and prosecutors, providing guidelines on the applicability of various provisions of the criminal code to specific scenarios of unlawful occupation of property and inviolability of residences, and sent them to Kosovo's public prosecutor, Hilmi Zhitije, on April 27, 2006.¹³⁰ He circulated the recommendations to the police and prosecutors, but problems persisted with the re-occupiers and the atmosphere of impunity that surrounded their activities.¹³¹

Despite a change in the KPS's Standard Operation Procedures with regard to re-evictions and a number of internal meetings on the issue, problems persisted in how the police tried to prevent usurpation. This compelled the DOJ, at the instigation of the KPA and the Office of the Police Commissioner, to draft an administrative direction for the SRSB clarifying the roles of the KPA and KPS when removing unlawful occupants and their belongings from properties previously

¹²⁸ "Standard Operational Procedures: Usurpations, Evictions and Re-Usurpations of Properties," Police MHQ, Department of Public Order, Directorate of Planning and Development, August 22, 2006.

¹²⁹ See Dan Bilefsky, "As Kosovo Rebuilds, U.N. Hurries to Return Property," *New York Times*, February 16, 2008, on the attitudes some Albanian officers had regarding evictions.

¹³⁰ See the letter Albert Moskovitz, director of the UNMIK Department of Justice, sent to Hilmi Zhitija, public prosecutor of Kosovo, April 27, 2006, referring to "Operational Directions for Police and Prosecutors on Investigation of Unlawful Occupation of Real Property and Infringing Inviolability of Residences."

¹³¹ An interesting case from Klina/Kline is based on an interview with a senior official of UNMIK, July 22, 2008. Vladimir Radosavljevic, 70, and his wife are Serbs who returned to Klina/Kline. A powerful local Albanian businessman, Bujar Morina, took their property and turned it into a restaurant. The Radosavljevics were the victims of an attempted murder in 2005, which UNMIK Police believe was linked to their struggle to repossess their property. The KPA finally evicted Morina after many threats, but he quickly re-occupied the property and left his belongings inside. Morina openly threatened the couple, arguing that the property was his and consequently changed the locks. The matter dragged on for some time until police finally got Morina to leave, but some of his belongings remained on the premises, and the police never charged him. The Radosavljevics have moved into part of the home, yet they live in fear.

subject to KPA eviction. Unfortunately since the SRSG never signed the document, the problem of illegal re-occupation continues to deny IDPs the right to free and unimpeded access to their properties.

E. LOCAL COURTS

The court system in any society plays a major role in protecting property rights. Although the establishment of the HPD and KPA has somewhat marginalized Kosovo's local courts in the process, they still have important jurisdiction over the determination and protection of property rights. Sadly, there is a consensus among most expert observers, from the Kai Eide Report in 2005 to a recent OSCE 2008 report,¹³² that the judicial system in Kosovo is one of the weakest and most corrupt institutions in the society. The weakness of the judicial system affects all communities in Kosovo and is a serious threat to its future stability. Mistrust and lack of credibility of the system not only harms the cause of justice but potentially pushes individuals to solve disputes outside of the framework of the judicial system. Needless to say, the absence of an effective court system is an obstacle to investment and economic development.

The weakness of the court system in civil proceedings is particularly evident in cases related to property claims. There are overarching reasons for such weakness, such as the state of the human, financial and physical resources of the courts. Many judges and lawyers lack adequate training and experience leading to problems of incompetence and poor case-management skills. Salaries are low, and working conditions are difficult, potentially opening the door to corruption and influence peddling. Judges and lawyers are also subject to pressures and intimidation from clan members to show "solidarity" in their approach to certain cases. Finally there is the legacy of the past hanging over the property issue in Kosovo. As seen in a previous section, Kosovo has always had a fragile legal culture, and the practices surrounding property transactions did not always respect legal requirements.¹³³ The inertia of this reality has seeped into the judicial system and affected its approach to adjudicating cases.

Specific problems in civil proceedings dealing with property transactions are numerous. One of them is the backlog of cases pending before the courts. In 2008 alone, there were 49,100 unsolved civil cases, more than 85 percent of which dealt with property.¹³⁴ Judges have consistently displayed poor management of civil cases thereby causing undue delays in their disposition of cases. The delays have become serious, dragging on for years in some cases and thus violating the requirement of Article 6 of the European Convention of Human Rights

¹³² See OSCE – Mission in Kosovo, "Human Rights, Ethnic Relations and Democracy in Kosovo," 2008. See also Kai Eide, "Comprehensive Review of the Situation in Kosovo," U.N. Security Council, October 7, 2005, 3: "The civil justice system is of particular concern, its increasing backlog of cases now stands at several tens of thousands. Combating serious crime, including organized crime and corruption, has proven to be difficult for the KPS and the justice system. It is hindered by family or clan solidarity and by the intimidation of witnesses and of law enforcement and judicial officials."

¹³³ OSCE – Mission in Kosovo, "Kosovo: First Review of the Civil Justice System," Department of Human Rights and Rule of Law, June 2006, 30.

¹³⁴ See Kosovo Judicial Council, Third Quarterly Report, 2008.

(ECHR) concerning the reasonable timeliness of court decisions. An OSCE report on the civil justice system has detailed a series of problematic court practices: poor preliminary examination of statements of claims, failure to deliver those claims to the opposing party before trial, failure to submit evidence before a main trial session, summons delivery problems, failure to establish time limits, lack of provisions regulating postponements, and excessive numbers of hearings and postponements.¹³⁵

The applicable law sets down a clear legal framework regulating the requirements of property transactions. The law states, “[a] contract pursuant to which the right of use of real estate, or ownership of real estate is being transferred must be compiled in written form, and the signatures of the contractors must be verified in the court.”¹³⁶ When the party to a property transaction is not the signatory of the contract, the signatory must possess legal written authorisation certified by the court to represent the party in signing and certifying the contract. When a property seller is represented by a third person, the seller must provide the courts with certified proof that the third person is legally authorised to represent him/her.¹³⁷ Once this procedure is done, the court must send the contract to a cadastral office to be registered.

Despite these detailed procedures to protect the integrity and authenticity of property transactions, courts in Kosovo have not respected the rules in many cases.¹³⁸ This is particularly the case in claims involving the property of displaced Kosovo Serbs and other minorities, in which people have tried to validate a fraudulent sale by using false ID cards (in some cases of dead individuals) or fake property titles. Indeed the courts frequently see cases in which people in Kosovo have used forged ID cards to get official authorizations in Serbia or Montenegro so they can sell property owned by Kosovo Serbs displaced to Serbia.¹³⁹ To authorize the sale of IDP properties, some people have gotten false powers of attorney that are registered and validated in a court in Montenegro. Certain Montenegrin towns such as Bar and Rozaje have been hubs for all kinds of corrupt transactions involving Kosovo Albanians and Serbs.¹⁴⁰ Indeed the fraudulent disposition of minority properties does not only involve Kosovo Albanians, but Serbs fraudulently acting as middlemen.¹⁴¹ In other cases, irregular cadastral documents are used to prove title, and courts regularly accept their validity. In many cases they accept the validity of

¹³⁵ OSCE – Mission in Kosovo, “Kosovo: First Review of the Civil Justice System,” Department of Human Rights and Rule of Law, June 2006, Chapter 1.

¹³⁶ Article 4(2) of the Law on Transfer of Real Property (LTRP), published in the Official Gazette of the Republic of Serbia, No. 43/81, on August 1, 1981.

¹³⁷ Article 9 of the “Law on the Validation of Signatures and Duplicates.”

¹³⁸ OSCE – Mission in Kosovo, “Kosovo: First Review of the Civil Justice System,” Department of Human Rights and Rule of Law, June 2006, 21.

¹³⁹ *Ibid.*, 22.

¹⁴⁰ See Krenar Gashi, “Ex-Policemen run Kosovo Passport Scam,” B92 News, December 7, 2006. The court in Bar is used to certify false powers of attorney that are used to validate purchase transactions of properties in Kosovo, often belonging to Serbian IDPs. Montenegro also was a place where Kosovo Serbs and Albanians could buy all kinds of official documents, including Yugoslav birth certificates, health cards and passports.

¹⁴¹ Witness the recent arrest in Serbia of an organized group illegally selling Kosovo Serb property. See “Ten-Member Group Arrested over Illegal Selling of Serb Property in Kosovo,” *Tanjug*, September 26, 2008.

doubtful records and do not follow the proper procedures to verify the documents' authenticity with the original issuing body.¹⁴²

The courts have major problems with claims filed against people no longer in Kosovo, usually displaced minority members. Courts are often unable to locate the displaced defendant, and, after a series of postponements, they assign a temporary representative to defend his/her interests. The OSCE has observed a widespread pattern of cases in Kosovo in which courts fail to comply with the procedural rules on the appointment of temporary representatives.¹⁴³ Courts often do not make reasonable efforts to find defendants.¹⁴⁴ They fail to demonstrate that the decision to appoint a temporary representative is necessary according to law, or they fail to publicly announce the appointment of a temporary representative in an appropriate manner.¹⁴⁵ Since most IDPs are in Serbia, announcements should be taken out in Serbian newspapers, but this is not always done.

An even more troubling aspect of this problem is that the temporary representatives are Kosovo Albanians who are sometimes paid by the claimant. These representatives often act passively during hearings or even support the claimant's case (as opposed to fulfilling their duty of due diligence to represent the defendant's interests).¹⁴⁶ This phenomenon raises concerns of inherent bias and collusion in the system.

