The European Union's Programme for the Republic of Serbia

Further support to refugees and IDPs

EuropeAid/129208/C/SER/RS

Republic of Serbia

Access to Justice for Internally Displaced Persons from Kosovo

This project is funded by
The European Union

This project is implemented by
DIADIKASIA in consortium with
Hilswerk, ICMPD and Group 484

Access to Justice for Internally Displaced Persons from Kosovo*

June 2012

* This designation is without prejudice to positions on status, and is in line with UNSCR 1244/99 and the ICJ Opinion on the Kosovo Declaration of Independence.

The report was prepared by Milica V. Matijević, Senior Human Rights Reporting Officer.

Disclaimer

The content of this report is the sole responsibility of the author and can in no way be taken to reflect the views of the European Union nor of the beneficiary of the Project.

The Project "Further Support to Refugees and IDPs in Serbia" is funded by the European Union and implemented by Diadikasia Business Consultants S.A. in consortium with Hilfsverk Austria International, ICMPD and Group 484. The Project started in November 2010 and it will last two years. Project beneficiary institution is The Ministry for Kosovo and Metohija of the Republic of Serbia.

The Project's main activities are provision of legal aid/assistance to IDPs and refugees, including direct representation of IDPs before courts and other relevant institutions, as well the provision of availability of timely and accurate information necessary for realization of the rights of IDPs and refugees in Serbia. All the cases are systematically registered in the database which currently has some 2200 cases.

More information at www.pravnapomoc.org

Contents:

Executive Summary 5
1. Introduction 7
1.1. Structure and Methodology 8
2. Access to Justice and Indirect Discrimination 9
3. Some Basic Considerations of the Right of Access to Court under International Human Rights Standards 10
4. Use of the Official Languages in the Justice System in Kosovo 12
4.1. Use of the Official Languages before the Internationally Administered Segments of the Justice System in Kosovo 13
4.1.a. Limited Accessibility of the EULEX Web Site in the Official Languages 14
4.1.b. Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters 15
4.2. Use of the Official Languages before the Local Courts 17
5. Costs of Proceedings in Conflict-Related Property Repossession Cases 23
6. Legal Representation of IDPs before the Courts in Kosovo 31
6.1. Legal Representation and Access to Legal Aid 32
6.2. Certification of powers of attorney 35
7. Conclusion 41

Executive Summary

Although more than a decade has passed since the end of hostilities in Kosovo, the process of post-conflict property restitution is not yet complete. Apart from the cases awaiting adjudication before the Kosovo Property Agency (KPA), a mass claims mechanism dedicated to post-conflict property repossession, a significant number of conflict-related property claims are also dealt with by the local courts.

Given the importance of local courts in post-conflict property restitution, the Report argues that for this process to be effectively resolved the justice system needs to accommodate the unique characteristics of these cases.

Their most prominent feature is that the greatest majority of claimants belong to the group of internally displaced persons (IDPs). According to the international equality and fair trial standards the local authorities should provide an unimpeded access to a court for all, regardless of a person's status. In the context of Kosovo this would mean that the local laws and institutions should enable an effective access to courts not only for the residential population but also for those who were displaced as a consequence of conflict. This obligation becomes even more pronounced when IDPs form the largest single ethnic minority group, as it is the case in Kosovo.

Another important feature of these property cases is that they are conflict-related and as such imply the application of a specific set of international standards. When ordinary courts are entrusted with the adjudication of conflict-related claims, as it is the case in Kosovo, the right of access to court shall be interpreted in the light of the international standards governing post-conflict property restitution and the right to a remedy for mass human rights violations.

As shown throughout the Report, the legislative and institution-building processes undertaken in Kosovo have not sufficiently addressed the specific needs of IDPs in relation to their claims nor have provided for an adequate institutional response.

This is illustrated by analysing some of the most typical systematic obstacles faced by IDPs in their attempt to access the courts in Kosovo. The first part of the Report considers the obstacles related to the use of official languages in judicial proceedings. The second part of the Report examines laws regulating court fees and the local courts' practice concerning the exemption from court fees of post-conflict property claims. In its last part, the Report investigates under which conditions IDPs in practice can use their right to participate in the civil proceedings through an authorized representative.

Access to justice is not merely an issue of procedural preconditions for the enjoyment of substantial rights. Due to its specific nature, the right of access to court is itself a fundamental legal guarantee of the equal protection by the law. When laws and institutional practice, in an apparently neutral manner, limit the enjoyment of the right of access to courts for a certain segment of population, which can be defined by its specific status or ethnic belonging, this right becomes interlocked with the issue of discrimination. The presence of indirect or direct discrimination restricts access to justice, which in turn limits the possibility of discrimination being judicially challenged.

The right of access to a court is a logical precondition of the right to fair trial. If a justice system does not recognize the specific obstacles faced by IDPs, the right to a fair trial and most of the substantive rights guaranteed by the domestic law, become an empty promise.

By analysing some of the barriers to the effective access to courts for IDPs, the present Report attempts to contribute to the objective of a more effective post-conflict property restitution in Kosovo. Given the complexity of the issues at stake, its main conclusion is that only a well-defined strategy on improving the access to justice for IDPs could bring the necessary changes.

1. Introduction

The process of post-conflict property restitution is not yet complete, although more than a decade has passed since the end of the hostilities in Kosovo. Significant portion of 42.064 claims lodged by December 2007 before the Kosovo Property Agency (KPA),[1] a body mandated with post-conflict property resolution, are not adjudicated while less than half of its decisions were implemented so far.[2] The widespread instances of illegal occupation, looting and destruction of the real property given back to the rightful owners too often nullify the effects of the provided remedies.[3]

A significant number of conflict-related property claims are also pending before the local courts. Although many of the policy makers in Kosovo believe that the KPA[4] is the sole body with the mandate to adjudicate the conflict-related claims over real property in Kosovo, this is actually not entirely true. The jurisdiction of the local courts over the issue of post-conflict property restitution exists in relation to several types of conflict-related claims.

Firstly, a significant portion of cases that were initially brought before the Housing and Property Directorate and Claims Commission (HPD/CC)[5] has been transferred to the local courts. These cases often involved claims over disputed purchase prices or were subject to secondary requests filed together with the initial claim, which fell outside of the HPD/CC jurisdiction. Secondly, the claim intake of the KPA has ended in December 2007 and any property claim field after this date is under the jurisdiction of the regular courts. Thirdly, neither HPD/CC had nor the KPA has the jurisdiction to award in-kind or financial compensation for more than 11.000 destroyed properties claimed by the displaced owners.[6] These claims together with more than

[1] The Kosovo Property Agency (KPA) is an independent agency mandated to resolve, subject to the right of appeal to the Supreme Court of Kosovo, conflict-related ownership claims and right of use claims in respect of private immovable property, including agricultural and commercial property, resulting from the armed conflict that occurred between 27 February 1998 and 20 June 1999. It was established in 2006 by UNMIK Regulation 2006/10 On the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial property, which was soon after amended by UNMIK Regulation 2006/50 of the same name. Since 31 December 2008 the KPA is operating under Law No. 03/L-079 adopting and amending UNMIK Regulation 2006/50 adopted by the Assembly of Kosovo on 13 June 2008.

[2] According to the data presented at the KPA web site at http://www.kpaonline.org/ClaimsTotalDecided_caseload.asp (last accessed on 1 June 2012) and in its Annual Report for 2011 (See: Kosovo Property Agency, Annual Report for 2011, pp. 12 and 21, available at: http://www.kpaonline.org/PDFs/AR2011.pdf (last accessed on 15 May 2012)).

[3] According to KPA, "in many cases the number of re-occupations and evictions has exceeded ten on the same person and property". *Ibidem*, p. 25.

[4] Kosovo Property Agency is comprised of 3 main bodies: the Executive Secretariat, the Kosovo Property Claims Commission (KPCC) and the Supervisory Board. For the sake of simplicity, we will refer to all these bodies by using a single abbreviation "KPA".

[5] Housing and Property Directorate and Claims Commission (HPD/CC) was the KPA predecessor established by UNMIK Regulation 1999/23 of 15 November 1999, to provide an efficient resolution of conflict related claims over residential property.

[6] These claims were initially submitted before the HPD/HPCC, which offered no remedy or compensation for destroyed property, but only a declaratory statement issued by the HPCC confirming lawful possession. According

21.000 other compensation claims for the destroyed or damaged property are under the jurisdiction of the local courts.[7] No less important is the group of cases where the real property was re-occupied after the HPD/CC or KPA has adjudicated the owner's claim, for which the only remedy is to claim its repossession before the regular courts.[8] The ordinary courts are also in charge of solving the claims arising from looting and destruction of property while it was illegally occupied, as the two other types of post-eviction incidents that often occur after the HPD/CC and KPA involvement was being completed.[9]

Given the importance of the local courts, this Report argues that for the post-conflict property restitution process to be effectively resolved the justice system needs to accommodate the specific features of these claims. In the context of Kosovo, their most obvious characteristic is that the greatest majority of those who are claiming back their real property belong to the category of internally displaced persons (IDPs). Another important feature of these claims is that they have a great share in the total number or cases pending before the local courts.[10]

The Report also intends to show that the fact that the domestic laws do not recognise the specific needs of IDPs in their pursuit of justice for the conflict-related property claims, leads to their access to justice being limited. This is illustrated through an analysis of some of the most typical systemic obstacles faced by IDPs in their attempt to access the courts in Kosovo.

1.1. Structure and Methodology

The first group of analysed obstacles are those related to the use of official languages in judicial proceedings, as explored in the first part of this report. The second part looks at the laws governing the system of court fees and the local courts' practice with regards the exemption from court fees in post-conflict property related cases lodged by IDPs. The last part of this report examines under which conditions IDPs in practice can use their right to participate in the civil proceedings through an authorized representative.

---

to available information, by December 2004 more than 18,000 claims for compensation in cases of damaged and destroyed property were filed by internally displaced Kosovo Serbs while another, approximately 2,900 compensation claims were filed by Kosovo Albanians. See: Margaret Cordial, Knut Rosandhaug, Post-conflict Property Restitution: The Approach in Kosovo and Lessons Learned for Future International Practice (Martinus Nijhoff Publishers / Brill Academic 2009), p. 221.

[7] European Commission, "Kosovo 2010 Progress Report", {COM(2010)660, Brussels, 9 November 2010, p. 18. It is not known to what extent the figures on compensation claims lodged before the HPD/CC and those lodged before the local courts overlap.

[8] See footnote 3 above.

[9] This list is not exhaustive. There are also other types of important conflict or displacement related claims such as claims in cases where property, which belonged to the displaced Serbs, was sold without their knowledge, most often by using forged personal documents and/or powers of attorney. Very important are also the claims arising from the privatisation process that had serious ramifications on the property rights of IDPs (see the letter sent by the International Ombudsperson in Kosovo to the Special Representative of the UN Secretary-General on 21 December 2005, available at http://www.ombudspersonkosovo.org/repository/docs/E2051221a.pdf accessed on 15 May 2012).

[10] Report of the COE Commissioner for Human Rights' on Special Mission to Kosovo of 2 July 2009, para. 174.

Although the focus of the report is access to justice for IDPs, this was not the main criterion in selecting the obstacles to be analysed. Some of them are affecting only IDPs, such as the problems related to the appointment of a legal representative. Others affect all communities but have particularly adverse effects on the accessibility of court to IDPs. An obvious example of this is the way the internationally administered segments of the justice system approach the rules on the use of the official languages. This issue, for instance, affects everyone in Kosovo but IDPs in particular given the remoteness of their current residence and the fact that the official web sites are for them often the only way to access information.

Furthermore, all the analysed impediments to the effective access to justice for IDPs in pursuit of their property related claims are of a systemic nature. Yet, as this report will show, their source can differ. Some of the obstacles are consequence of the failure of the domestic legal framework in recognizing the specific needs of IDPs, while others are caused by the inconsistent application of law by the local courts.

The report is based on the findings of the statistical analysis[11] conducted within the EU-funded Legal Aid Project "Further Support to Refugees and IDPs in Serbia" (hereinafter: Legal Aid Project), on the sample of cases where a party to the proceedings was a beneficiary of the Legal Aid Project. The analysis was limited to the civil law cases where the legal matter was related to post-conflict property restitution.

The observations contained in this report are also based on the insights gained through the provision of legal aid to hundreds of IDPs by the Legal Aid Project legal officers. No less important were the findings gained through the regular field visits to Kosovo and consultations with the representatives of the Kosovo institutions, international stakeholders, independent specialists, NGOs, etc.