A related phenomenon involves court decisions to validate property transactions without any formal, written documentation, as required by law. The legacy of the past certainly looms large in the cases in which people base their claims on oral contracts or informal written ones that were never certified in court or registered in a cadastre. Courts in Kosovo, often in the absence of the displaced defendant (usually a Kosovo Serb represented by a temporary representative), approve property claims solely on the basis of witness testimony on behalf of the claimant with no corroborating written evidence as required by law. Courts have ruled that oral contracts and/or written informal contracts are valid if eyewitnesses can confirm that the deal took place and that the parties fulfilled all their obligations.¹⁴⁷ By relying solely on such testimonies and acknowledging oral contracts as a valid means to transfer property, some courts in Kosovo have violated the law and may have contributed to the dispossession of people's properties.¹⁴⁸

Another serious problem bedeviling Kosovo's civil courts stems from the undue influence that outside factors have on decisions. Powerful people often are involved in usurping property, and they try to legitimize their seizures through the court system. Threats and intimidation of judges

¹⁴² *Ibid.*, 24.

¹⁴³ OSCE – Mission in Kosovo, “Kosovo: First Review of the Civil Justice System,” Department of Human Rights and Rule of Law, June 2006, 29.

¹⁴⁴ See Article 148 of the “Law on Contested Procedure.”

¹⁴⁵ See Articles 84 and 86 of the “Law on Contested Procedure.”

¹⁴⁶ OSCE – Mission in Kosovo, “Kosovo: First Review of the Civil Justice System,” Department of Human Rights and Rule of Law, June 2006.

¹⁴⁷ *Ibid.*, 32.

¹⁴⁸ *Ibid.*, 32.

have been noted in several property cases. In a number of cases, municipalities have interfered in court proceedings either by obstructing them or pressuring judges who oversee disputes in which they were a party.¹⁴⁹ Municipalities have used their authority to influence third parties such as municipal inspectors to prevent courts from exercising authority. Evidence is withheld or inspection of municipal sites is prevented. Certain municipal officials have a personal stake in the outcome of property cases and have been known to directly interfere with the work of the courts.¹⁵⁰ The realities of the system do not escape public notice. So the perception that the judicial system is corrupt feeds a growing frustration with seeking justice and redress through the courts.¹⁵¹

The growing backlog of the civil courts system is directly linked to a history of institutional weakness, the influence of local culture, and practices inherited from the recent past. The turmoil of the 1990s continues to affect the system because many property cases initiated during that decade are now handled in a different judicial context. Many of those properties were destroyed in the conflict, and documents and records such as civil registers or cadastral records were removed or are missing. In some cases, one of the parties is dead, and in others one of the parties is displaced. All these factors combined with the long history of the proceedings and some of the outdated evidence make it very difficult for the courts to handle old property disputes in the present context.¹⁵² The backlog of property cases in the civil court system is rendered more acute by the existence, as of December 2006, of 18,132 claims for compensation for damage to private property (during and after 1999) that Kosovo Serbs have filed against Kosovo municipalities, UNMIK and KFOR.¹⁵³ In addition, Kosovo Albanians had filed more than 2,939 property damage claims incurred during the conflict against individual Kosovo Serbs and the Republic of Serbia.¹⁵⁴

In August 2004, the UNMIK DOJ suspended consideration of the Serbian claims, instructing all Kosovo court presidents not to process the cases until an adequate solution was found. The DOJ feared that the number of these claims would overwhelm a system that was already suffering from a heavy backlog. The Kosovo Albanians' claims, although not subject to a DOJ instruction, were also suspended, given the courts' inability to deal with compensation claims against Kosovo Serbs who are displaced and whose whereabouts are largely unknown, as well as the lack of jurisdiction of courts in Kosovo to try cases against Serbia.¹⁵⁵ Although the DOJ and the

¹⁴⁹ Ibid., 38.

¹⁵⁰ Ibid., 38.

¹⁵¹ According to a USAID report about corruption in Kosovo prepared in July 2003, lawyers are the third most corrupt group of professionals in Kosovo, immediately followed by judges. The conclusion was based on a questionnaire in which people were asked which professionals have asked them for unofficial cash, gifts or favors to solve problems.

¹⁵² Ibid., 33.

¹⁵³ OSCE – Mission in Kosovo, “Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo,” Department of Human Rights, Decentralisation and Communities, June 2007, 32.

¹⁵⁴ Ibid., 33.

¹⁵⁵ Ibid., 32.

Kosovo Ministry of Justice drafted an overall strategy in cooperation with the OSCE and the European Union Planning Team for Kosovo (EUPT) to address the backlog, little has been done and equally little progress has been noted in reducing the backlog.¹⁵⁶ The continued lack of resolution of backlogged property cases, particularly in addressing compensation claims, undermines the right to a fair trial as prescribed by the European Convention on Human Rights. Above all, it violates the right of all displaced people to recover any housing or property they were arbitrarily deprived of, or to be compensated for their loss if that loss is irrevocable.¹⁵⁷

F. KOSOVO TRUST AGENCY AND PRIVATIZATION

No survey of the measures that local or international institutions in Kosovo have taken to address property rights issues would be complete without touching on the issue of privatization. Privatization of public enterprises and SOEs is a complex, politically charged process in Kosovo. It affects a large number of people across all communities and raises profound questions about past and present injustices related to waves of nationalizations, expropriations and usurpations of property. Aside from its long-term potential effects on economic development, the way privatization has been pursued in Kosovo has proven to be controversial. It raises concerns about abuse of power by the relevant agencies involved and problematic legislation that can lead to discrimination.¹⁵⁸

The international community, with UNMIK Regulation 2002/12 (later amended by UNMIK Regulation 2005/18), established the Kosovo Trust Agency as the body responsible for redistributing SOE assets to individuals or enterprises.¹⁵⁹ These regulations, combined with other relevant legislation, give the KTA vast authority to administer publicly owned enterprises and SOEs registered in Kosovo as of Dec. 31, 1988, and socially owned property located in Kosovo as of March 22, 1989.¹⁶⁰ In short, the KTA's primary goal was geared toward privatizing public and socially owned assets.

SOEs were based on a unique concept of social ownership introduced by the Socialist Federal Republic of Yugoslavia (SFRY) Constitution of 1974. In essence this concept dictates that property is not owned by individuals but is the common heritage of the society as a whole. Thus the concept can be summed up by the dictum that property is owned "by no one and everyone."¹⁶¹ Society is vested with property rights, while individuals and legal entities possess only user rights. This concept was transferred to enterprises in which workers, managers and the

¹⁵⁶ See DOJ, European Union Planning Team for Kosovo (EUPT), PISG, OSCE, "Strategy and Action Plan for the Reduction of Judicial Property Backlogs," March 16, 2007.

¹⁵⁷ *Ibid.*, 32.

¹⁵⁸ OSCE – Mission in Kosovo, "Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo," Monitoring Department/Rule of Law Division, May 2008.

¹⁵⁹ *Ibid.*, 8.

¹⁶⁰ *Ibid.*, 8.

¹⁶¹ David Stanfield, et al., "An Assessment of Property Rights in Kosovo: Final Report," USAID, 2004, 29.

society as a whole theoretically benefited from user rights but did not own the enterprise in question.

The international community established a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters in 2002.¹⁶² This comprised three international judges, one of whom is the presiding judge of the chamber, and two local judges; all three are appointed by the SRSG in consultation with the president of Kosovo's Supreme Court.¹⁶³ The Special Chamber has primary jurisdiction to review challenges of the KTA's decisions or actions, to hear claims against the KTA for financial losses incurred as a result of decisions the KTA made as administrator of an SOE, to hear claims against SOEs when the latter are under KTA administration, and finally to hear all other claims detailed in Section 4.1 of UNMIK Regulation 2002/13. The chamber also can remove claims within its jurisdiction from the regular courts, make decisions regarding complaints about lists of eligible employees of SOEs in the privatization process, and hear cases on appeal from judgements rendered in regular courts in matters that are within the chamber's jurisdiction.¹⁶⁴

Aside from concerns related to the complexity and nature of the relevant legislation in the privatization process in Kosovo, particularly with regard to issues of lack of clarity and detail,¹⁶⁵ two human rights concerns stand out. Certain dispositions of UNMIK Regulation No. 2002/13 open the door to discrimination in the manner in which lists of eligible employees for privatization shares are compiled, and certain dispositions of UNMIK Regulation No. 2005/18 amount to an illegal expropriation of property when applied to the privatization process.¹⁶⁶

In the first instance, UNMIK Regulation 2002/13 stipulates that employees can participate in the 20 percent share of the proceeds of a privatized SOE if they were registered as an employee with the SOE when it was privatized¹⁶⁷ and have been on the payroll of the SOE for no less than three years (at any time). In practice, a representative body of employees of an SOE and the Federation of Independent Trade Unions of Kosovo would produce lists of eligible employees and provide them to the KTA. However the federation rarely reviewed the lists before publication. Consistently, names of minority members (among others) were kept off the eligibility lists with the justification that most had not reported to work since June 1999 and therefore did not qualify

¹⁶²See UNMIK Regulation No. 2002/13, "On the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters," June 13, 2002.