This report does not analyze all the obstacles faced by IDPs in the process of post-conflict property restitution but it highlights those that can best depict a need for a more inclusive judiciary in Kosovo.

2. Access to Justice and Indirect Discrimination

An important objective of the report is to show that access to justice is not merely an issue of procedural preconditions for the enjoyment of substantial rights. Due to its specific nature, the right of access to court is not just a procedural right but is itself a fundamental legal guarantee of the equal protection by the law.

[11] EU-funded Project "Further support to refugees and IDPs in Serbia", *On Certain Aspect of the Right of Access to Courts in Kosovo for the Internally Displaced Persons – Statistical Analysis*, April 2012 at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

As illustrated throughout the report, the right of access to justice can often conceal other important matters such as discrimination.[12] When certain laws and institutional practice negatively affect an enjoyment of the right to access to court only for certain segment of the population, which can be defined by its specific status or belonging to an ethic group[13], the issue of access to court becomes interlocked with the issue of discrimination.

To state this does not entail that there shall exist evidence of an overt, direct discrimination. Where *an apparently neutral* law or institutional practice would put persons of a particular ethnic origin or status at a particular disadvantage compared with other persons there is indirect discrimination. The instances of indirect discrimination before the courts, although more subtle than direct discrimination, are an equally dangerous enemy of the principle of equal protection by law.[14]

3. Some Basic Considerations of the Right of Access to Court under International Human Rights Standards

The right of access to court constitutes a basic element of the right to fair trial embodied in Article 14 of the International Covenant on Civil and Political Rights (ICCPR) and Article 6 of the European Convention on Human Rights (ECHR).[15] As the European Court of Human Rights (hereinafter: European Court) held in *Golder v. United Kingdom,* "[i]t would be inconceivable […] that Article 6 para. 1 should describe in detail the procedural guarantees afforded to parties in a pending lawsuit and should not first protect that which alone makes it in fact possible to benefit from such guarantees, that is, access to a court".[16]

As any other right guaranteed by the ECHR and other major international instruments, this right may be subject to limitations that "should not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired".[17] In principle,

[12] See on this an excellent essay of B. M. Zupancic, *Access to court as a human right according to the European Convention of Human Rights*, (2000) 9(2) NLJ.

[13] Any practices or laws that indicate existence of discrimination on ethnic ground are always subject of a strict scrutiny test.

[14] Unless, that law or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. This definition is based on the definition contained in Article 2 para. 2 of the EU Directive 200/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin ([2000] OJ L180/22) which has also served as a model of a definition of indirect discrimination contained in Kosovo Antidiscrimination Law (Law No. 2004/3) of 19 February 2004.

[15] In Kosovo, the right to fair trial is guaranteed in: Article 31 para. 1 of the Constitution of Kosovo of 15 June 2008; Article 7 para. 2 of Law No. 03/L-19 on Courts of 22 July 2010. This right is also guaranteed by virtue of Article 22 of the Constitution of Kosovo which makes directly applicable all the major international human rights instruments.

[16] Judgment of 21 February 1975, para 35.

[17] *Stubbings v. UK* (1996) 23 EHRR 213, para. 50.

the limitations of the right must be lawful, should have a legitimate aim and there should be a reasonable relationship between the aim to be achieved and the means used.

The international human rights standards on what constitutes an equal access to court for all are drawn on these subtle considerations of what shall make up the duty of the state[18] and what possible limitations of this right could be permitted under the normal circumstances. In the post-conflict settings where the conflict-related legal claims are still lingering and the large segments of the population are in displacement, the issue of what is an equal access to court becomes even more complex.

Firstly, the conditions provided by the state must be inclusive enough to provide an unimpeded access to a court to all, regardless of a person's status. In the context of Kosovo this would mean that the local laws and institutions should facilitate an effective access to courts not only for its residential population but also for those who were displaced as a consequence of conflict.[19] Article 14 and Protocol 12 to the ECHR prohibit discrimination on all grounds and in all its forms, including discrimination on the basis of a person's status, and the same prohibition is contained in Article 26 of the ICCPR. As elaborated by the Human Rights Committee in the General Comments No. 32:

> "The right of access to courts and tribunals and equality before them is not limited to citizens of States Parties, but must also be available to all individuals, regardless of nationality or statelessness, or whatever their status, whether asylum seekers, refugees, migrant workers, unaccompanied children or other persons, who may find themselves in the territory or subject to the jurisdiction of the State party."[20]

This obligation becomes even more pronounced when IDPs form the largest single minority group, as it is the case with those displaced from Kosovo. The Council of Europe Framework Convention for the Protection of National Minorities, which is by virtue of Article 22 of the Kosovo Constitution[21] directly applicable in Kosovo, requires from the domestic authorities to guarantee to persons belonging to national minorities an equal protection of law.[22]

---

[18] When recalling the international human rights instruments, the text of this Report will often contain reference to the duties of the state as the state is primary responsible for guaranteeing human rights under international law. In all these instances the term "state" shall be taken to include any non-state actor exercising powers normally reserved for a state (e.g. transitional administration bodies like UNMIK, provisional institutions under international supervision, the governmental authorities of self-proclaimed territories).

[19] *Xenides-Arestis v. Turkey* (admissibility), decision of 14 March 2005 (Application No. 46347/99).

[20] Human Rights Committee, 'General Comments No. 32' on the right to equality before courts and tribunals and to a fair trial under art 14 of the ICCPR', U.N. Doc. CCPR/C/GC/32 (2007). Kosovo is not a signatory of the ICCPR. However, these general comments shall be applicable also to the conduct of its institutions as the provisions of the ICCPR are directly applicable in Kosovo

[21] The Kosovo Constitution, adopted by the Assembly of Kosovo on 15 June 2008. After the unilateral declaration of independence (UDI) in February 2008, numerous laws and other legislative acts have been adopted in Kosovo that are substituting, in effect, the previous legislation. No legislation passed by the Kosovo Assembly after the UDI has been promulgated by the SRSG which is contrary to the UN SC Resolution 1244 and to the related legal framework created by UNMIK (see Section 1.1 of UNMIK Regulation No. 1999/24 on the Law Applicable in Kosovo and Section 9.1.45 of UNMIK Regulation No. 2001/9 on Constitutional Framework for Provisional Self-Government in Kosovo).

When, as it is the case in Kosovo, the ordinary courts are entrusted with the adjudication of conflict-related property claims, the right of access to court shall be seen in the light of the international standards governing the post-conflict property restitution.

The UN Principles on Housing and Property Restitution for Refugees and Displaced Persons (hereinafter: Pinheiro Principles), translate the right to a remedy for human rights violations into right of "everyone who has been arbitrarily or unlawfully deprived of housing, land and/or property [to] be able to submit a claim for restitution and/or compensation to an independent and impartial body".[23] In the similar vain, the UN Guiding Principles on Internal Displacement (hereinafter: Guiding Principles) point to the duty of the competent authorities to assist IDPs to recover property and possessions which they left behind or were dispossessed of upon their displacement.[24] Another international soft-law document essential for understanding the duties of domestic authorities in a territory whose population still awaits resolution of conflict-related claims is the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[25]

In the European context important is also the Council of Europe Resolution 1708 (2010) on Solving Property Issues of Refugees and Internally Displaced Persons,[26] which calls upon the responsible authorities to "guarantee timely and effective redress for the loss of access and rights to housing, land and property abandoned by refugees and IDPs without regard to pending negotiations concerning the resolution of armed conflicts or the status of a particular territory". Resolution 1780 (2010) also emphasizes the importance of ensuring "that such redress takes the form of restitution in the form of confirmation of the legal rights of refugees and displaced persons to their property".[27]

4. Use of the Official Languages in the Justice System in Kosovo

Albanian and Serbian and their alphabets are the official languages in Kosovo and the right not to be discriminated against on the ground of language is constitutionally guaranteed.[28] The duty of ensuring that the inhabitants of Kosovo can use both official languages on an equal ground in

---

Since UN SC Resolution 1244 is still in force, the lawfulness of the post-UDI laws is questioned by the Republic of Serbia and other countries which do not recognize the unilaterally declared independence of Kosovo.

[22] Article 4.1. of the Council of Europe Framework Convention for the Protection of National Minorities adopted in Strasbourg on 1 February 1995.

[23] Principle 13.1. (E/CN.4/Sub.2/2005/17).

[24] Article 29.2 of the Guiding Principles (E/CN.4/1998/53/Add.2).

[25] Resolution adopted by the United Nations General Assembly on 21 March 2006 (A/RES/60/147).

[26] Adopted by the Parliamentary Assembly of the Council of Europe (CoE) on 28 January 2010.

[27] Paras. 10.1. and 10.2.

[28] Turkish, Bosnian and Roma language are in the official use at the municipal level under conditions specified in Article 2.3. and 12.4. of the Law No. 02/L-37 on the Use of Languages of 20 July 2006, promulgated under UNMIK Regulation No. 2006/51. See Article 5.1 and Article 24.2 of the Constitution of Kosovo.

the judicial proceedings is the responsibility of the courts. They shall make sure that the judicial proceedings of any kind are conducted in the language known by the parties as well that entire correspondence between the parties and the court is conducted in the language(s) chosen by the parties.[29]

The importance of this right in the context of court proceedings cannot be overstated. The duty of the court to issue all the documents in relation to the proceedings in the language(s) of the parties is a precondition for enjoyment of all the other substantive and procedural guarantees that form the right to fair trial. Yet, despite the strong constitutional and legal guarantees, the right to use the official language of one's choice in judicial proceedings is not adequately fulfilled. This can be observed at two levels: 1) in relation to the internationally administered segments of the justice system in Kosovo, 2) at the level of the local courts.

4.1. Use of the Official Languages before the Internationally Administered Segments of the Justice System in Kosovo

During the period in which UNMIK was administering Kosovo[30] and when all major institutions were run by international staff English was, in practical terms, a third language in official use in Kosovo. This was particularly true for the functioning of the legislative and justice system.

All laws were promulgated in English together with their promulgation in Albanian and Serbian. Moreover, the high number of international judges and prosecutors in the justice system rendered the use of the English language a common feature of court proceedings.[31] When an international judge or an international prosecutor was participating in the court proceedings, the proceedings were conducted in English in addition to any other language(s) required by applicable law while an immediate interpretation and translation into another language or other languages was being made.[32]

With the decrease of the executive and legislative powers of UNMIK, the significance of English in the work of the Kosovo institutions gradually diminished. In 2006 the law set the Albanian and Serbian and their alphabets to be the official languages of Kosovo.[33]

However, the developments in the justice system did not follow this trend since the international judges and prosecutors remained its constant feature.[34] Furthermore, the

[29] Articles 12.2. and 14 of the Law No. 02/L-37 on the Use of Languages.
[30] Formally, UNMIK is still governing Kosovo since UN SC Resolution 1244 is still in force.
[31] The engagement of the international judges in the judicial proceedings started soon after the establishment of the United Nations Interim Administration Mission in Kosovo.
[32] Section 1, UNMIK Regulation 2000/46 on the Use of Language in Court Proceedings in which an International Judge or International Prosecutor Participates of 15 August 2000.
[33] Article 2.1 of the Law No. 02/L-37 on the Use of Languages. See also Article 5 of the Constitution of Kosovo, promulgated on 15 June 2008.
[34] According to Article 16 of the Law No. 03IL-053 On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, adopted on 13 March 2008.

approach of EULEX to the use of the local languages also did not conform to this tendency. On the one hand, the accessibility of the information about the activities conducted by the EU Mission has significantly decreased in comparison to the period under UNMIK while, on the other hand, EULEX retained and modified certain rules introduced by UNMIK by conferring a yet greater importance to English in certain type of judicial proceedings. This can be illustrated by two examples.

4.1.a. Limited Accessibility of the EULEX Web Site in the Official Languages

The EULEX official web page is not entirely accessible in the official languages.[35] While the non-translated web page sections on tenders and job opportunities can raise the issue of the Mission's transparency, the situation is much more worrisome when it comes to the section of the web page dedicated to the activities of the EULEX Justice Component.