¹⁶³ UNMK Regulation No. 2005/18, Sept. 6, 2005, Section 30.1.

¹⁶⁴ OSCE – Mission in Kosovo, "Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo," May 2008, 32.

¹⁶⁵ See the discussion on this issue of the complexity and lack of detail of the legislation in the OSCE report on privatization, "Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matter by the Special Chamber of the Supreme Court of Kosovo," May 2008, 17-22.

¹⁶⁶ *Ibid.*, 25-27.

¹⁶⁷ According to UNMIK Administrative Directive No. 2005/12, July 26, 2005, Section 4.3, the "time of privatization" is the date and time of the conclusion of an agreement for the sale of shares in a subsidiary.

under the law. The burden of proof for proving that someone was not a registered employee at the time of privatization because of alleged discrimination rested squarely on the claimant.¹⁶⁸

The large number of complaints filed against the KTA and its published list of eligible employees occupied most of the Special Chamber's time. On June 9, 2004,¹⁶⁹ the chamber established for the first time that the security conditions in Kosovo after 1999 were such that no minority community member could reasonably have been expected to report to work and that these conditions amounted to discrimination. As a consequence, the claims of the complainants in this case were accepted since "they would have been listed on the register of employees of the Enterprise at the time of the privatization in 2003, if they had not been discriminated against."¹⁷⁰ The decision established the precedent that discrimination did exist against certain categories of workers and eventually prompted the KTA to review lists of eligible employees itself. The Special Chamber also struck down the requirement that people claiming discrimination had to submit documentary evidence to that effect.¹⁷¹

In the second instance, the applicable law¹⁷² grants the KTA the authority to privatize or liquidate an SOE, regardless of the validity of the previous "transformation" of the entity from private property into a social asset and whether this transformation took place in a non-discriminatory manner, such that a third party could be recognized as the owner of the entity.¹⁷³ The KTA can verify the social transformation of an asset or entity only after it has been privatized or liquidated. In this framework, a privatized entity or its assets cannot be returned to the legitimate owner(s). The owners legally are entitled to a share in the proceeds, but only after administrative costs and the 20 percent proceeds for eligible employees on an employees' list have been subtracted.

The troubling aspect of this legislation is that it grants the KTA full authority to sell assets without determining who owns them, and it protects buyers who purchase such property from the KTA, potentially leading to property rights violations by turning some privatizations into illegal expropriations of assets owned by third parties.¹⁷⁴

¹⁶⁸ See UNMIK Regulation No. 2003/13, May 9, 2003, Section 10.4, as amended by UNMIK Regulation 2004/45, November 19, 2004, Sections 1.B and 10.6. This reversal of burden of proof on discrimination matters does not conform to international standards.

¹⁶⁹ See the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters in the case *Vahdet Kollari et al. vs the Kosovo Trust Agency* in the matter of the privatization of the SOE "Termosistem," June 9, 2004.

¹⁷⁰ *Ibid.*

¹⁷¹ See Section 10.6(b) of UNMIK Regulation No. 2003/13, May 9, 2003. The Special Chamber argued that this requirement violated Article 14 (prohibition of discrimination) of the European Convention on Human Rights.

¹⁷² See Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18, September 6, 2005.

¹⁷³ OSCE – Mission in Kosovo, "Privatization in Kosovo: Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo," Monitoring Department/Rule of Law Division, May 2008, 25.

¹⁷⁴ *Ibid.*, 26.

In a landmark decision of November 20, 2007,¹⁷⁵ involving a claim by two Kosovo Serb claimants on a property that had been privatized by the KTA as belonging to an SOE, the Special Chamber ruled against the KTA and confirmed the claimants' ownership rights. After reviewing applicable international law, the judges argued that certain provisions of UNMIK Regulation No. 2005/18 "appear to allow the Kosovo Trust Agency to carry out a disguised expropriation, under the term 'disposition of assets.'"¹⁷⁶ The Special Chamber concluded that these same provisions of UNMIK Regulation No. 2005/18¹⁷⁷ allow the KTA to take property under the definition of disposition of assets "without imposing any precise conditions for such deprivation and not done in accordance with the conditions prescribed by Article 1 Protocol 1 of the ECHR."¹⁷⁸

The Special Chamber went on to review certain provisions of UNMIK Regulation 2002/13¹⁷⁹ that prohibit the rescinding or annulment of any transaction the KTA make; they judged that these provisions run counter to the right of a court to exercise full judicial review of transactions and provide a remedy. In both instances, the Special Chamber ruled that the provisions of the ECHR supersede the provisions of the relevant UNMIK Regulations.

The KTA has been disbanded, pending the Kosovo government's establishment of a new privatization agency. While this is being done, the Special Chamber is inactive until the EULEX Mission replaces the international judges. As of November 2007, the KTA has privatized 320 SOEs (for which 550 subsidiaries had been created) and liquidated 110 SOEs.¹⁸⁰ The privatization of SOEs has netted close to 500 million Euros held in trust in a foreign bank.¹⁸¹ A new wave of privatisations should start once the new agency is up and running.

There is a concern that the system has opened itself up to a number of lawsuits from other public enterprises and governments with a stake in the privatized Kosovo assets, which could potentially tie up Kosovo's economic development for some years to come. More worrying is the legacy of a legislative framework designed to allow the KTA to privatize and liquidate public enterprises and SOEs in Kosovo in a non-transparent fashion with almost full, arbitrary discretion and no effective judicial control, a system that some have described as an abuse of the

¹⁷⁵ See the case *Alexander Hadzijevec and Vera Frtunic vs. Kosovo Trust Agency and SOE Trepca Hotels*, SCC-06-0010, November 20, 2007.

¹⁷⁶ *Ibid.*, 7.

¹⁷⁷ See Sections 5.3 and 5.4 of UNMIK Regulation No. 2005/18, "Amending UNMIK Regulation 2002/12 on the Establishment of the Kosovo Trust Agency," September 6, 2005.

¹⁷⁸ See the case *Alexander Hadzijevec and Vera Frtunic vs. Kosovo Trust Agency and SOE Trepca Hotels*, SCC-06-0010, November 20, 2007, 7.

¹⁷⁹ See Section 10.5 of UNMIK Regulation No. 2002/13, "On the Establishment of a Special Chamber of the Supreme Court on Kosovo Trust Agency Matters," June 13, 2002.

¹⁸⁰ OSCE – Mission in Kosovo, "Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo," Monitoring Department/Rule of Law Department, May 2008, 52.

¹⁸¹ No decision has yet been made on how to handle the funds accumulated and the additional funds that should come from subsequent waves of privatizations.

law.¹⁸² The Kosovo Assembly's new law on privatization has by and large maintained the discriminatory provisions of the previous UNMIK regulations.¹⁸³

¹⁸² Interview with Judge Tudor Pantiru, presiding judge of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency related matters, July 27, 2008.

¹⁸³ Ibid.

Pravda drzi zemlju i gradove, a nepravda rusi obadvoje.

Justice holds town and country together, but injustice destroys both. – Serbian proverb.

IV. TRANSITIONAL JUSTICE AND THE CONSEQUENCES OF PROPERTY CONFLICT IN KOSOVO

A. BACKGROUND

Marek Nowicki, the last international ombudsman of Kosovo, summarized the main challenges of Kosovo society in an interview before he stepped down in September 2006. “There are two kinds of problems involved. One involves the problems of everyone who lives in Kosovo, the other are specific problems of the non-Albanian population.”¹⁸⁴ He went on to identify the dysfunctional justice system as a problem that affects all Kosovo residents, while highlighting specific problems of the Kosovo Serb and Roma communities, such as freedom of movement, security and everything that stems from those issues.¹⁸⁵

Kosovo has since unilaterally declared independence. Yet the underlying sources of conflict remain, and Nowicki’s summary of the important challenges facing Kosovo society, although in slightly modified form, continue to hold true. The judiciary remains weak, corrupt and burdened with an enormous backlog of civil cases, many of which deal with property. As of this writing, there are 50,000 to 60,000 outstanding claims on damaged, destroyed or illegally occupied property as a result of the conflict, and most of them belong to Kosovo Serbs.¹⁸⁶ The society continues to be partitioned along community lines. Kosovo’s remaining Serb community mostly lives in isolated rural enclaves with basic services, such as health and education, provided by the relevant institutions of the Republic of Serbia. The remaining Kosovo Roma, Ashkalis and Egyptians continue to suffer from discrimination and insecurity, and live on the margins of society. The Goranis, down from 28,000 residents in 1999 to about 8,000 now, live in isolation and have difficulties attending schools that teach in Serbian.¹⁸⁷ North of the Ibar River, Kosovo

¹⁸⁴ Marek Nowicki, “Corruption and Makeshift Arrangements,” interview in *Vreme Magazine*, September 14, 2006.

¹⁸⁵ Ibid. “The first problem is the non-functioning of the justice system, which we can call legal chaos because there is still no justice system, no one knows what laws are in effect, and you have no one to ask what law should be applied in a concrete situation.”

¹⁸⁶ See OSCE – Mission in Kosovo, “A Long Awaited Remedy: Property Restitution through the Kosovo Property Agency,” Monitoring Department, September 2008, 4.

¹⁸⁷ Since June 1999, the Gorani community has suffered 57 bombings and 11 murders. No perpetrators have been brought to justice. UNMIK abolished the Municipality of Gora in 1999 and combined it into the new Municipality of Dragas/ Dragash in which Kosovo Albanians form the majority. The attacks and abolition of their municipality, along with poor economic conditions, led many Gorani to move to Serbia and other countries. All Kosovo Serb, Gorani (and some Kosovo Roma) children attend schools run by the Serbian Ministry of Education. The Kosovo authorities and UNMIK consider these schools “parallel institutions,” but no alternative has been developed to replace these schools, nor would any such strategy have the support of many parents. The Kosovo government recently took over the schools of the Goranis and imposed the curriculum of the Kosovo Ministry of Education in the Bosniak language. Gorani parents object to this policy, arguing that their children will not be able to pursue a higher education in Serbia. Many Gorani children no longer go to schools and instead are taught in private homes by

institutions are virtually absent. The municipalities of Leposavic/Leposaviq, Zubin Potok, Zvecan and North Mitrovica/Mitrovice operate on their own while receiving their budgets from the Serbian government. The divisions in society, no matter how real and potentially destabilizing, are often overshadowed by the poor socio-economic conditions that affect all communities. Kosovo continues to have the highest unemployment rate in the region as well as the lowest productivity and export rate.

Kosovo's demography has changed dramatically since the armed conflict ended. Mass numbers of Kosovo Albanians migrating from the countryside into urban centers and the almost simultaneous departure and expulsion of Kosovo Serbs, Roma and others have changed the landscape. With the exception of the divided town of Mitrovica/Mitrovice, Kosovo no longer has any substantial urban Kosovo Serb or Roma communities.¹⁸⁸ Certain areas such as the Pec/Peje region, the Gnjilane/Gjilan region and parts of central Kosovo have seen a drastic reduction in their Kosovo Serb and Roma populations. Political developments since the end of the conflict have tended to consolidate this demographic change and rendered it ever more permanent. When the OSCE's former ambassador to Kosovo, Tim Guldemann, recently told reporters at a press conference that Kosovo was not a multiethnic society, he could well have been referring to ongoing demographic trends as much as to the lack of integration and separation of the communities.

This reality emphasizes the importance of transitional justice in a society that, in many respects, continues to live with the consequences of the 1999 conflict while facing the future as divided as ever on questions of legitimacy and identity. The international community has invested more civilian aid per capita in Kosovo than in any other post-conflict area in the world and is set to continue to do so.¹⁸⁹ In a period of transition from UNMIK to the new European Union rule of law mission (EULEX), it is important for international officials to take stock of the road already travelled before attempting to focus on new goals with regard to restitution, returns, rule of law and how the Kosovo experience compares to other post-conflict scenarios.

Ombudsman Nowicki characterized UNMIK as an experiment that could have achieved better results. However he added, "The real question is whether in 1999 there was a clear vision of what they wanted to do, and I'm not sure there was."¹⁹⁰ The international community must have a clear, realistic and coordinated vision of the direction to take with regard to the right to restitution if any progress is to be made at all to correct some of the past wrongs and move the society closer to some form of reconciliation. The term reconciliation is understood in this report

teachers from the Serbian Ministry of Education. This information came from a Gorani community leader on July 19, 2008, whose name was withheld for security reasons.

¹⁸⁸ Some Kosovo Serbs and Roma still live in very small numbers in Prizren, Pristina/Prishtine, Lipljan/Lipjan town and Gnjilane/Gjilan, but most are elderly. These residents are the last representatives of what were once substantial urban minority populations before 1999.

¹⁸⁹ OSCE – Mission in Kosovo, "Background Report: Human Rights, Ethnic Relations and Democracy in Kosovo," 2008, 1.

¹⁹⁰ Marek Nowicki, "Corruption and Makeshift Arrangements," interview in *Vreme Magazine*, September 14, 2006.

as a multifaceted and long-term process of rebuilding civic trust between citizens and the state and among citizens themselves after a period of conflict. The term does not encompass the notion of forgiveness or forgetting.

B. TRANSITIONAL JUSTICE IN KOSOVO IN COMPARATIVE PERSPECTIVE

i. Background

The end of the armed conflict in Kosovo on June 10, 1999, and the arrival of an international civilian administration (UNMIK) and military peace-force (KFOR) did not mark the end of ethnic cleansing and violence; in fact, it was just the beginning for one segment of the population. In many post-conflict areas following the end of armed hostilities, the inertia of low-level violence or discrimination against undesirable populations continues. In the case of Kosovo, however, targeting minority communities, although already evident during the armed conflict, began in earnest after the Yugoslav Army and Serbian police left. The massive departure of Kosovo Serbs, Roma and others and the usurpation of their property brought restitution to the heart of the international community's agenda, without altering the priority on returns. Although kept as separate processes, it was clear that restitution of property rights to the displaced was one of the necessary preconditions for any hope of getting minorities to return.

Restitution of property rights in Kosovo was designed to effectively deal with a large, complex caseload as quickly as possible. In this respect international planners clearly understood the importance of establishing a "streamlined, administrative program with relaxed evidentiary rules" to address widespread, systematic property rights violations.¹⁹¹ By establishing the Housing and Property Directorate (later succeeded by the Kosovo Property Agency), the international community recognized that it was necessary to find a legal remedy outside of the existing dysfunctional judicial system for all victims who lost property. The process of restitution of property rights under the quasi-judicial system set up by the international authorities was and is an important part of a strategy to provide a durable solution to the problems of the displaced in Kosovo. By offering the possibility of placing IDPs' property under the government's administration, renting out properties for IDPs, and confirming possession rights to allow IDPs to sell their property if they are unable or unwilling to return to their homes, the HPD/KPA process fulfills a recommendation that Rhodri C. Williams made in his paper on the contemporary right to restitution in the context of transitional justice: not to condition restitution on return, and to employ restitution as a means to provide IDPs with durable solutions to their dislocation.¹⁹²

The HPD/KPA quasi-judicial system offers a legal remedy to the problem of dispossession of property to IDPs and others, but continues to face serious challenges when analyzed from the

¹⁹¹ Rhodri C. Williams, "The Contemporary Right to Property Restitution in the Context of Transitional Justice," International Center for Transitional Justice (ICTJ), Occasional Paper Series, May 2007, 50.

¹⁹² *Ibid.*, 51.

point of view of restorative justice and repair. It suffers from a lack of coordination with other relevant institutions in the society. From the start, Kosovo's restitution and returns process has been plagued by a multiplicity of local and international actors who often acted in disunity and competed with each other.¹⁹³ Context counts for a lot, particularly when restitution is attempted in a situation in which conflict over the future of Kosovo prevails, and faced with forces within Kosovo society with a vested interest in the system failing, in order to hold on to illegally usurped property and prevent too many IDPs from returning. Kosovo IDPs are compelled to work with an exceptional administrative system in hopes of getting restitution for their properties in a society that often sends contrary messages with regard to minority rights in the work of its institutions. Williams recommends that where restitution is a part of transitional programming, it should be conceived of in a way that supports other efforts to provide broader redress and avoid future conflict.¹⁹⁴ The challenge of Kosovo lies precisely in the fact that the restitution process has become part of a non-coordinated approach to reform institutions and habits that undermine the specific mandate of the HPD/KPA system in restoring possession rights to the dispossessed.

Bearing in mind the ultimate goal of transitional justice is to move society toward peace, democracy, the rule of law, and respect for individual and collective rights, a question arises as to the legacy of building institutions in Kosovo. Experts agree that transition to peace and democracy cannot take place without confronting the painful legacy of the past in order to achieve a holistic sense of justice for all citizens.¹⁹⁵ This aspect of consolidation of peace-building and democracy remains the most deficient in Kosovo. The international community largely neglected to address the legacy of abuse and to promote genuine inter-ethnic dialogue, in favour of constructing the apparatus of a democratic society (elections, parliament, police, reformed judiciary and media).

Political divisions between Kosovo Serbs and Kosovo Albanians over the legitimacy of Kosovo institutions overlap onto the domain of narratives of history and pain. Both communities have developed a vision of their own victimization as a result of the last conflict, which in many respects denies the victimization of the other; this acts as a formidable obstacle to reconciliation. The dominant and official narrative of the Kosovo conflict of the late 1990s, particularly for Kosovo Albanians, is triumphant and unapologetic.¹⁹⁶

¹⁹³ "The problem is not that IDPs are unable to voice their concerns. The problem is that the institutions which are responsible for conveying these messages complicate the matter... IDP concerns are taken into consideration only if there is an attraction of interest there in the first place. In the rare occurrence of a symphony of interests, both the UNDP & UNHCR and especially NGOs then maximize the utility of these messages through either exaggeration or procrastination. As a result what is heard is not a human voice, but an institutional product. In the end the repetition of such false hopes & failed promises send IDPs only deeper into misery and depression." Interview with Dusan Radosavljevic, project field officer, "UNIJA M" NGO, December 19, 2008.

¹⁹⁴ *Ibid.*, 51.

¹⁹⁵ Paul van Zyl, *op. cit.* note 3.