Although EULEX is predominantly a technical mission with the goal to monitor, mentor and advise the local institutions in the rule of law field, it also has certain executive powers. Its most significant executive powers lay in the role carried by the EULEX judges and prosecutors, who shall ensure that certain types of cases are properly investigated, prosecuted, adjudicated and enforced according to the applicable law.[36]

Yet, despite the fact that EULEX has such an important responsibility through which it can directly affect the exercise of the individual rights in Kosovo, the inhabitants of Kosovo have no possibility to learn about the way EULEX is carrying on its mandate, at least not by accessing its web site. The section of the official EULEX web site devoted to its Justice Component is not accessible in either Albanian or Serbian.[37]

The same applies to the decisions of the Assembly of EULEX Judges, a self-governing body that is "responsible to manage all issues related to the administration and the work of the EULEX Judges, according to the modalities established by EULEX Kosovo".[38] Although the relevant section of the EULEX web site states that decisions of the Assembly of Judges "are public and can be consulted on this website", in reality a great number of its decisions cannot be accessed in Serbian and in Albanian.[39]

---

[35] On 13 May 2012, non-accessible in the Albanian and Serbian language were part of the web page devoted to the Justice Section, to the Job Opportunities and to Tenders, as accessed from the main menu.

[36] Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO; Law No. 03/L-053 On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo; Law No. 03/L-052 On the Special Prosecution Office of Kosovo.

[37] Any attempt to access the EULEX Justice Component web page in Albanian or Serbian redirects the Internet visitor to the front page of the EULEX web site. Visit the http://www.eulex-kosovo.eu/en/justice/ (last accessed on 1 June 2012).

[38] Art. 4 of the Law No. 03/L-053 On the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo.

[39] At http://www.eulex-kosovo.eu/en/justice/assembly-of-the-eulex-judges.php (last accessed on 1 June 2012).

Although not all the decisions of the Assembly of the EULEX Judges are of direct significance to the fulfilment of the individual rights, the importance of this body for the overall functioning of the justice system in Kosovo asks for greater respect of the duty to inform the public and respect the applicable language laws.

4.1.b. Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters

Similarly to the decisions of the Assembly of the EULEX Judges, the decisions on the rules of procedure issued by the President of the Special Chamber of the Supreme Court on Privatization Agency Related Matters[40] (hereinafter: SCSC), which are published at the EULEX web site, cannot be accessed in the Serbian language.[41] Instead, notice is posted that "the translations of the decisions into the official languages – Serbian and Albanian – will follow as soon as possible", although most of the decisions were issued during 2009. To date this includes all 12 of the rules, clarifications, addendums, amendments and directions issued by the President.[42]

The adjudication of claims before the SCSC also provides further illustration of the non-application of the legal rules governing the use of the official languages in Kosovo. Addressing SCSC for the violations of individual property rights during the process of privatization can be a very costly exercise since all the submissions and documentary evidence must be accompanied with an English translation.

The SCSC, at that time the Special Chamber of the Supreme Court on Kosovo Trust Agency (KTA) Related Matters, was established by UNMIK in 2003 with a purpose of adjudicating claims relating to the decisions or actions of the KTA and other claims arising from the privatization process.[43] This judicial body adjudicates claims in mixed panels composed of both local and international judges for the reason of which the proceedings are conducted in English. However, as different from other judicial instances in Kosovo characterised by the presence of international judges, the legal provisions regulating the work of the SCSC require that all pleadings and supporting documents submitted by the claimants in one of the official languages

[40] Before November 2011 this body was know as the Special Chamber of the Supreme Court on Kosovo Trust Agency Related Matters.

[41] These texts cannot be accessed otherwise, for instance, via the web page of the Supreme Court of Kosovo.

[42] At http://www.eulex-kosovo.eu/en/justice/rules-for-case-allocation.php (last accessed on 1 June 2012).

[43] Section 1.1 of UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters of 13 June 2002. In 2008 the given law was amended by UNMIK Regulation No. 2008/4 Amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters of 5 February 2008. Since September 2011 the Special Chamber of the Supreme Court of Kosovo is renamed to Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters in accordance with the new Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, adopted on 22 September 2011.

must be accompanied by an English translation.[44] Such translation is at the expense of the person or party submitting pleadings or other documents except if the party was granted assistance for the translation of submissions.[45] If the certified English translation is not provided the SCSC rejects the claim on the grounds of inadmissibility.[46]

The provisions of the Law on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters, which set the translation of the submissions and documentary evidence as an admissibility requirement, are directly in contravention with Article 5 of the Constitution of Kosovo and Article 13 of Law No. 02/L-37 on the Use of Languages. Furthermore, they amount to direct discrimination on the ground of language which is explicitly prohibited by Article 3.3 of the Law on the Use of Languages, Article 4(j) of the Anti-Discrimination Law No. 2004/2 as well by the major international human rights instruments which are directly applicable in Kosovo by virtue of Article 22 of the Constitution of Kosovo.

The duty of translating documents into English can also cause considerable financial hardship on the claimants, which can deter them from claiming protection of their rights before the SCSC. This in itself can amount to the violation of the right of access to court. Although the right of access to court may be subject to limitations in the form of regulation by law, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between them and the aim sought to be achieved.[47]

[44] 22.7 of UNMIK Administrative Direction No. 2006/17 Amending and Replacing UNMIK Administrative Direction No. 2003/13, and Implementing UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters of 6 December 2006; Article 25.8 of the Rules of Procedure of the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Matter contained in the Annex of the Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters. The rules referring to the translation of the submissions and documentary evidence are further reiterated in the Additional Procedural Rulings issued by the President of SCSC on 1 December 2009, at http://www.eulex-kosovo.eu/docs/justice/assembly/rules/09_Additional_Procedural_Rules_consolidated.pdf (last accessed on 1 June 2012).

[45] Exempted from this general rule are complaints related to the list of eligible employees in which the claimants are, as a rule, natural persons. In this type of claims the SCSC shall arrange, where necessary, for the translation into English of the complaint, any subsequent submissions and any supporting documents (Article 68(12) of the Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters). The law also provides for the possibility of lodging an application for assistance in the translation of pleadings and supporting documents if a party to the proceedings is a natural person (Article 25(9) of the Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters). The Presiding Judge rules on such application on the basis of the statement of the party's financial means and any supporting evidence which the party can submit together with the application (Article 25(10) of the Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters).

[46] Article 25(10) of the Law No. 04/L-033 On the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters.

[47] *Tolstoy Miloslavsky v UK*, Series A, No 323, judgment of 13 July 1995. para. 59.

The actual aim of this restriction of access to court – to mitigate the logistical obstacles to the effective functioning of the SCSC [48] - could not be taken as a legitimate aim in the light of the standards established by the case law of the European Court. Firstly, it is the primary responsibility of the state to place sufficient resources at the disposal of the judicial system in order to enable its effective functioning. Secondly, even if the aim of reducing the backlog of documents waiting for translation is considered to be a legitimate aim, the above-described burden placed on parties restricts their access to court in a manner which does not seem to be proportional, effective and necessary for the proper functioning of the justice system in Kosovo.

4.2. Use of the Official Languages before the Local Courts

The importance of ensuring that the documents produced in the course of proceedings must be in the language(s) of the parties prompted UNMIK Department of Justice to issue already in 2000 a Justice Circular No. 2000/08 On the Use of Languages in Court Proceedings[49]. The circular recalled the provisions of the applicable Law on Realization of Equality of Languages and Alphabets of Nations and Nationalities from 1977, and reminded courts and public prosecutors of their duty to respect the equality of both Albanian and Serbian as the official languages in all their communications.[50]

Since then, the issue of the use of official languages in the court proceedings has been influenced by divergent developments. The newly enacted laws underlined the duty of the courts to ensure that a person participating in judicial proceedings of any kind may use both Serbian and Albanian on an equal footing[51] and that all documents issued by the court in relation to proceedings shall be in the official language(s) chosen by the parties.[52] The courts also started using, to a greater extent, bilingual and trilingual forms. On the other hand, the fact that after the conflict Serbian was not in use in many parts of Kosovo due to the displacement of the greatest portion of its Serbian speaking inhabitants significantly decreased number of courts' staff who preserved adequate command of this language.

---

[48] See EULEX, A*nnual Report* 2010 *on the Judicial Activities of EULEX Judges*, p. 66. See also OSCE Mission to Kosovo, *Privatization in Kosovo: Judicial Review of Kosovo Trust Agency Matters by the Special Chamber of the Supreme Court of Kosovo* (Report, May 2009), pp. 35 - 40.

[49] See also UNMIK DOJ Justice Circular No. 2001/18 regarding Bilingual Court Forms and Prosecution Folders, and Justice circular No. 2003/07 in relation to Public Access to Courts.

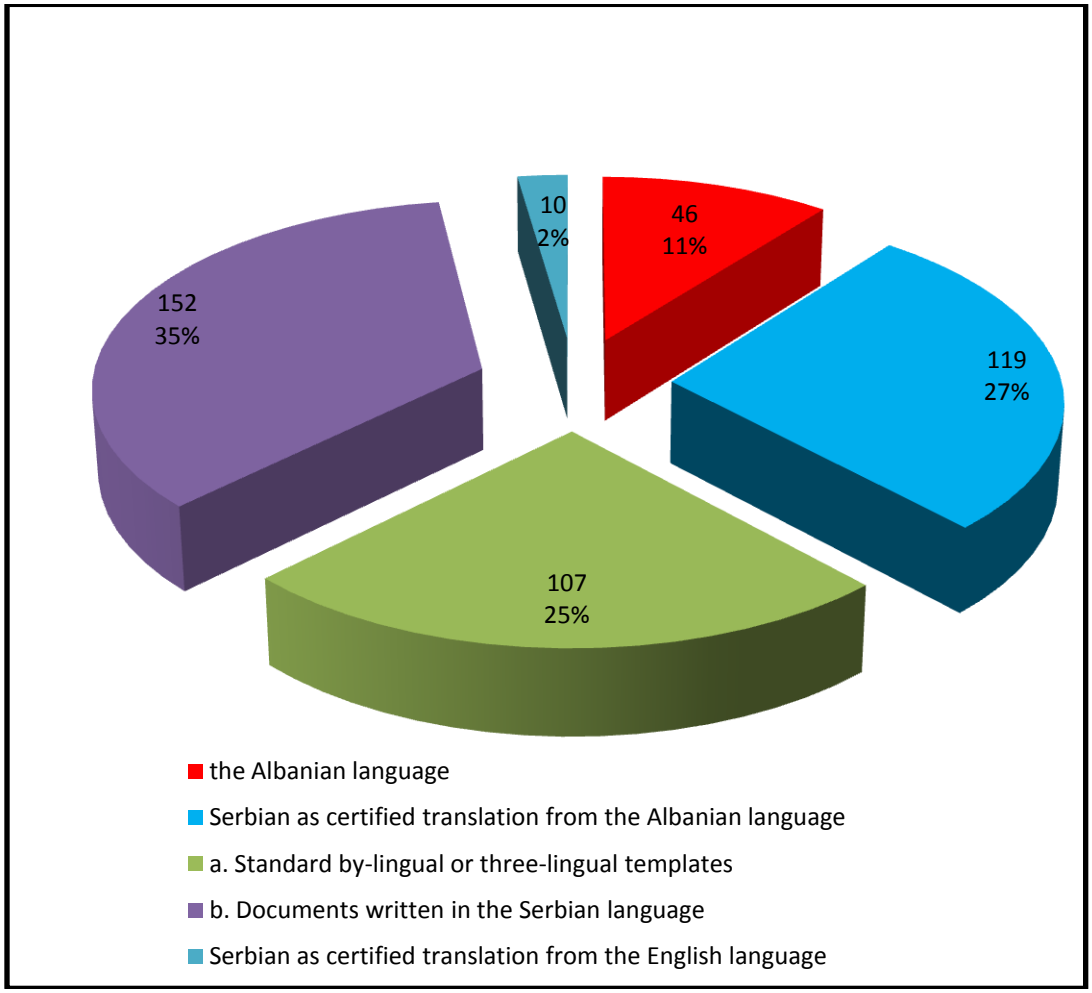
[50] Following this another two circular letters were issued by the UNMIK Department of Justice on the same issue: Justice circular No. 2001/18 regarding Bilingual Court Forms and Prosecution Folders, and Justice circular No. 2003/07 in relation to Public Access to Courts, which remind courts and public prosecutors of the need to adhere to the applicable law respecting the use of official languages in all communications. These circulars stress that all orders and judgments must be in the language of the parties to proceedings. They also point out that official communication includes signs, notices, and all other forms of communication posted in public places in Kosovo shall be in both official languages.

[51] Article 12.2. of the Law No. 02/L-37 on the Use of Languages.

[52] Article 14 of the Law No. 02/L-37 on the Use of Languages.