¹⁹⁶ Indicative of this is a press conference that Prime Minister Hashim Thaci gave in a Serb enclave. When asked if he was willing to apologize to victims of KLA crimes, he said, "We need to turn to the future, not to the

Having temporary agencies under international supervision such as the HPD/KPA restore property is a consequence of the conflict. Yet few of Kosovo's permanent institutions have been sensitized to the pain and suffering that minority community members have endured because of displacement and the loss of property. In many post-conflict societies, civil society groups often act as a bridge over the ethnic divide to initiate attempts to seek the truth and reconcile groups. This has yet to seriously take place in Kosovo because the civil society sector is weak and lacks any strong constituency.¹⁹⁷ Patron-client and clan structures are strong in Kosovo Albanian society, while Kosovo Serbs retreat to the institutional protection of the Serbian government's so-called parallel institutions (schools, health, pensions, civil registries). Despite the international community's efforts to build institutions, Kosovo remains far from an integrated society, driven by crime and trauma from years of conflict and intimidation, with a fragmented, polarized civil sector that is highly susceptible to mobilization by extremist leaders.¹⁹⁸ The complex reality of division in Kosovo continues to pose a serious challenge to reconciliation.

ii. Bosnia and Herzegovina

In comparison, although implementing restitution in Bosnia and Herzegovina (BiH) was a lengthy, complicated affair that faced entrenched hostility from nationalists in both territorial entities created by the Dayton Peace Agreement (DPA),¹⁹⁹ the international community was able to overcome some of this resistance. By 2004, both entities had largely completed the restitution process.²⁰⁰ The DPA created three institutions in BiH that played major roles in the return and restitution process: the Commission for Real Property Claims of Refugees and Displaced Persons (CRPC), a quasi-international body charged with making and enforcing decisions on property claims; the Human Rights Chamber, set up as a high court to monitor BiH's compliance with human rights obligations, particularly under the European Court of Human Rights in Strasbourg (ECtHR); and the Office of the High Representative (OHR), mandated to oversee the implementation of civilian aspects of the DPA in BiH.²⁰¹

Similar to UNSC Resolution 1244 relating to Kosovo, the DPA in its Annex 7 stated that getting refugees and IDPs to return was "an important objective of the settlement of the conflict in Bosnia." However the international community's efforts to reverse ethnic cleansing by encouraging ad hoc return quotas failed. The two Bosnian territorial entities (Bosniak-Croat Federation and the Republic of Srpska) continued to favor their co-nationals when re-allocating

past...Everyone knows who should be apologizing." "Thaci Refuses to Apologize for KLA Crimes," B92 News, January 19, 2008.

¹⁹⁷ "Most of them are Pristina/Prishtine based, service-oriented and organized around short-term, donor funded projects." Jessica Johnson, "International Assistance to Democratization and Reconciliation in Kosovo," Department of Peace and Conflict Research, Uppsala University, November 2004, 53.

¹⁹⁸ *Ibid.*, 56.

¹⁹⁹ The Federation of Bosnia and Herzegovina (with a majority of Bosniaks and Croats) and the Republika Srpska (with a majority of Serbs).

²⁰⁰ Rhodri C. Williams, "The Contemporary Right to Property Restitution in the Context of Transitional Justice," International Center for Transitional Justice (ICTJ), Occasional Paper Series, May 2007, 40.

²⁰¹ *Ibid.*, 36.

property, and low-level ethnic cleansing continued.²⁰² The international community's insistence on the return of refugees and IDPs to their original place of residence was proving to be a barrier to the effective restitution of property. So beginning in 2001, the OHR made a series of amendments that revoked the requirement that IDPs had to return to BiH as a prerequisite to repossess their property.²⁰³

The international community had shifted its perception of restitution from a means of promoting return to a search for durable solutions for IDPs. Responding to international pressure in 1998, the OHR repealed problematic property laws at the entity level and established a domestic claims process that helped restore disputed properties to their rightful pre-war owners.²⁰⁴ Furthermore the OHR used its full power under the DPA to remove 22 local officials from their posts because they were charged with obstructing the application of property laws; dismissing these officials eventually led to more harmonious and effective applications of the laws in both entities.²⁰⁵

The end result of the international community's efforts was the restitution of properties to nearly one million people in BiH by 2004. The OHR subsequently transferred all responsibility for return issues to domestic authorities.²⁰⁶ Rhodri C. Williams qualifies BiH as "the first example of successfully implemented mass restitution in the wake of full-blown conflict."²⁰⁷ However this success is qualified by the fact that relatively few of the IDPs who successfully re-possessed their properties actually returned. An important lesson of Bosnian restitution, according to Williams, is the need to facilitate individual choice of durable solutions to displacement rather than prejudge the outcome by emphasizing return. Nevertheless, he concludes his analysis by questioning whether enough was done beyond restitution of property to ensure that decisions taken on durable solutions were truly sustainable and made voluntarily.²⁰⁸

The OHR's decisive actions in BiH against local officials charged with obstructing the restitution process contrasts with the poor performance of UNMIK and KFOR. Despite the far superior executive authority of the SRSG and UNMIK as a whole, and in a context in which hundreds of crimes were being committed against people and property in violation of the UN mandate, no Kosovo officials were ever dismissed or publicly sanctioned.²⁰⁹ Despite laudable efforts and intensive programs to reform the police and justice systems, the international community's inability to decisively come to grips with the issue of impunity for crimes has placed a mortgage on the future of rule of law in Kosovo.

²⁰² Ibid., 37.

²⁰³ Ibid., 39.

²⁰⁴ Ibid., 37.

²⁰⁵ Ibid., 37.

²⁰⁶ Ibid., 41.

²⁰⁷ Ibid., 33.

²⁰⁸ Ibid., 41.

²⁰⁹ On two occasions, SRSGs did use their exceptional executive authority to order municipal cadastral offices to reinstate the possession rights of Cedomir Prlinevic (leader of the small Jewish community in Pristina/Pristhine) and the Visoki Decani Serbian Orthodox Monastery into the cadastral records.

Some in the international community have glossed over serious structural problems in Kosovo when reporting policy, presenting at times wishful and overly optimistic assessments of ongoing trends. They seem to have taken to heart Hobbes' dictum that only "such truth as opposeth no man's profit, nor pleasure, is to all men welcome." Such reports have been compiled to conform to a set agenda, ultimately doing a disservice to attempts at understanding the depth and complexity of problems and then to tackle these problems with bold, wise reforms.

Similarities do exist between BiH and Kosovo in the relatively poor results in getting refugees and IDPs to return. In both cases, post-war realities of consolidation of ethnic hegemony under nationalist elites have contributed to preventing a significant number of people from returning to live in the homes they had before the conflicts.

Despite the legal commitments to return, the results in Kosovo continue to be meager. The international community and local authorities set up a large, complex process to oversee returns, a process that is separate from the mechanism created to ensure property restitution.²¹⁰ The centerpiece of the returns strategy is the establishment of a Ministry of Communities and Returns (MCR)²¹¹ and the Municipal Working Group (MWG), a body that brings together local municipal authorities, NGOs, UNMIK, UNHCR, OSCE, Kosovo Police and IDP associations. These bodies coordinate the different steps of an organized return of IDPs at the local level according to a protocol laid down in an official "Manual for Sustainable Return."²¹² UNMIK, the Serbian government and the then-Provisional Institutions of Self-Government of Kosovo signed the Protocol on Voluntary and Sustainable Return, which calls for the provision of reconstruction aid to people who return voluntarily within 60 days of declaring their intentions to do so.²¹³ However, this mechanism has yet to be implemented.

iii. Turkey

Turkey's approach to restitution and return of IDPs provides another useful comparative case for Kosovo. The conflict in south-eastern Turkey (1984–1999) between the Kurdish Workers Party (PKK) guerrillas and Turkish security forces has left more than 30,000 people dead, mostly

²¹⁰ OSCE – Mission in Kosovo, "Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo," Department of Human Rights, Decentralization and Communities, June 2007, 16-17.

²¹¹ The MCR was established by UNMIK Regulation No. 2004/50 on December 2, 2004. It was initially placed under strict supervision of the UNMIK Office of Communities and Returns (OCR) and operated on the basis of the first "Manual for Sustainable Return," that UNMIK produced in consultation with the UNHCR and other civil society actors. The MCR gradually got greater responsibility in accordance with UNMIK's policy of transferring executive authority to Kosovo counterparts as capacity developed. The MCR was fully transitioned to local operational authority on Dec. 12, 2007. It was plagued from the start by poor management and staffing, no clear strategy, and serious allegations of fraud and corruption. By convention, the MCR's minister was always supposed to be a Serb. However, given that the majority of Kosovo Serbs are not fully integrated in Kosovo institutions, it was always a challenge to find suitable Serb candidates, with the necessary qualifications and legitimacy in their community. Three of the four people who have occupied that job have been forced to resign because of allegations of fraud, mismanagement and corruption.

²¹² See UNMIK and PISG, "Revised Manual for Sustainable Return," July 2006.