This is well reflected in the findings of the statistical analysis conducted on the sample of the documents issued by the courts in Kosovo in the course of civil proceedings in the period between July 2008 and 31 March 2012.[53]

Graph 1.a: Use of the official languages before the courts in Kosovo[54]



Out of 434 documents that were sent by the Kosovo courts to the Legal Aid Project beneficiaries in relation to their civil litigations, 11 percent was issued in the Albanian language although the litigants could speak only Serbian. These documents were most often the court

[53] The given time frame was set in order to cover all the cases which are still active and which were registered for in-court representation during the first, second or the current Legal Aid Project. Prior to this Legal Aid Project, the EU successively financed two other legal aid projects for IDPs and refugees in Serbia in the period between May 2008 and April 2011. The mandate of the previous two legal aid projects was almost identical to the mandate of the third Legal Aid Project.

[54] For the explanation of the methodology, related tables and additional graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

records of the hearings, court orders or notifications sent by the courts in relation to the procedural aspects of the litigation.

The documents in the Serbian language were further disaggregated according to the way they were produced. The ratio between the documents, which were directly drafted in Serbian, and those that were issued in Albanian and then translated by the court interpreters shows that in many courts in Kosovo there is still in-house capacity to use Serbian despite the low number of court staff belonging to the Serbian speaking communities. This can be an indication that, apart from the positive action measures for recruitment of court staff from these communities in order to improve their representation in the justice system, another useful tool for ensuring the equality of Serbian and Albanian in the courts could be to stimulate further development of the language skills of the existing court staff.

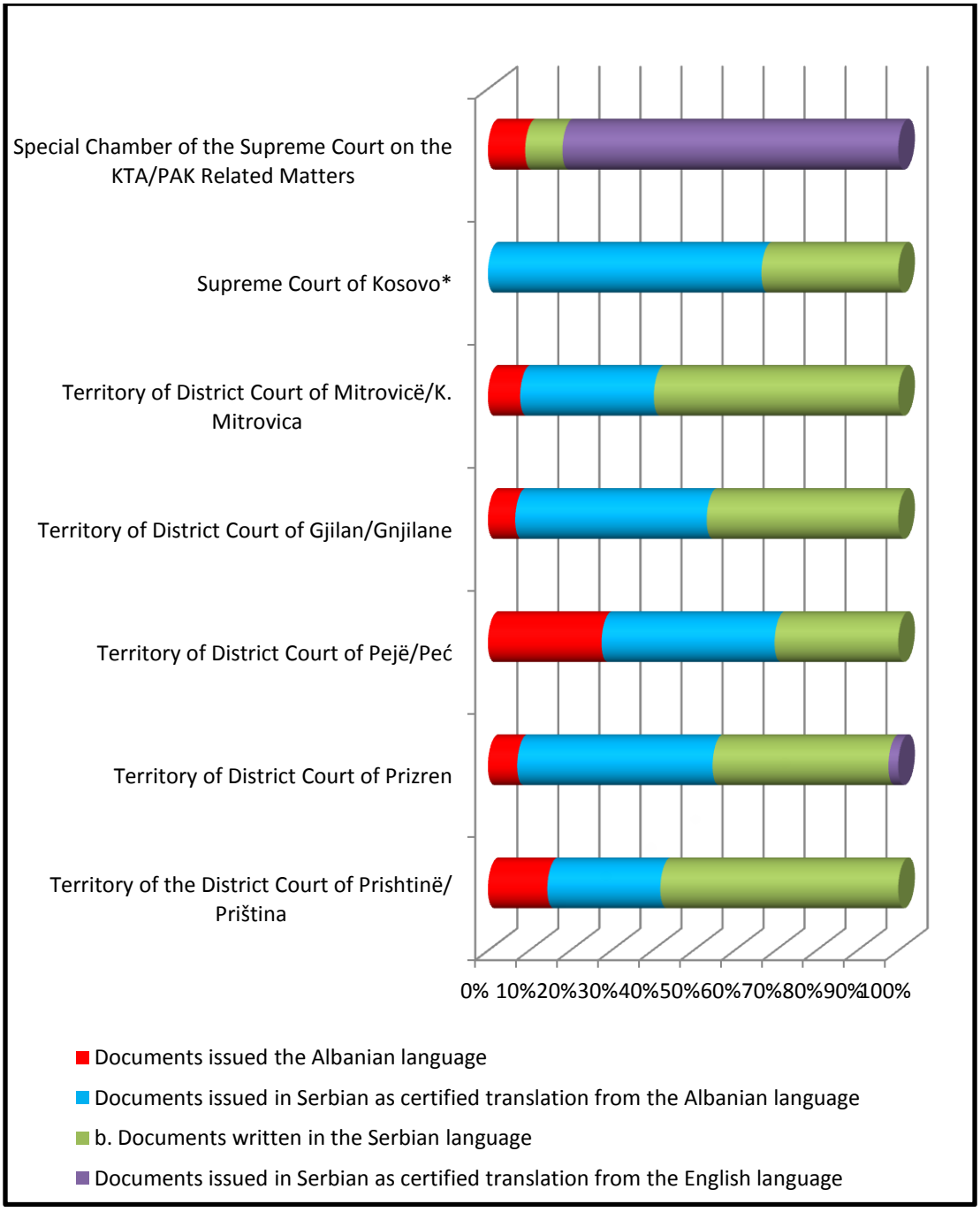
This could also be the way to solve another important problem with the use of Serbian in court proceedings – the low quality of translations. The translations of the court decisions as well of the other documents issued in the course of proceedings are often of such a low quality that the documents received by the parties become incomprehensible.[55]

The same applies to the documents that are only partially translated into Serbian, which frequently happens with templates used by the courts or related institutions. An example of this is a form for lodging a complaint against judges, lay judges or prosecutors issued by the Office for the Disciplinary Council of the Kosovo Judicial Council, which can be found on its official website.[56] Since the bilingual or trilingual forms make up a great portion of the documents issued in the course of the proceedings, as is evident from the previous graph, further standardization of these forms could also add to the equality of the official languages before the courts.

Moreover, this could decrease the regional disparities in relation to the use of Serbian in the judicial proceedings. As shown in the following graph, in this respect there is a notable difference between the courts from different regions.

[55] According to the experience of the Legal Aid Project Lawyers.
[56] Available at: http://www.kgjk-ks.org/?cid=3,183 (last accessed on 10 May 2012).

Graph 1.b: The use of official languages according to the territorial allocation of courts[57]



As the Graph 1.b. indicates, the lowest record in ensuring the equality of Albanian and Serbian are the courts situated in the territory under the jurisdiction of the District Court of Pejë/Peć.[58]

[57] For the explanation of the methodology, related tables and additional graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

[58] The names of municipalities used throughout the analysis are in accordance with the rules contained in UNMIK Regulation No. 2000/43 on the Number, Names and Boundaries of Municipalities of 27 July 2000.

Out of 115 analysed documents, the Legal Aid Project beneficiaries received 23 documents in the Albanian language although they did not speak Albanian. In a significant number of cases, the courts from this region were sending even the completely non-translated judgments to the parties from the Serbian-speaking communities.[59] This unlawful practice was particularly evident in the documents issued by the Municipal Court of Pejë/Peć which, according to the available information, since several months reportedly does not have adequate capacities for in-house translation.[60]

A lack of possibility to understand the content of documents issued by the court, either because the court has used the language not spoken by the party or because of an inadequate translation, is a serious obstacle to access to justice.[61] The party whose right to choose the language of the proceedings has been breached faces further expenses for the translation of documents; for him/her it can be difficult to meet the legal deadlines; this can also lead to the infringement of the principle of equality of arms.

A violation of the principle of the equal status of Albanian and Serbian is not only a violation of the applicable law regulating the use of the official languages and the right to fair trial but it also leads to the breach of the prohibition of discrimination on the ground of language.[62] Furthermore, since the language preferences are, in the context of Kosovo, commonly associated with belonging to a particular ethnic group, when the institutions use only one of the official languages this can result in discrimination along ethnic lines.

According to the domestic law and international legal instruments applicable in Kosovo, the domestic institutions are under a positive obligation to take all the steps necessary to ensure that the right to use the official language of one's choice in the court proceedings is fulfilled.[63] This means putting sufficient resources at the disposal of the judicial system in order to enable its effective functioning and also adequate control of the courts and relevant authorities over the way this right is guaranteed in practice.[64] For the purpose of ensuring effective guarantees of the rights contained in Article 6 of the ECHR, the European Court held that "the obligation of

[59] According to the experience of the Legal Aid Project lawyers gained through the delivery of the legal aid to IDPs.

[60] In some cases, the presiding judges have even asked the parties represented by the Legal Aid Project lawyers to translate on their own their submissions in Albanian in order to speed up the proceedings which were halted due to the lack of court interpreter.

[61] See the Explanatory Memorandum to the European Agreement of the Transmission of Applications for Legal Aid, opened to signature by the member states of the Council of Europe on 27 January 197, p. 7.

[62] Article 3.2. of the Law No. 02/L-37 on the Use of Languages and Article 2 of the Anti-Discrimination Law No. 2004/2.

[63] The Explanatory Memorandum to the European Agreement of the Transmission of Applications for Legal Aid, opened to signature by the member states of the Council of Europe on 27 January 197, p. 7.

[64] The problem of the use of language in the court proceedings also very much affects the RAE community, whose displaced segments are as well beneficiaries of the Legal Aid Project. Although the use of non-official languages in the court proceedings is not subject of this report, it shall be nevertheless stressed that the domestic institutions are under duty to ensure that persons in an economically weak position, such as displaced members of RAE community, are not disadvantaged in relation to access to the court or in the course of any proceedings by their inability to speak or understand the language of the court. See Recommendation No. R(81)7 on measures facilitating access to justice of the Committee of Ministers of the Council of Europe.

the competent authorities is not limited to the appointment of an interpreter but, if they are put on notice in the particular circumstances, may also extend to a degree of subsequent control over the adequacy of the interpretation provided".[65]

Recommendations:

1. The local authorities shall dedicate more financial and institutional resources to the goal of effective implementation of the principle of equality of the official languages in the judicial proceedings.

2. The international institutions, in particular EULEX, should give more consideration to the domestic laws and international human rights standards on the use of languages.[66] When their mandate includes executive powers, they shall fully conform to the domestic rules on the use of local languages, since only in that way the inhabitants of Kosovo are properly informed about their activities that have a direct influence on the fulfilment of individual rights.

3. The Kosovo Judicial Council and other relevant institutions shall develop a more systematic approach to the issue of the use of the Serbian language in the judicial proceedings. This could include: a) broad-scale monitoring instead of complaint-driven monitoring; b) development of the uniform standardized bilingual forms to be used by all courts in Kosovo.

4. The Law on Contested Procedure shall be amended as to include a provision which shall stipulate that the legal time-limits can run only from the moment when the party to the proceedings has received a court order, instruction or decision written in the official language chosen by the party. If the court has communicated with the party in another language or through a document translated in a manner that renders the given document incomprehensible, the time limits related to the given decision, order or instruction shall not commence until the party has received an adequate translation of the given document. The same shall apply to the situations in which the court order, decision or instruction was given to the party verbally on record through an interpreter who is not duly qualified to provide for the adequate translation/interpretation.[67]

---

[65] *Kamasinski v. Austria*, Series A, No 168 Application No. 9783/82, para. 74.

[66] In fact, "[…] development and consolidation of respect for human rights and fundamental freedoms in Kosovo" is one of basic segment of EULEX mandate. See Article 3(e) of Council Joint Action 2009/137/CFSP of 16 February 2009 extending the mandate of the European Union Special Representative in Kosovo. See also Consuelo Navarro Susino, *Success or failures in the integration of a human rights component in the EU Civilian European Union Rule of Law Mission in Kosovo (EULEX)*, (European Commission, May 2010).

[67] The given recommendation is just a part of the theoretical considerations of the way in which the legal requirements foreseen by Article 6 of the ECHR for fair representation could be met. In no way should it be taken to imply any recognition of the legitimacy of legislation adopted after the UDI (see footnote 21). It is believed that the resolution of this issue shall be endorsed through a mutually agreed settlement between the authorities in Kosovo and the authorities of the Republic of Serbia.

5. The relevant provisions of the Law on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters and the relevant parts of the Additional Procedural Rulings issued by the President of SCSC on 1 December 2009, should be harmonised with Article 5 of the Constitution of Kosovo and Articles 2 and 12 of the Law No. 02/L-37 on the Use of Languages.[68]

6. The Registrar of the SCSC shall make sure that the rules of procedure issued by the SCSC on the basis of Article 10 of Law on the Special Chamber of the Supreme Court of Kosovo on Privatization Agency Related Matters are equally and adequately accessible in both official languages in Kosovo.

5. Costs of Proceedings in Conflict-Related Property Repossession Cases

The right of access to court in Kosovo is subject to certain limitations, which are commonly found in contemporary legal systems.[69] As a rule, each party shall cover beforehand the costs of the procedural actions it has undertaken in the proceedings before the civil courts.[70] Different fees are set for different types of claims and petitions at the level that generally corresponds to the medium income in Kosovo.[71]

Although the requirement to pay fees[72] to civil courts in connection with civil law claims cannot be regarded as a restriction on the right of access to court that is incompatible *per se* with the right to a fair trial, this requirement cannot be imposed if it would mean a substantial reduction of the claimant's standard of living.[73] Under certain circumstances, a requirement to pay the court fees in order to have one's claim determined by the court could be regarded as a restriction of the right of access to court.[74]

---

[68] *Ibidem*.

[69] As a general rule, the interests of the fair administration of justice may justify imposing a financial restriction on the individual's access to a court (see *Tolstoy-Miloslavsky v. UK*, judgment of 13 July 1995, Series A no. 316).

[70] Article 450 of Law No. 03/L-006 on Contested Procedure of 30 June 2008.

[71] Section 10 of Administrative Instruction No. 2008/02 on Unification of Court Fees of November 2008.

[72] In the present analysis the terms "court fees" and "costs of the proceedings" although not conveying the identical meaning will be used interchangeably since, according to Article 468 para. 2 of Law No. 03/L-006 on Contested Procedure, "exemption from payment of the costs of the proceedings shall include court fees and advance payment of the expenses for witnesses, experts, site inspection and publication of court announcements".

[73] See *Aït Mouhoub v. France*, judgment of 28 October 1998, Reports 1998-VIII, p. 3227, *Brualla Gómez de la Torre v. Spain*, judgment of 19 December 1997, Reports of Judgments and Decisions 1997-VIII, p. 2955, *Tolstoy-Miloslavsky v. the United Kingdom*, judgment of 13 July 1995, Series A no. 316-B.

[74] See *Kreuz v. Poland*, Application No 28249/95, 19 June 2001. See also *Weissman and Others v. Romania*, no. 63945/00, 24 May 2006.

Moreover, adjudication of claims of those who have lost their property rights as a consequence of conflict, according to the relevant international standards, should be done free of charge.[75] According to the Pinheiro Principle 13(2), everyone who has been arbitrarily or unlawfully deprived of property as a consequence of conflict should be able to submit a claim for restitution or compensation *free of charge* to an independent and impartial body.[76]

The first standard is well elaborated in the relevant domestic laws. A court may exempt from the payment of litigation costs a party who in terms of his or her financial situation is unable to pay those costs without harm to the vital support of him or herself and his or her close family.[77] Exemption from the payment of court fees shall be requested by the party to the proceedings and is decided by the court of first instance.[78] When considering the request "[…] the court shall carefully assess all the circumstances, having particular regard to the value of the subject matter under adjudication, the number of the family members and their income."[79] The court shall decide whether or not to grant the exemption within *seven days* of the filling of the request.[80] As any other decision on legal matter, this decision shall be *recorded in writing*.[81]

Yet, as a general practice the courts in Kosovo do not apply these rules. According to the findings of statistical analysis conducted on the sample of 101 civil law cases in only 4 of them the court ruled on the request for exemption from court fees.[82]

[75] Although the basic property resolution mechanism is free of charge a number of types of these cases fall within the jurisdiction of regular courts. Furthermore, as it will be shown later, neither this basic mechanism is truly free of charge.

[76] The same principle is implicitly contained in article 29.2 of the IDP Guiding Principles according to which competent authorities have the duty to assist returned and/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.

[77] Article 468 para. 1 of Law No. 03/L-006 on Contested Procedure.

[78] Article 469 of Law No. 03/L-006 on Contested Procedure.

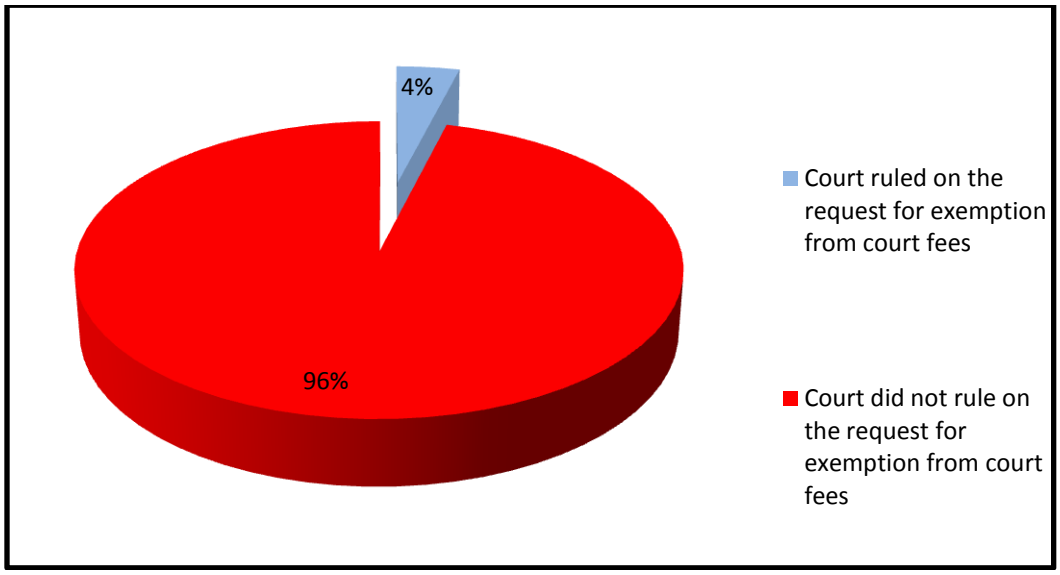
[79] The eligibility requirements for the exemption from court fees are further set in the Administrative Instruction No. 2008/02 on Unification of Court Fees of November 2008, issued by the Kosovo Judicial Council. This bylaw repeats the general principle that an exemption from court fees can be granted to "a person who is in a poor economic situation, […] if the payment of the fee directly affects his existence, respectively existence of his family members or other persons who depend on him" (Section 7.1), and than goes on to determine which category of persons would be automatically considered to fall in this category.

[80] Article 468 para. 5 of Law No. 03/L-006 on Contested Procedure.

[81] Article 6 of Law No. 03/L-19 on Courts.

[82] Since the civil proceedings in Kosovo are characterized by significant procrastination given the excessive backlog of old cases faced by the courts, the study analysed only those cases where the court undertook at least one legal action.

Graph 2.1.a: Percentage of cases where courts ruled on the requests for exemption from court fees[83]



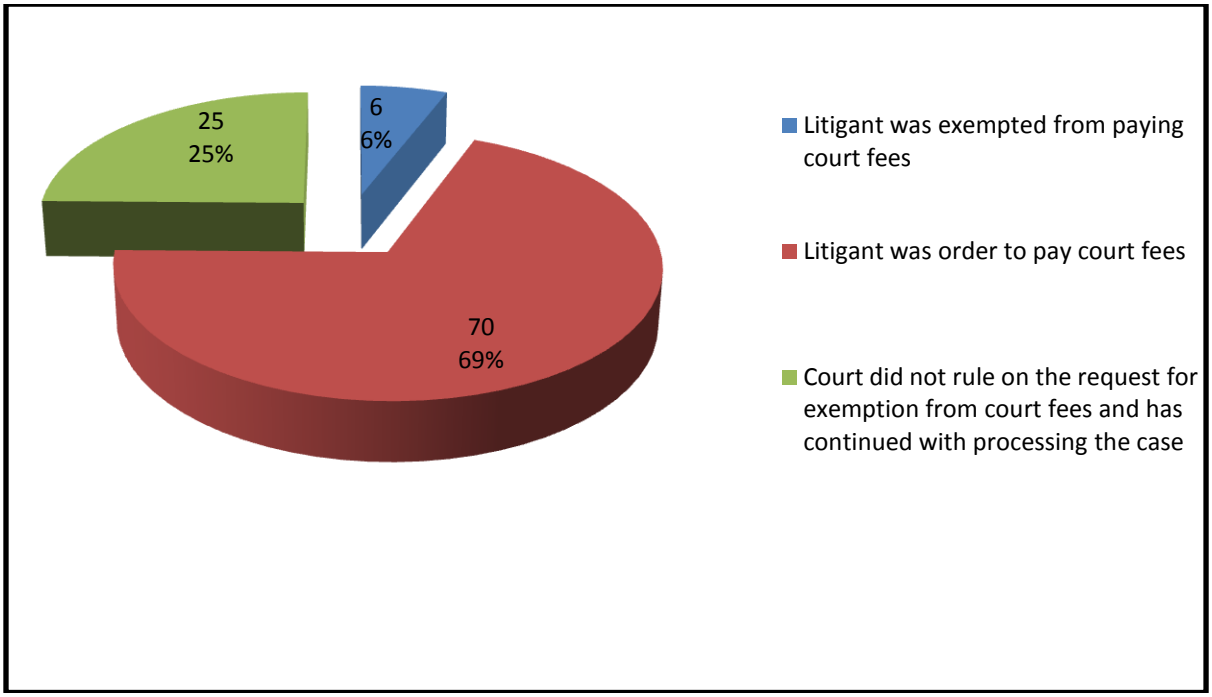
According to the same analysis, three out of four decisions on the request for exemption from court fees rendered before the main trial were brought by a mixed panel in which an international judge was sitting.

Furthermore, in very few cases a fee waiver was granted. According to the available statistics, IDPs belong to the category of persons who are particularly deprived, marginalized or excluded from mainstream society both in economic and in social terms.[84] In the majority of the analysed cases their claims are an indication of heavy financial losses they suffered because of the conflict. Yet, in only 6 of the 101 analysed cases, where a request for exemption was submitted together with a conflict-related property claim, the court exempted the IDP from paying the fees.

[83] For the explanation of the methodology, related tables and additional graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

[84] See: Commissioner for Refugees of the Republic of Serbia, UNHCR, Joint IDP Profiling Service, *Assessment of the Needs of Internally Displaced Persons in the Republic of Serbia (February 2011)* http://www.kirs.gov.rs//docs/Assessment_of_the_Needs_of_IDPs_in_Serbia.pdf (last accessed on 10 August 2011).

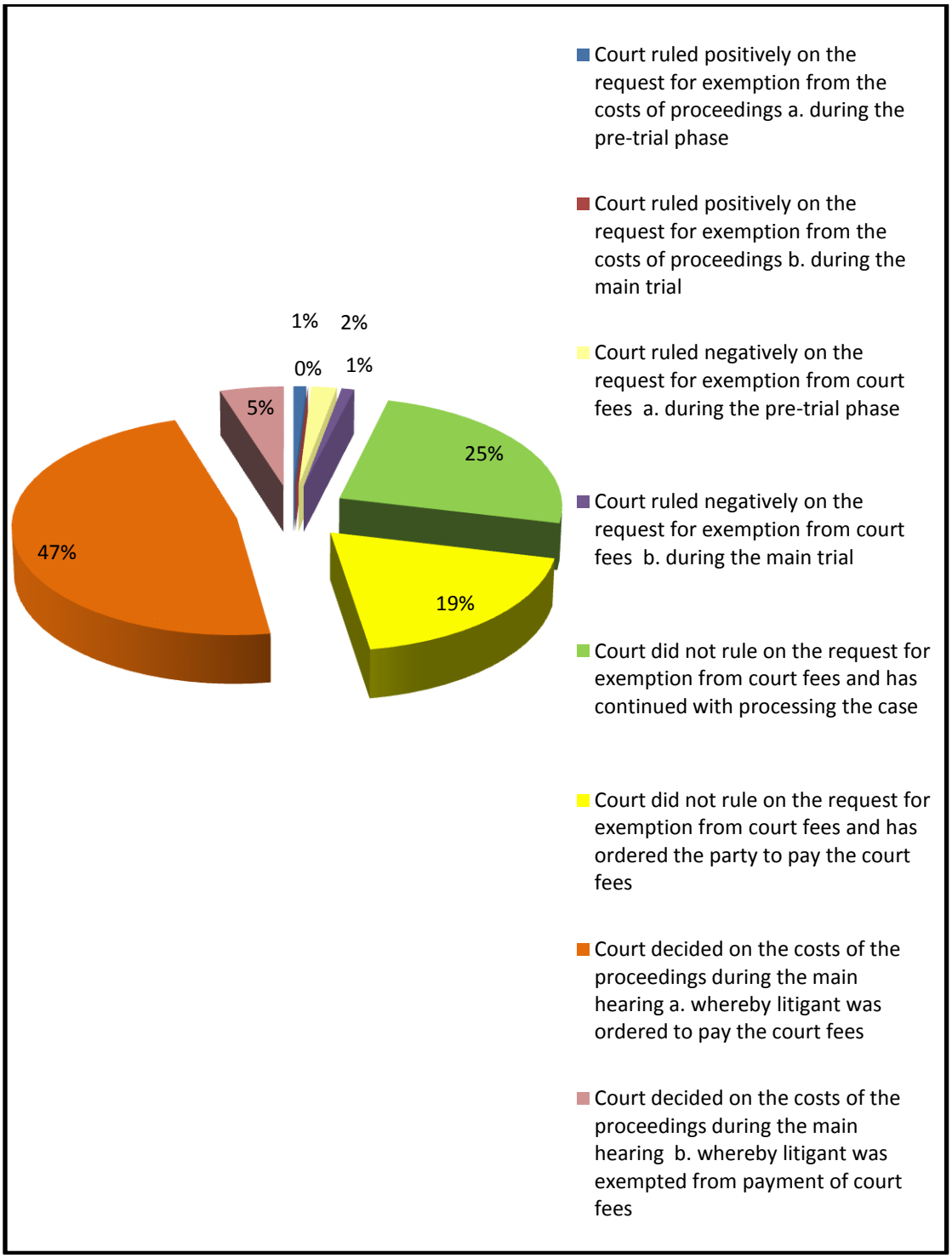
Graph 2.2.a: The courts' responses to the request for exemption from court fees[85]



What actually happens with the claims where a request for exemption from court fees was submitted together with the initial act is illustrated in the following graph.