²¹³ OSCE – Mission in Kosovo, "Eight Years After: Minority Returns and Housing and Property Restitution in Kosovo," Department of Human Rights, Decentralization and Communities, June 2007, 16.

civilians, and led to the displacement of hundreds of thousands more, mostly Kurds.²¹⁴ The Turkish Government's strategy aimed at restitution and return rests on two programs: the Return to Village and Rehabilitation Project (RVRP), launched in March 1999, and the Compensation Law 5233, enacted on July 17, 2004.²¹⁵

The RVRP was the first program launched in Turkey to help IDPs return to their homes or settle in new village sites. Overseen by the Ministry of Interior, the program aims to develop a systematic study of the problems and needs of the displaced, identify families that want to return, restore the necessary infrastructure within abandoned and destroyed villages, complete social facilities such as schools and clinics, and promote housing development and endeavours to support activities such as agriculture, husbandry and beekeeping to help families sustain themselves.²¹⁶ The RVRP is implemented through governorships and sub-governorships in the relevant south-eastern provinces. As of 2006, the Turkish Human Rights Commission calculated that 95,451 people had returned under the program's aegis.²¹⁷

International human rights officials and human rights organizations, as well as local NGOs, have criticized the RVRP, however. They cite the authorities' lack of transparency in the implementation of the program, lack of adequate financing, the absence of clearly outlined policy objectives and the scope of resources and funding to achieve them, the authorities' lack of consultation with NGOs and IDPs themselves, and the inability or unwillingness of the authorities to tackle the continuing obstacles to return in south-eastern Turkey.²¹⁸ Observers insist that the program has done very little to revive the socio-economics in areas affected by the conflict, and that without such an approach, any talk of sustained return is premature.²¹⁹ IDPs face the following obstacles:

a) Poor security, particularly since 2004. Although security forces do not prevent IDPs from returning, the renewed fighting makes many IDPs worry that they will get caught in the fighting or become a victim of the security forces or guerrillas.²²⁰

²¹⁴ Some organizations say that government forces forcibly removed or deported between three million and four million people from the conflict zone. Turkish Ministry of the Interior statistics say there were between 350,000 and 400,000 IDPs. See Bar Human Rights Committee of England and Wales, "The Status of Internally Displaced Kurds in Turkey: Returns and Compensation Rights – An Update," December 2006, and Dilek Kurban et al., "Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced," Turkish Economic Social Studies Foundation (TESEV), May 2006. In 2004, violence broke out again when the PKK revoked a ceasefire that had been in force since the group's leader, Abdullah Ocalan, was captured in 1999.

²¹⁵ Dilek Kurban et al., "Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced," Turkish Economic Social Studies Foundation (TESEV), May 2006, 33.

²¹⁶ Bar Human Rights Committee of England and Wales, "The Status of Internally Displaced Kurds in Turkey: Returns and Compensation Rights – An Update," December 2006, 21.

²¹⁷ *Ibid.*, 23.

²¹⁸ Dilek Kurban et al., "Overcoming A Legacy of Mistrust: Towards Reconciliation between the State and the Displaced," Turkish Economic and Social Studies Foundation (TESEV), May 2006, 30.

²¹⁹ *Ibid.*, 30.

²²⁰ *Ibid.*, 31.

b) The lack of transparency in the assistance authorities provide under the RVRP. Many IDPs complained that they received little or no aid from the authorities, that the home construction materials they got were insufficient, and that very little of the promised public infrastructure had been built.²²¹

c) The attempt by the authorities to resettle IDPs in “centralized settlements” rather than their own villages.²²²

d) The continued presence of landmines.

Walter Kaelin, the representative of the UN Secretary-General on the Human Rights of Internally Displaced Persons (RSG), criticized the RVRP’s lack of progress in a 2002 assessment. He called for fair, speedy compensation to those who had suffered loss because of the conflict.²²³ The Turkish Government reacted to the demands for change—as well as pressure from the high number of cases taken to the ECtHR—by passing Compensation Law 5233 in 2004, an act analysts consider “without doubt the most significant step taken to date towards addressing the problem of internal displacement in Turkey.”²²⁴ The law aims to compensate people for material damage sustained since 1987, when a state of emergency was declared in the relevant provinces. It permits compensation to anyone who sustained losses due to terrorism or anti-terror activities, including (but not limited to) IDPs, members of the armed forces, police and village guards.²²⁵ The law provides compensation for three kinds of losses: damage to moveable or immovable property, damage to the life and body of the person, and damage sustained due to inability to access one’s property.²²⁶

Although Turkey’s compensation process is similar to Kosovo’s in that it operates under a provisional legal regime in the form of damage assessment commissions, it differs because these bodies are composed almost entirely of public employees (six of the seven members, the seventh being a member of the local bar association) and could be set up on demand in any of the provinces under the chairmanship of a deputy-governor as designated by the provincial governor.²²⁷

²²¹ Ibid., 31.

²²² Ibid., 31.

²²³ Bar Human Rights Committee of England and Wales, “The Status of Internally Displaced Kurds in Turkey: Returns and Compensation Rights – An Update,” December 2006, 22.

²²⁴ Dilek Kurban et al., “Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced,” Turkish Economic and Social Studies Foundation (TESEV), May 2006, 33.

²²⁵ Ibid., 33. “Village guards” were local Kurds whom authorities began armed on March 26, 1985, to assist the security forces in fighting the PKK. A number of human rights organizations have accused these guards of grave human rights violations and of participating in criminal activities. They also act as a potential obstacle to return in some areas. See Bar Human Rights Committee of England and Wales, “The Status of Internally Displaced Kurds in Turkey: Returns and Compensation Rights – An Update,” December 2006, 24.

²²⁶ Dilek Kurban et al., “Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced,” Turkish Economic and Social Studies Foundation (TESEV), May 2006, 33.

²²⁷ Ibid., 33.

Following the acceptance of an applicant's petition, a damage assessment is completed and the commissions prepare declarations of a settlement setting out the compensation to be paid in kind or cash.²²⁸ No internal mechanism of appeal exists against commission decisions (such a provision is foreseen in Kosovo against KPA rulings). However people have the right to bring an independent action for compensation to a local court.²²⁹ As of January 31, 2006, almost 180,000 applications had been made to the commissions and about 16,000—less than 10 percent—were resolved.²³⁰

While the Compensation Law has been praised as significant step forward, particularly over the RVRP, human rights and civil society groups criticize how the process has been applied. They say the law excludes a large number of IDPs who fled from the conflict areas, because it specifies that only those “forcibly expelled” are covered by compensation. The lack of adequate dissemination and outreach to IDPs and civil society actors has been another point of contest. This criticism overlaps well with some of the problems that Kosovo IDPs encounter in their relationship with the relevant institutions in Kosovo.

Critics contend that commissions composed of full-time public employees can lead to arbitrary decisions, a lack of fairness and ineffective assessments.²³¹ In Kosovo this problem was avoided by setting up full-time, quasi-judicial bodies staffed by professionals (the HPD, KPA and KTA), but this has not prevented people from accusing the commissions of lack of transparency when making decisions.

Compensation Law 5233's lack of clear, binding and implementing guidelines has led to inconsistent settlements of similar cases depending on which commission is sitting where.²³² Because of poverty and poor education, IDPs in Turkey have struggled to access the process and the court system in general. Critics point out that not enough has been done to assist these people access their rights and call on the government to provide legal aid.²³³

This has been a problem in Kosovo also, but it was compounded there by security and distance since most IDPs were in Serbia proper or Montenegro and could not access the system in Kosovo. Recently the Danish Refugee Council (DRC) set up a “Legal Assistance Programme to the Institutions of the Government of Serbia dealing with Refugees and IDPs” under an EU-funded program to provide IDPs with free legal aid and representation in Kosovo legal institutions.²³⁴

²²⁸ Ibid., 33.

²²⁹ Ibid., 33.

²³⁰ Ibid., 34.

²³¹ Ibid., 40.

²³² Ibid., 40.

²³³ Ibid., 40.

²³⁴ See Danish Refugee Council (DRC), “Legal Assistance Program to the Institutions of the Government of Serbia dealing with Refugees & IDPs,” Inception Report, Belgrade, August 30, 2008.

The Turkish Compensation Law's provisions for compensation for harms arising during the conflict make it more than a law that oversees restitution of lost property. This is an ambition beyond the scope of any regulation yet passed in Kosovo. In remarks addressed to an IDP conference in Ankara in 2006, Rhodri C. Williams pointed out that by aiming to provide a remedy for damages resulting from harms such as "injury, physical disability, and death and the expenses made for medical treatment and funerals," (Article 7b of Law 5233), Law 5233 "shares certain elements of reparations programs."²³⁵ However in the law's attempt to seek durable solutions for displacement and to process a high number of claims in a short period of time under a special provisional legal regime, it resembles other restitution schemes, such as those set up in Kosovo and BiH.²³⁶

One issue that Turkey and Kosovo share is the lack of any progress made toward addressing reconciliation, despite the existence of return and restitution programs. The preamble of Compensation Law 5233 makes an allusion to the need for reconciliation and states that one of its aims is "bolstering trust towards the state, rapprochement between the state and its citizens and contribution to social peace."²³⁷ However, the law only offers reparations in the form of material compensation and does not directly address issues of trauma related to past abuse.²³⁸ Furthermore, neither the Turkish government nor the PKK have taken any steps to acknowledge responsibility for past wrongs. "The state's public acknowledgement," recommends one report, "of responsibility for village evictions, compensation for pain and suffering, and declaration of a will to identify and prosecute—where possible—those who committed human rights violations...may be among such measures. However it is also important...that reconciliation would require the PKK to demonstrate a similar will to assume its responsibility for the human rights violations it has committed."²³⁹

This situation is echoed in Kosovo, where Serb and Albanian communities have different views over the future of Kosovo, and few, if any, steps have been taken to address the trauma of past abuses and to establish responsibility.

C. OBSTACLES AND CHALLENGES

Walter Kaelin, the RSG, emphasized how important it is that governments create effective policies through close consultation with IDPs.²⁴⁰ "Policies and programs responsive to the major needs of the displaced are the best means of creating a national consensus around the issue and laying the foundation for peace and stability," he argued. "Too often governments and

²³⁵ Rhodri C. Williams, "Property Compensation: Observations on Turkey's Compensation Law No. 5233 in International Context," Internally Displaced Persons Conference, Ankara, Turkey, February 23, 2006.

²³⁶ Ibid.

²³⁷ Dilek Kurban et al., "Overcoming a Legacy of Mistrust: Towards Reconciliation between the State and the Displaced," Turkish Economic and Social Studies Foundation (TESEV), May 2006, 43.

²³⁸ Ibid., 44.

²³⁹ Ibid., 44.

²⁴⁰ Walter Kaelin, "The Voice of Civil Society and the Internally Displaced," Internally Displaced Persons Conference, Ankara, Turkey, February 23, 2006.

organizations develop policies and programs for IDPs without consulting them adequately. This in turn produces policies and programs that are not sufficiently responsive to their needs.”

The RSG’s remarks can serve as a leitmotif for some of the problems that have plagued the international community’s response to the plight of IDPs in Kosovo. All too often, international planners took a top-down approach, because they were driven by overriding political imperatives and deadlines linked to the resolution of Kosovo’s final status. NGOs adapted to this context and had to comply with its limitations in order to effectively compete for mandates and donor funds. Their subsequent work on outreach and returns was constrained and compartmentalized into micro-projects that had very little impact on most IDPs.

The HPD and its successor, the KPA, were innovative approaches to property restitution. The innovation rests in the nature of these bodies as full-time, quasi-judicial bodies under a special legal regime with flexible rules of evidence, whose decisions are final and not subject to oversight by local courts, and who have the authority to carry out evictions. Their founding statutes stipulate that they are temporary in nature and meant to deal with a large volume of claims stemming from the armed conflict. However the effectiveness of restitution in this approach has also been affected by the political context in Kosovo, which has prioritized status resolution over all other issues. The restorative justice aspect of the KPA’s mandate was weakened or harmed whenever dissonance arose between the active pursuit of the agency’s goals and the practices inherent in some of Kosovo’s relevant institutions in the matter. This directly challenges the ability of the restitution process to support other efforts to provide “broader redress and pre-empt future conflict.”²⁴¹

This dissonance is manifested by serious weaknesses in Kosovo’s judicial system and certain police practices with regard to the property issue. The KPA faces increased numbers of people re-occupying residential properties under its administration. Impunity has surrounded the act of illegal occupation of residential property from the start of the international mission. This phenomenon is a profound indicator of the weakness of the enforcement of the rule of law in Kosovo as some people have returned to the same property as much as three times after eviction.²⁴² Kosovo Police and public prosecutors have shown a great reluctance to arrest or pursue illegal occupants, even though they’re authorized to do so.²⁴³

Effective restitution is further harmed by the fact that IDPs who are granted positive PCC decisions have great difficulty registering their property in the local municipal cadastres. PCC

²⁴¹ Rhodri C. Williams, “The Contemporary Right to Property Restitution in the Context of Transitional Justice,” International Center for Transitional Justice (ICTJ), Occasional Paper Series, May 2007.

²⁴² “In some instances they have openly stated to us [KPA] and the police that evicting them is irrelevant since they intend to return to the property, knowing that they face no consequences for doing so.” Interview with a senior KPA official, September 25, 2008.

²⁴³ International prosecutors of the UNMIK Department of Justice (DOJ) identified and investigated 40 cases of fraud regarding IDP properties, but very few were ever prosecuted in the local courts. By the end of 2006, the DOJ delegated these cases to local prosecutors. Despite the fact that 27 of the cases came from Pec/Peje region, police never conducted a systematic investigation to determine whether organized groups were behind this pattern of fraud.

decisions have the force of title for the claimant, but IDPs have often been rejected in their attempt to register their property because some of the offices do not recognize PCC decisions, or they request a court decision before doing so. In other instances, locals who have an interest in the property lodge challenges to ownership in the local courts, an action that induces local municipal cadastral offices to refuse to register the IDP's property until the courts decide. Other IDPs cannot get to local municipal cadastral offices,²⁴⁴ and this potentially blocks their attempts to sell their property.

The drawbacks in the Kosovo court system and the seeming ineffectiveness of the courts to adjudicate the backlog of cases in a fair, timely manner potentially threatens the society's stability. Most local and international observers agree that the difficult economic situation in Kosovo poses the most dangerous threat to stability. If not adequately addressed, this can lead to strikes and social unrest.²⁴⁵

In a brief published late last year, the World Bank cited chronic high unemployment and widespread poverty in Kosovo, home to Europe's youngest and fastest-growing population. To deal with the challenges these problems present, the brief's authors urged the Kosovo government to come up with new sources of revenue by improving its economy and promoting a strategy of economic growth.²⁴⁶ Kosovo desperately needs foreign investment to create new jobs, but the problems that surround settling property claims, particularly in the commercial and agricultural sectors, can potentially put-off investors who seek a secure legal environment for their investments.²⁴⁷ The inability to resolve property claims, a controversial privatization process, and a generally weak judicial sector all present a poor picture for foreign investors, thus hurting future economic development.²⁴⁸

²⁴⁴ In order to address the issue of a lack of freedom of movement for minorities in Kosovo, UNMIK established nine Court Liaison Offices (CLOs). Staffed by local minority officers, the CLOs are supposed to give minorities access to justice by transporting claimants or defendants to court in Albanian areas, helping claimants file necessary court papers, and delivering to and from courts any relevant official documents for the benefit of their clients. While the initiative has had some success, it has been controversial. Some argue that the CLOs only further isolate minorities and prevent the justice system from becoming open, fair and accessible.

²⁴⁵ Besa Beqiri, "Many Kosovo Citizens Gloomy about 2009," *Southeast European Times*, January 6, 2009.

²⁴⁶ World Bank, "Kosovo Brief," December 2008. This brief reports that around 32 percent of the population is younger than 15 years old and that 45 percent of the population lives in poverty (1.42 Euros per day).

²⁴⁷ An interesting case that illustrates some of the problems that arise concerns JYSK, a bathroom and bedroom accessories company. The Norwegian government helped a Kosovo Albanian return and invest in opening a JYSK outlet in Kosovo. He signed a lease for land with the Municipality of Kosovo Polje/Fushe Kosove, and construction of the store proceeded well. Eventually two local men met the investor and informed him that he was building on their land and requested compensation or demolition of the building. The investor sought clarification and assistance from the municipality, but this did not help. He complained to the KPA, which investigated and verified the cadastral records that had been moved to Serbia. The KPA discovered some irregularity existed regarding ownership of the land in question. The investor eventually allegedly settled with the two men for a sum of money. Source: Interview with Knut Rosandhaug, former executive director of the KPA, January 2007.

²⁴⁸ A good example of this problem concerns the Trepca mining enterprise. It is a conglomerate of different enterprises that had always been the economic engine of Kosovo. However no foreign investors have surfaced because local politics are interfering with Trepca's ability to appoint an administrator who can oversee the conglomerate's reorganization. This continues to damage Kosovo's economy. Source: interview with Judge Tudor

In January 2009, the ICR Pieter Feith appointed Lars Lage Olofsson of Sweden as Auditor General of Kosovo, who, among other duties, will play an important role in securing international economic assistance.²⁴⁹

Given the volume of property cases, the perceived absence of effective remedies in the courts has led some people to seek alternative solutions in settling property disputes.²⁵⁰ This phenomenon underscores the importance of cultural factors with regard to the justice system's fragility. Knut Rosandhaug, the former long-time director of the HPD and the KPA, noted that in some cases of property dispute in Kosovo, people did not use what the legal framework provided to complain and solve their property claim, but often opted for informal or other means.²⁵¹

No progress in applying the full potential of the institutions meant to deal with the problem of the displaced can take place without addressing the issue of impunity and fear that act as brakes on the full implementation of the law. The international community has contributed to this state of affairs by its inability or unwillingness to deal effectively with perpetrators of serious crimes and the weak state of the rule of law. Doing so effectively would mean directly challenging Kosovo elites in centers of power with whom some segments of the international community openly cooperated during the conflict against Serbia and afterward. The contradiction of not directly pursuing certain criminal elites while pushing for an ambitious agenda of human rights and rule of law becomes self-evident when viewing the situation of property rights, restitution and the return of IDPs. The task of establishing functioning institutions at all levels of society to fairly apply the law and enable citizens, regardless of nationality, to seek redress is undermined by a system that favors people in powerful positions. Because these people either have strong clan ties or wealth, they occupy any vacuum of authority and thus become unavoidable arbitrators and distributors of "justice." In this sense, many aspects of Kosovo society resemble a patron-client structure.²⁵²

Pantiru, former presiding judge of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Matters, January 24, 2009.

²⁴⁹ UNMIK Media Summary Report, January 23, 2009.

²⁵⁰ One dramatic example highlights this point. Two people were killed in the town of Stimlje/Shtime, including the deputy mayor, and eight were wounded in a shootout between two groups of armed Kosovo Albanians on April 22, 2006. The dispute centered over a former Kosovo Serb property that the deputy mayor and another group claimed. Other similar cases have occurred over unsolved property disputes. See Krenar Gashi, "Mass of Conflicting Property Claims since the War Leads Many Kosovars to try Solving Disputes with Guns," Balkan Insight, April 26, 2006.