[85] For the explanation of the methodology, additional tables and related graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

Graph 2.4.a: The timing of the courts' responses to the request for exemption from court fees[86]



[86] For the explanation of the methodology, related tables and additional graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

As shown, in the greatest number of cases, the courts ruled on the issue of costs of the proceedings at the main hearing and asked the litigant to pay the court fees. In other cases the court did not decide about the request but has continued to process the case. Furthermore, according to the observations of the Legal Aid Project Team, it is more and more an established practice in Kosovo that the court clerks refuse to register a claim, appeal or any other relevant submission before receiving evidence that court fee was paid is presented. This appears to be contrary to the domestic law and the international standards. The right of access to court cannot be realized if financial burdens in the form of court fees are placed on the person who seeks redress for the violation of his or her rights even before the tribunal has considered his or her application for exemption from court fees.

Where the court has not ruled at all on the request for exemption this creates a significant level of legal uncertainty for the claimant and could eventually lead to a situation in which the IDP claimant could be asked to cover all the litigation costs at the end of the proceedings. In the other two above-described situations, the right of access to court is absolutely barred to those who have no financial means to cover the litigation costs.

The practice of the courts whereby in 94 per cent of cases, as shown in the Graph 2.1.a, they did not decide at all on the request for exemption is *prima facie* unlawful. Such practice can also be an indication that the law itself does not provide enough clear rules or that the law is indirectly discriminating against certain group(s) of population.

In fact, detailed eligibility requirements for the exemption from court fees are set in the Administrative Instruction No. 2008/02 on Unification of Court Fees, issued by the Kosovo Judicial Council.[87] Careful analysis of this bylaw shows that IDPs have no, or have a very small chance, to qualify for the exemption from court fees, as the bylaw does not recognise the specific needs of this segment of the population.

As it ensues from the provisions of the Administrative Instruction No. 2008/02, exempted from paying court fees will be a person who fulfils one of the two alternatively set requirements: a) that he or she is *a beneficiary of social welfare assistance* provided by the Ministry of Labour and Social Welfare, or b) that he or she is *a recipient of a free legal aid* provided under the legal aid scheme established in Kosovo.

An analysis of the provisions regulating eligibility for the social benefits and free legal aid reveals that there are several obstacles to an IDP becoming a beneficiary of these services. Firstly, the answer to the question who can be considered to have a "habitual residence in Kosovo", which is according to the provisions of the Law No. 2003/15 on the Social Assistance Scheme *sine qua non* requirement for receiving the given benefits, has become complicated

[87] Administrative Instruction No. 2008/02 on Unification of Court Fees of November 2008.

since the enactment of the new laws based on the so-called "Ahtisaari plan"[88]. Although UNMIK Regulation No. 2000/13 on the Central Civil Registry establishes an assumption that IDPs have a "habitual residence in Kosovo"[89] and hence could theoretically be eligible to receive social benefits and/or free legal aid, after the enactment of the Law on Citizenship of Kosovo in 2008, this has become questionable. Hence, it is uncertain whether the institutions in Kosovo, when interpreting the given laws, would hold an opinion that IDPs are fulfilling this formal prerequisite and hence are eligible for the social assistance.

Even more importantly, most of the IDPs do not satisfy the financial eligibility criteria for social assistance since most of them own reckonable assets i.e. objects such as real estate, agricultural land, etc. the value of which usually exceeds the limits established by the relevant legal acts.[90] The legislator did not take into account the fact that IDPs usually retain only the title over the given property without the actual possession, due to it being illegally occupied, destroyed or inaccessible because of the hostile security situation.[91]

This reasoning can be illustrated by the compensation claims lodged by IDPs for the damages or destruction of their pre-conflict immovable and movable property. The court fees for this type of claims are, according to the relevant bylaw, calculated at a certain percentage of the value of the claim in question. Since most of these claims are aimed at the compensation of damages caused by the total destruction of property owned by IDPs, the court fees in these cases reach their maximum amount as prescribed by the bylaw. This eventually leads to the scenario where IDP claimants are asked to pay a very significant amount just to lodge a claim that arises from the total destruction of their property. At the same time, since they are de jure owners of the parcels of land on which their pre-conflict house was built this prevents them from being eligible for any social benefits in Kosovo.

Further illustration of this restriction can be found in the situation where an IDP whose property is occupied by a third person seeks the protection of his or her property rights before the court. Given the fact that property registry does not contain information that the property has been illegally occupied, the IDP would be ineligible for social assistance benefits because he or she formally possesses a property of significant value although it cannot use it for the very reason for which he or she would seek protection before the court.

In both situations the IDP claimants cannot satisfy at least one of the two main eligibility criteria for being exempted from paying the court fees. There are strong grounds to believe that the imposition of court fees on IDPs claiming repossession of property constitutes a disproportionate restriction on their right of access to court both according to the domestic and

[88] Letter dated 26 March 2007 from the Secretary-General addressed to the President of the Security Council (S/2007/168).
[89] See in particular Article 28 of the Law Nr. 03/L-034 on "Citizenship of Kosovo" of 20 February 2008.
[90] Section 5 of the Law No. 2003/15 on the Social Assistance Scheme in Kosovo of 11 July 2003.
[91] When it comes to the provisions on free legal aid, various problems affect the effective functioning of the given legal aid scheme and significantly decreased chances of IDPs to become its beneficiaries. See more in the Section 6.1 of the Report, pp. 30 – 33.

international standards. Furthermore, the eligibility requirements apply in equal manner to those who are displaced and those who are not and hence lead to indirect discrimination of IDPs on the ground of their status. Here, an apparently neutral set of criteria in a disproportional way negatively affects the displaced population as they seek to protect their property rights lost during the conflict and/or displacement. These facially neutral criteria do not seem to be neither appropriate nor necessary for the achievement of the aim for which they were set.

The effective protection of right to fair trial and the requirement of the equal protection by law requires that claims lodged by IDPs for the restitution of property should be exempted from the application of the general rule on court fees and that the relevant laws regulating the exemption from court fees should therefore take into account the particularities of the status of IDPs.

Recommendations:[92]

Given the significance of the right to fair trial and the right not to be discriminated against, the present situation urgently calls for the amendment of the relevant legal acts:

1. Article 450 of Law on Contested Procedure should be amended to emphasize that a claim or other submission shall be registered by the competent court, even if the claimant or petitioner did not submit proof that court fees or other litigations costs were paid, if such a claim or petition is accompanied by an application for exemption from the costs of the proceedings.

2. Article 468 para. 5 of Law on Contested Procedure should be amended in order to make sure that the party who has submitted the request for the exemption from court fees receives the decision of the court within the time limit set by the law.

> "The court shall render a ruling on exemption within 7 (seven) days of the filing of the request. [If the court does not issue a decision within the given period of time it shall be presumed that the court has ruled positively on the request for exemption from court fees].

3. In order to ensure that the courts give adequate considerations to the request for exemption from court fees, a new paragraph should be added in Article 468. Accordingly, the new paragraph should read as follows:

> "[468.6 Any decision rejecting such a request should provide compelling

[92] The given recommendation is just a part of the theoretical considerations of the way in which the legal requirements foreseen by Article 6 of the ECHR for fair representation could be met. In no way should it be taken to imply any recognition of the legitimacy of legislation adopted after the UDI (see footnote 21). It is believed that the resolution of this issue shall be endorsed through a mutually agreed settlement between the authorities in Kosovo and the authorities of the Republic of Serbia.

reasons.]"

4. An IDP claimant should be automatically exempted from the obligation to pay the costs of the proceedings if the proceedings arise in relation to property rights affected by the conflict or displacement and if she or he can present a valid proof of his or her status. Hence, Article 7.2. of the Administrative Instruction No. 2008/02 on Unification of Court Fees**,** should be amended to read as follows:

> "Unless evidence is presented to the contrary, the judge assigned to the case shall presume that a person cannot afford to pay a fee as described in Section 7.1 if:
>
> […]
>
> [c. The person can provide evidence that he or she has a status of a displaced person and that the claimed violation of the property right is consequence of conflict and/or displacement.]"[93]

6. Legal Representation of IDPs before the Courts in Kosovo

The ultimate aim of any judicial proceedings is to arrive at a decision on the merits of the parties' claims. However, the possibility of achieving this objective while respecting the legitimate rights and interests of the parties depends on the fulfilment of series of procedural guarantees protected under the right to fair trial.

The right to be assisted by adequate counsel is among these important procedural guarantees. A party to civil proceedings shall have the right to an effective legal representation and right to choose his or her own legal representative at all stages of the proceedings.[94] This right enables a party to the proceedings to present his or her case properly and satisfactorily and as such is an important aspect of access to justice considerations.

The right to have a legal representative becomes even more important in the post-conflict environments such as Kosovo, where physical accessibility of the court becomes a problem for the claimants whose residence is, for the matter of being displaced, far from the seats of the regular courts.

[93] Of course, this would not exempt the given category absolutely since the court can always invoke the provisions contained in Article 469 para. 3 of Law on Contested Procedure which says that in case of a doubt the court may *ex officio* gather information and data concerning the party that has requested the exemption.

[94] Principle 4 of the Recommendation No. R (81) 7 adopted by the Committee of Ministers of the Council of Europe on 14 May 1981 at its 68th Session and Explanatory Memorandum; Principle III (c) of the Recommendation No R (93) 1 of the Committee of Ministers on effective access to the law and to justice for the very poor adopted by the Committee of Ministers on 8 January 1993 at the 484th meeting of the Ministers' Deputies.

In the UNMIK Report submitted in 2005 to the Council of Europe, the question of legal representation was given significant prominence in the context of access to justice for the minority communities, including IDPs:

> "Access to justice is seriously compromised by a lack of legal representation that places minority groups at a serious disadvantage, discouraging their participation and undermining their faith in the justice system. There are three main causes of the problem: 1) most members of minority groups are indigent and cannot afford legal representation, 2) there are insufficient skilled professionals in non-majority communities, and 3) many lawyers are reluctant to represent minority claimants. The legal aid that is available to non-majority community members is limited and there is no source of legal aid for IDPs, who form the largest single minority group. Legal and conventional rights to effective representation, essential to attaining equality under the law, are not being met under the present system." [95]

Almost seven years have passed since the given situation was reported by UNMIK and some of the factors contributing to the lack of legal representation of non-majority communities have been removed. Today, there is decent number of lawyers coming from the minority communities and it can be said that the reluctance of the local lawyers to present minority claimants has decreased to a significant extent.

However, the two principal obstacles to the adequate legal representation of IDP claimants before the courts in Kosovo – their low socio-economic status and their remoteness from the sits of courts and local legal offices – have not changed. These obstacles were then coupled with new impediments arising in relation to certain developments linked to the status of Kosovo as described in the following sections.

6.1. Legal Representation and Access to Legal Aid

The right to participate in civil proceedings through a chosen representative is clearly established in the applicable laws in Kosovo.[96] The presence of legal representative is not mandatory in any type of case and at any stage of civil proceedings. A litigant may conduct the case in person or through an authorized representative.[97]

Yet, for internally displaced persons, whether or not to have a legal representative is not a matter of choice. There are no postal services connecting places in Kosovo and in Serbia proper

[95] UNMIK, *Report submitted by the United Nations Interim Administration Mission in Kosovo (UNMIK) pursuant to Article 2 .2 of the Agreement between UNMIK and the Council of Europe related to the Framework Convention for the Protection of National Minorities*, ACFC (2005) 003, Strasbourg, 2 June 2005, p. 48.
[96] Law No 03/L-006 on Contested Procedure. According to Article 74.1 of this law, a litigant may conduct the case in person or through an authorized representative.
[97] Article 74.1 of the Law No 03/L-006 on Contested Procedure.

as a consequence of which it is impossible for those who are displaced in Serbia proper to participate in the judicial proceedings before the courts in Kosovo (and vice versa).

This is the reason often cited by the Kosovo courts when deciding to stay the proceedings in the cases in which one of the parties is an IDP who has no appointed legal representative.[98] In another equally frequent scenario occurring in proceedings where an IDP is claimant or respondent, the decisions, orders and instructions issued by the court are being placed at the court's announcement board.[99] This situation is even more unfortunate for the IDP claimant/respondent as it almost certainly leads to loss of rights in the civil proceedings.[100]

This is possibly the reason why the new Law on Special Chamber of Supreme Court of Kosovo on PAK Related Matters establishes a requirement that a claimant, respondent or any other person seeking to participate as a party in the proceedings before the SCSC, shall provide in its claim or written response the name and address of a person in Kosovo "who is to serve as his/her authorized agent for the purposes of service of [documents]". Only if the "claimant is a natural person resident in Kosovo, he/she may serve as his/her own agent".[101]

This practically means that, due to the unavailability of postal services between Kosovo and Serbia proper, the participation of IDPs in the judicial proceedings without an authorized representative is either not possible (as is the case with the proceedings before the SCSC) or can be detrimental for his/her rights and interests.[102]

Typically, IDPs also face financial constraints for participating in civil proceedings due to their generally bad economic situation caused by the conflict and displacement related impoverishment. In their case, the right to counsel in *forma pauperis* is often a virtual precondition for participation in judicial proceedings.

In order to tackle the problem of access to court for the vulnerable segments of the Kosovo population, already in 2006 a legal aid system was established.[103] However, due to a number of

[98] Judges here invoke Article 278 .1 b of the Law No 03/L-006 on Contested Procedure.

[99] By applying Article 116.5 of the Law No 03/L-006 on Contested Procedure. The delivery conducted in this way is assumed to be effected after seven days period expires (Article 116.6).

[100] From the common sense perspective, in this context the announcements made at the court's announcement board do not have a prospect of success. Notwithstanding the expectation that a reasonable person would take care of her/his own affairs, it cannot be reasonably expected that the absent party who was forcibly displaced would be able to carefully and regularly follow the court's board notices. See: *De Geouffre de la Pradelle v. France*, para. 33. This is even less reasonable to expect when the IDP does not even know that he/she is the respondent in the proceedings.

[101] See Article 17 of the Annex of the Law No. 04/L-033 on Special Chamber of Supreme Court on Property Agency of Kosovo Related Matters, as different from Section 7 of the old UNMIK Regulation on SCSC.

[102] The Legal Aid Project has overcome this barrier in providing legal representation to IDPs before the courts in Kosovo by establishing a regional office in Gračanica/Graçanicë, which practically serves as an intermediary between the courts in Kosovo and the Legal Aid Project Lawyers who are the legal representatives of IDPs. All the correspondence sent by the courts in Kosovo are first received at the address of the Office in *Gračanica*/*Graçanicë* and than further transmitted by the Project vehicles to the Legal Aid Project offices situated in the Serbia proper.

[103] The basis of this system was set in UNMIK promulgated the Regulatory Framework of the Judiciary System in

constraints the created legal aid system has not managed to meet the needs presented by the unique environment in Kosovo. Due to its meager budget the legal aid system could not respond to the actual needs of the generally impoverished Kosovo population: it is estimated that about 74 per cent of the resident population of Kosovo qualifies for the legal aid services as per criteria for financial eligibility set in the law.[104] Furthermore, neither the Law on Free Legal Aid[105] nor the existing institutional arrangements pay any considerations to the special needs of IDPs. The reach of the legal aid offices is confined to the boundaries of Kosovo and there is no possibility to access the legal aid scheme from the Serbia proper. Furthermore, it is not clear whether IDPs can fulfill the residential requirements prescribed by law, neither whether they could meet the financial eligibility criteria with the documents issued by the institutions situated in Serbia.

Their right of access to free legal aid is also uncertain because of the requirement of probability of succeeding in the claim.[106] This last requirement whereby the administrative authority responsible for providing legal aid has a discretionary power to decide whether the presented case merits the provision of counsel free of charge can be particularly problematic in the typical post-conflict property related cases such as the compensation claims for the property destroyed or damaged during the conflict.

As seen from the practice of the local courts, in those cases the legal standing of a claim is often confused with the issue of who shall be responsible for property restitution and who shall bear the costs of it.[107] However, the right to a remedy for human rights violations is among the core rights guaranteed by the principal international human rights instruments[108] while the right of access to court and to it related right to have adequate legal representation are its natural preconditions. As elaborated in the UN Basic Principles on the Right to a Remedy for Victims of Gross Violations,[109] those who claim to be victims of a human rights or humanitarian law violation shall be provided "with equal and effective access to justice […] irrespective of who may ultimately be the bearer of responsibility for the violation".[110]

2006, determining the principles for the development and promotion of the judiciary, and a legal aid system that foresees institutional mechanisms to ensure access to justice for all. Following that, the legal aid system was established by UNMIK Regulation No. 2006/36 on Legal Aid of 7 June 2006. Since the beginning of 2012 the rules on provision of legal aid are set in Law No. 04/L-017 on Free Legal Aid of 2 February 2012.

[104] According to the Director of the Legal Aid Commission (Interview held in March 2012; record of the interview on file with the Legal Aid Project). Although the legal aid system has recently undergone significant changes, as the new law on free legal aid was adopted, the financial eligibility criteria have remained the same.

[105] Law No. 04/L-017 on Free Legal Aid of 2 February 2012.

[106] Article 12(c) UNMIK Regulation on Free Legal Aid and 9.1.3. of the Law on Free Legal Aid.

[107] Those are mostly the cases where the damage committed cannot be attributed to identifiable natural person(s).

[108] The International Covenant on Civil and Political Rights (ICCPR) in its Article 2 asks state parties to ensure a right to an effective remedy to any person whose other rights or freedoms recognized in the Covenant are violated and to ensure "that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."

[109] UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

[110] See more on this in the Legal Aid Project Report, *Right to Restitution and Compensation of Property Damaged or*

Civil society organizations situated in Serbia proper and other bodies providing legal aid services financed through private funds have traditionally played an important role in overcoming the limitations of the publicly funded legal aid scheme vis-à-vis the needs of IDPs.[111] However, recent announcements made by the judicial institutions in Kosovo that in the future only those who are registered in the Kosovo Chamber of Advocates will be able to undertake legal representation of the parties in the civil proceedings[112], could eliminate this last possibility of IDPs to have their interests adequately represented before the local courts. The problem with the announced legislative changes with regards the legal representation of IDPs lays again in the fact that they do not take into account the specific position of the Kosovo population displaced in Serbia proper nor how numerous are their conflict-related claims.

The right to free legal assistance to those without sufficient financial means, when such assistance is necessary to ensure effective access to justice, is guaranteed by the 2008 Constitution of Kosovo and other relevant domestic laws in accordance with the international standards. However, as the European Court has ruled on many occasions, the rights protected by the ECHR shall not be theoretical or illusory but interpreted and applied so that they are practical and effective. Without a functional postal services and legal aid system that can reach those who were displaced by the conflict, the right to have legal representation before the courts and the very right of access to court become illusory. As the European Court held in *Artico v. Italy*, if the failure to provide legal aid is manifest or sufficiently brought to their attention, it is the responsibility of the public authorities to ensure that their legal aid system functions.[113]

6.2. Certification of powers of attorney

Since 2010 many courts in Kosovo[114] have been refusing to accept powers of attorney issued in Serbia proper i.e. they have been limiting the possibility of a party displaced in Serbia proper to have a legal representative in civil proceedings only to those cases in which the legal representative was appointed verbally in the course of the proceedings.

Destroyed During Displacement under International Human Rights Law and International Humanitarian Law, January 2012, available at: http://www.pravnapomoc.org/web/2nd_Human_Rights_Report_Final.pdf.

[111] Today, several NGOs are active in providing legal aid services to vulnerable segments of IDP population, among them the Legal Aid Project.

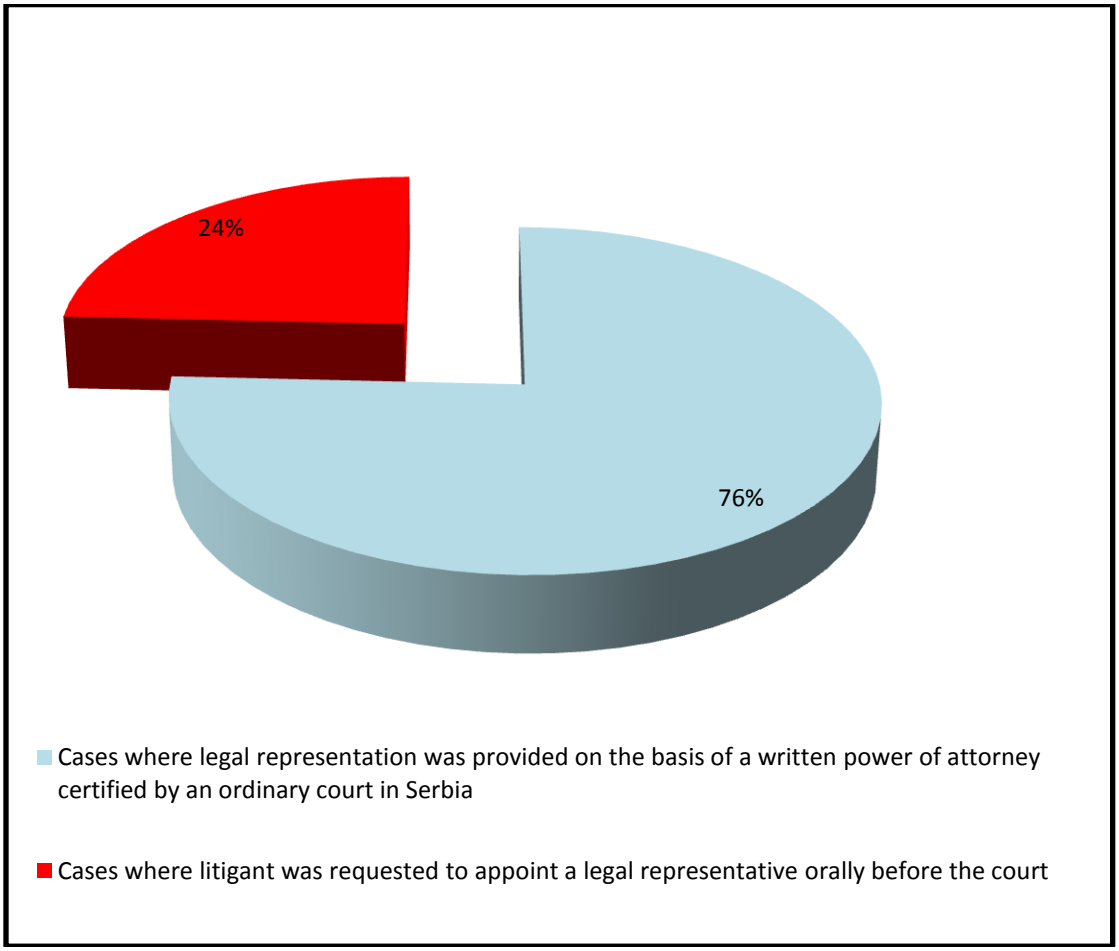
[112] Interview with the Director of the Kosovo Ministry of Justice Department for Legal Affairs held in Pristina in February 2012 (record on file with the Legal Aid Project).

[113] Application no. 6694/74) Judgment of 13 May 1980. Compare with the judgment in *Kamasinski v. Austria (*Application no. 9783/82, Judgment of 19 December 1989), which expressly recognises that the public authorities cannot be held responsible for every shortcoming of a legal aid lawyer.

[114] This information is based on the first-hand experience of the Project's lawyers representing the IDP clients before the municipal and district courts in Kosovo. Another problem with the legal representation of IDPs by the local lawyers is the fact that IDPs could not be able to exercise any significant level of control over the provided representation nor could have an easily recourse to courts to make sure that their rights and interests are adequately represented.