²⁵¹ Ibid.

²⁵² There are many examples of powerful patrons unaffiliated with any government institutions solving disputes. In a recent case, two Kosovo Serb women who returned to Decani/Deqan asked former KLA commander Ramush Haradinaj to solve a dispute with the municipality because it refused to fulfill its obligation of employing one of them if they came back. Although he did not have an official position with the municipality, he was widely believed to be very influential in Decani/Deqan. Haradinaj succeeded in getting the municipality to employ one of the women. See UNMIK, Department of Civil Affairs (DCA), Pec/Peje Hub Daily Report, July 7, 2008.

V. CONCLUSION AND RECOMMENDATIONS

A. CONCLUSION

Return, restitution and reparation in and of themselves are not sufficient to bring about full social rehabilitation following conflict and displacement; that requires a comprehensive approach to the legacy of the past. Such an approach remains elusive in Kosovo. Although some people on both sides of the divide are coming to their own private reckoning, important obstacles exist that prevent a full accounting of past wrongs and a move toward a peaceful future and mutual respect and dignity.

This paper has touched on one such obstacle, the legacy of property conflict and the rule of law. But other obstacles of a deeply painful nature remain; the ongoing, unsolved issue of missing people; the pursuit and sentencing of people for war crimes and crimes against humanity on both sides of the conflict; producing an integral common narrative; the public acknowledgement of responsibility for the pain, suffering and loss of victims on all sides of the conflict; and the construction of public memorials to the suffering of all victims rather than glorifying one side.

In Kai Eide's 2005 report on Kosovo, the Secretary-General's Special Envoy reserved a special section in his conclusion on the challenge of reconciliation. He made a plea for reconciliation to get immediately under way. "The main burden," he stated, "will fall on the shoulders of the leaders of the majority population. Those who are eager to obtain recognition, integration, and investment must also demonstrate generosity."²⁵³ However he also called upon Kosovo Serb leaders and the government of Serbia to actively and in good faith take part in reconciliation efforts and gradually move toward the integration of Kosovo Serbs in Kosovo institutions.²⁵⁴ "All the communities," Eide insisted, "must make an effort to base their future on inclusiveness, modernization and democracy, rather than on separation and ethnic belonging."²⁵⁵

Since that plea was made, little progress has been made toward addressing the outstanding obstacles to reconciliation. It is precisely separation and ethnic belonging that have become and remain pillars of identity and a bulwark of community defence. In a polarized context over the future of Kosovo and when many of those who participated in the armed conflict hold positions of political power, it is difficult to conceive of a coordinated strategy of transitional justice at this moment.

The international and Kosovo authorities must continue to address specific flaws in Kosovo's justice system in the hope of eventually redressing past. Restitution of property rights is vital in this regard, since in the absence of any substantial IDP returns, it would give victims a sense of

²⁵³ See Kai Eide, "A Comprehensive Review of the Situation in Kosovo," UN Security Council, October 7, 2005, 20.

²⁵⁴ *Ibid.*, 20.

²⁵⁵ *Ibid.*, 20.

justice, dignity and restoration, as well as help them make clearer decisions about the future. It is equally vital to solve this issue before the Kosovo authorities embark on the contentious road of restitution of properties Communist authorities nationalised after 1945. No such policy exists, but scenarios in which the open legacies of two pasts clash in a fragile justice system, potentially provoking more tensions, should not be discounted.

Reconciliation is a long, hard process that can take many forms. In South Africa, Professor John De Gruchy and Dr. Pumla Gobodo-Madikizela, participants in the South African Truth and Reconciliation Commission, drew from their experiences to conclude that reconciliation is always and at all times a costly and painful journey.²⁵⁶ Kosovo's "costly and painful journey" has yet to begin in earnest.

Kai Eide argued forcefully in his report that "Kosovo will not in the foreseeable future become a place where Kosovo Albanians and Kosovo Serbs are integrated. They probably never were. Nevertheless the reconciliation process should start. It must come from inside Kosovo and be embraced by all communities."²⁵⁷ This is a realistic appraisal of the situation that should encourage all relevant international actors to seize the challenge of promoting peace and justice in Kosovo beyond any other political considerations. Hard-nosed realism does not preclude optimism in attempting to address the challenge of reconciliation in Kosovo, but no progress can be made without the active, balanced and fair engagement of the international community and courageous voices from the Kosovo Albanian and Serbian communities.

B. RECOMMENDATIONS

Drawing on all of the above, this report makes the following recommendations on how to improve the restitution process in Kosovo and provide displaced people access to their rights in the search of durable solution for their plight:

1. The mandate of the KPA should be renewed under UNMIK Regulation 2006/50. All avenues should be explored to reach a consensus among those involved in the work of the agency regarding its legislative framework. Specifically, those involved should consider how the PCC could fall under EULEX's supervision within the framework of UNSC Resolution 1244, in case UNMIK is unable to play an effective, direct role. This would open the possibility for the extension of the application of UNMIK Regulation 2006/50. From a human rights point of view, the regulation provides legal mechanisms that are more suitable to address individual property rights and can lead to the reopening of the suspended KPA regional offices in Serbia. Keeping these offices closed can lead to human rights violations with regard to the protection of property rights.

²⁵⁶ Donald W. Shriver, "Evil Consequences: the Costs of Reconciliation," *Christian Century*, January 27, 2004.

²⁵⁷ Kai Eide, "A Comprehensive Review of the Situation in Kosovo," UN Security Council, October 7, 2004.

2. The Office of the Prime Minister recently opened a Community Affairs Advisory Office. This should spearhead a coordinated strategy on making restitution to IDPs for properties. The office also has the power to act across all government ministries in order to address failures, deficiencies and outstanding problems in the system. Currently the office has senior advisor on Serbian Community Affairs.²⁵⁸ In view of developing a coordinated strategy on property restitution, the Kosovo government should consider putting the advisor on the KPA's executive board.
3. The OSCE, in its monitoring activities, should systematically inform the Kosovo Ministry of Justice about parallel proceedings and contradictory decisions in local courts in cases strictly involving the KPA. Monitored cases should be followed to ensure that courts, before proceeding with any property case, check with the KPA to be sure that it is not reviewing the same claim. Local courts must respect the KPA's jurisdiction under the law.
4. Stricter measures must be put in place by the Kosovo Ministry of Local Government Administration to ensure that municipalities fully comply with expropriation procedures and prevent the demolition of displaced peoples' properties and the construction of illegal structures on their property. These measures should include a more effective inspection regime and financial disincentives such as reduced budget transfers to municipalities that do not fully comply with the law. This issue is directly related to the need for UNMIK, EULEX and the Kosovo authorities to break entrenched patterns of impunity and corruption with regard to displaced peoples; properties.
5. In the past, the Kosovo police have not been very responsive to property crimes. They have also been reluctant to conduct criminal investigations of property crimes. EULEX should include a section on what the police are doing to prevent crime against IDP properties and how they are applying the Kosovo Criminal Code against lawbreakers in its regular reports to the Security Council and Brussels. The aim, in cooperation with the Kosovo Ministry of Internal Affairs, should be to provide both pressure and incentive for the Kosovo police to be more proactive in fully applying the Kosovo Criminal Code against usurpers and re-occupiers of IDP properties and investigating alleged patterns of property fraud.
6. The Kosovo Ministry of Justice and the Ministry of Local Government Administration should adopt a policy to temporarily exempt IDPs from court, cadastre and other administrative fees.
7. The Kosovo Ministry of Local Government Administration should draft a specific plan with binding recommendations to municipalities on how to integrate informal

²⁵⁸ Interview with the senior advisor on Serbian Community Affairs, Community Affairs Office, Office of the Prime Minister of Kosovo, December 17, 2008.

settlements, including those destroyed during the conflict, into spatial and urban development plans. The individual right of IDPs to return home should be placed above all technical impediments with regard to informal settlements and undocumented tenure, in order to encourage Roma, Ashkalis and Egyptians to return to Kosovo.

8. One of the greatest challenges has been the inability of some IDPs to get information about the restitution process and interact with the relevant institutions. Only recently, the Danish Refugee Council established a program to provide legal aid to IDPs and other vulnerable groups from Kosovo to protect their property rights.²⁵⁹ The program also aims to carry out information campaigns for the benefits of IDPs and vulnerable groups on property rights and improve the capacity of Serbian institutions to help IDPs protect their property rights. The Serbian Ministry for Kosovo and Metohia and the Kosovo Ministry for Communities and Returns should establish contact within the framework of a technical working group on making sure that IDPs get relevant information swiftly, including changes in the Kosovo Immoveable Property Rights Register.
9. The new Privatization Agency of Kosovo established by the Assembly of Kosovo Law No. 03/L-067, on the basis of a lessons-learned strategy from the former Kosovo Trust Agency, should establish an outreach unit to improve accessibility to IDPs. IDPs are often difficult to reach and lack good resources. The outreach unit should establish a regular, formal line of communication with civil society actors who represent the interests of IDPs. They should forge a systematic strategy to inform IDPs about the agency's activities; some of this can be done through the Serb media.

²⁵⁹ See DRC, "Legal Assistance Program to the Institutions of the Government of Serbia dealing with Refugees and IDPs," Inception Report, Belgrade, August 30, 2008.



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