According to the analysis conducted on the sample of 33 civil law cases where in-court representation is being provided through the Legal Aid Project, in 8 cases the courts requested the IDP claimant to appoint a legal representative orally before the court although the claimant had already submitted to the court power of attorney certified by an ordinary court in Serbia proper.[115]

Graph 3.a: Legal representation before the courts in Kosovo with regards the form in which the power of attorney was provided[116]

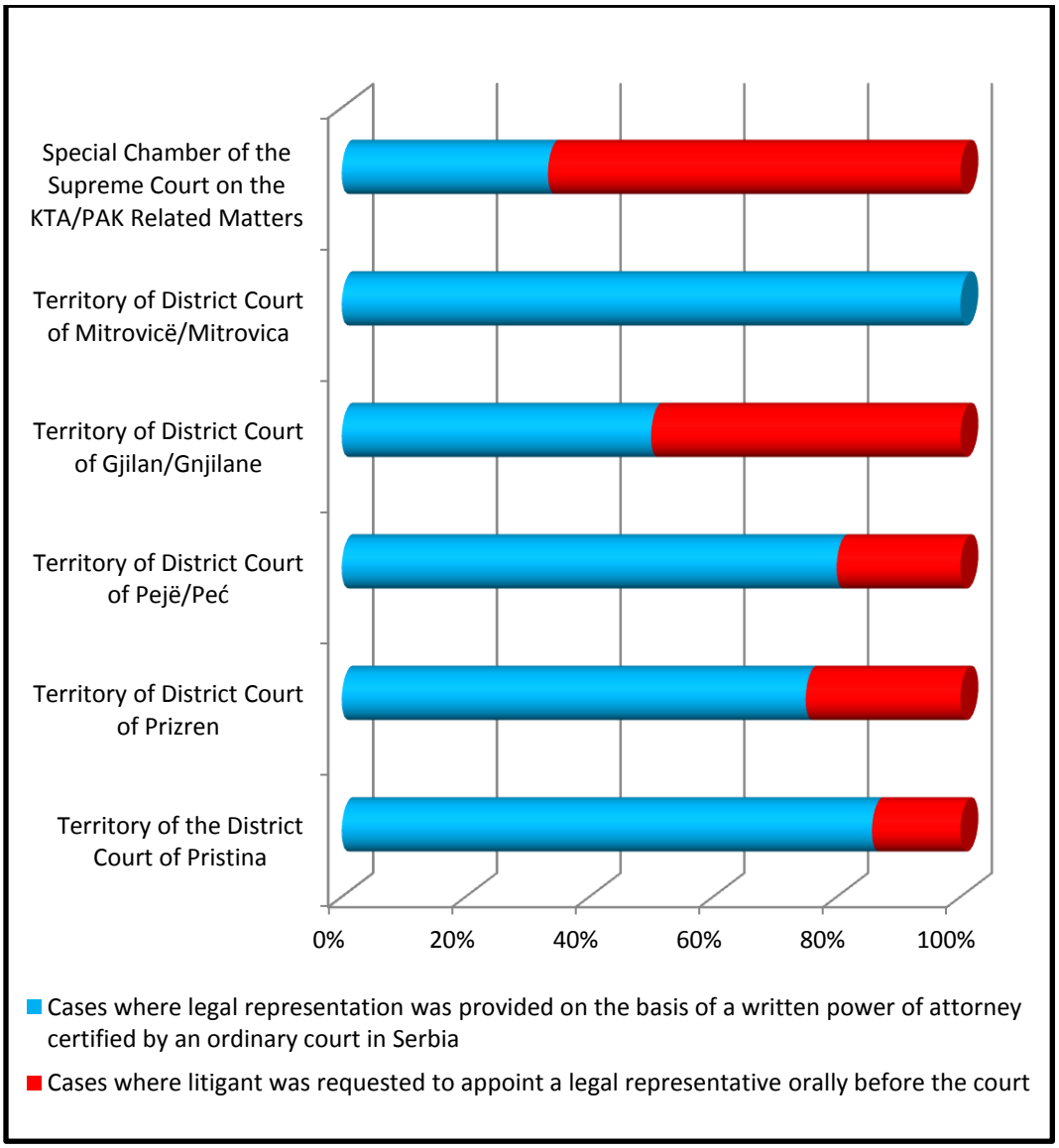


As shown in the following graph this is particularly the case with the courts located on the territory of the District Court of Pejë/Peć.

[115] As different from municipal and district courts situated within Serbia proper that were dislocated from Kosovo after the 1999 conflict, which according to the law applicable in Serbia still have jurisdiction over legal matters related to Kosovo.

[116] For the explanation of the methodology, related tables and additional graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

Graph 3.b: Legal representation before the courts in Kosovo with regards the form in which the power of attorney was provided according to the territorial allocation of courts[117]



It is not clear whether this is a response of the local courts to the status-related developments or consequence of the halted communication between the authorities in Serbia proper and in Kosovo. Namely, since 2009 when the Ministry of Justice in Kosovo took over from UNMIK the responsibilities in the sphere of international legal cooperation[118], the legal cooperation between the Ministry of Justice in Kosovo and the Ministry of Justice of Serbia, including the process of verifying powers of attorney certified by the courts located in Serbia proper, is

[117] For the explanation of the methodology, related tables and additional graphs go to the full text of the Statistical Analysis at http://www.pravnapomoc.org/web/Statistical_Analysis.pdf

[118] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/5, 5 January 2010, p. 6, para. 27.

completely halted.[119] According to the UNMIK report dated October 2011, the Ministry in Kosovo does not process any documents from the Serbian Ministry although received through UNMIK and the Serbian Ministry does not process any documents received directly from the Kosovo Ministry.[120] The same report also states that on 12 August 2011 EULEX and the Ministry of Justice in Kosovo have signed a technical arrangement about the mutual legal assistance under which "EULEX assumes the responsibility currently borne by UNMIK to facilitate the transmission of requests for mutual legal assistance between non-recognizing States and the Kosovo Ministry of Justice". It is also said that agreement between EULEX and the Ministry of Justice in Kosovo can become effective only after the conclusion of ad hoc agreements between EULEX and non-recognizing States.[121]

Some of the judges interviewed by the Legal Aid Project Team, including one president of the municipal court, have stated that this new practice was a consequence of an administrative instruction issued by the Kosovo Judicial Council whereas the local courts were instructed not to accept powers of attorney verified in Serbia proper. Others denied the existence of such a document.[122] After an extensive inquiry, the Legal Aid Project Team found no indication that the administrative instruction of this kind was ever issued by the Kosovo Judicial Council.[123]

The domestic law regulating the question of form in which the authorization shall be granted prescribes that the authorized representative may be appointed either in writing or verbally to be recorded in the court minutes.[124] The authorization for legal representation issued in the written form produces effects equal to the verbal authorization given by the party before the court and recorded in court minutes.[125] This rule provides for equality between (potential)

[119] European Commission, *Kosovo 2010 Progress Report*, {COM(2010)660, Brussels, 9 November 2010, p. 11.

[120] Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo to the UN Security Council, 31 October 2011, S/2011/675, para. 26.

[121] In: Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, S/2010/5, 5 January 2010, p. 6, para. 27. In fact, the intermediary role of EULEX in this matter has also been confirmed by international officials operating in the region.

[122] Minutes of the interviews are on record with the Legal Aid Project.

[123] The KJC itself has never answered on the official inquiry the Legal Aid Project has made on this through a letter sent in January 2012. However, during the subsequently held interviews, several high officials of the KJC stated that they had no knowledge of such an instruction being ever issued (minutes of the interviews are on record with the Legal Aid Project).

[124] Article 92 of the Law No 03/L-006 on Contested Procedure.

[125] The law also provides guarantees against unauthorised representation of the parties. If so requested by the court, the legal representative shall be able to prove at any point of proceedings that he or she possess proper authorization to act on behalf of the party or, if undertaking of certain procedural actions requires special authorization, that he or she possesses such an authorization (Article 77.2). Moreover, "during the entire course of the proceedings the court shall have a duty to check whether the person appearing as a representative possesses an authorization for representation" (Article 93.4). The law in question also stipulates that if the court determines that the person who acts as a legal representative of a party to the proceedings is not so authorized by a party, it shall annul the procedural actions undertaken by that person, unless those actions were consented to by the party afterwards (Article 93.4). Lack of proper authorization to act on behalf of a party to the proceedings constitutes substantial violation of the rules on contested procedure and as such can serve as a ground for challenging a court decision through the appellate procedure (Article 182) or by filling a request for reopening of the proceedings (Article 232).

parties in the proceedings who are capable to appear before the court in person and those who cannot do so due to their specific personal circumstances. This proves to be particularly important in the post-conflict Kosovo.

In the context of the volatile security situation, and in that sense particular vulnerability of the members of minority communities,[126] the determination of personal circumstances that could justifiably prevent a person from appearing before the court in person should still include security considerations.[127] Due to the fears for personal security, for many IDPs initiation or participation in civil proceedings in certain areas of Kosovo is only possible through a legal representative. Moreover, among around 200 000 of those who are displaced in Serbia proper, many are unable to travel to Kosovo because of their old age, illness or physical impairment. For this particular segment of displaced population, even without taking into account the security considerations, it is impossible to initiate or participate in civil proceedings in Kosovo in a manner other than by authorizing a legal representative in Serbia proper.

Therefore there are good reasons to conclude that the practice of certain courts in Kosovo not to allow legal representation on the basis of the power of attorney certified before the ordinary Serbian courts restricts the right of access to court for IDPs. The right of access to court constitutes a basic element of the right to a fair trial as embodied in Article 6 of the ECHR, which is directly applicable in Kosovo.[128] The enjoyment of this right may be subject to certain limitations but they must be based in law and pursue a legitimate aim. Moreover, there must be a reasonable relationship between the aim to be achieved and the means used to achieve that aim.

In the light of the significant number of cases of illegal property transactions that occurred in the past to the detriment of displaced Kosovo Serbs, where forged powers of attorney were used to create the appearance of authorized representation, the attempt of the Kosovo authorities to verify the validity of the powers of attorney can be considered as a legitimate aim. Yet, the means chosen by the Kosovo authorities to achieve this objective are not based in the law and do not seem to be necessary and proportional to the aim pursued.

Namely, the method chosen by the courts in Kosovo to ensure validity of the powers of attorney granted by the displaced persons appears to be arbitrary since it contradicts the provisions regulating this subject matter. Moreover, even if one would consider it to be

[126] This observation embraces as well the situation of majority community in minority position.

[127] As observed in a research on freedom of movement in Kosovo supported by UNDP, "since 1999, threats to freedom of movement for communities have always arisen along with escalating tensions in the political arena, which have principally to do with contested structures of government over the Kosovo territory.". Despite the fact that the number of serious security incidents has significantly decreased since 1999, the still unresolved issue of the Kosovo status and the history of freedom of movement in the post-war period renders the feeling of fears and insecurity widely expressed by Kosovo Serbs and other communities displaced in Serbia proper justified. See: Anna di Lellio, *Freedom of Movement Report*, UNDP, 2009, pp. 13 and 17. See also: OSCE Mission in Kosovo, *Kosovo Communities Profile*, 2010, pp. 8, 16; OSCE Mission in Kosovo, *Communities Rights Assessment Report*, December 2010, pp. 18-20.

[128] By virtue of Article 22 of the Constitution of Kosovo.

necessary given the risk of illegal property transactions and the lack of cooperation in legal matters between the institutions in Kosovo and in the Serbia proper, there is still a problem of the proportionality of these restrictions. Firstly, they go beyond what is necessary to achieve the aim pursued since they are applied by the courts to all cases where IDPs are in need of legal representation and not only to the proceedings for the certification of property transactions where the forging of powers of attorney usually occurred,[129] Secondly, the given measure places on a party to the proceedings a burden which is disproportionate to the aim sought and in some instances it can even completely restrict the right of access to court for certain segments of IDP population (as described above).

Last but not the least, given that those who can give authorization for legal representation only in written form signed and/or certified in the Serbia proper are almost exclusively belonging to IDPs and the minority communities, this measure of the Kosovo authorities leads to indirect discrimination in access to court on the ground of status and ethnic origin.

Recommendations:

1. Kosovo Judicial Council shall clarify the matter of non-recognition of the powers of attorney certified before the regular Serbian courts. It shall also ensure that the courts pay due respect to the legal provisions containing the rule that a written power of attorney shall produce the same effects as the verbal authorization recorded in court minutes.

2. The authorities in Serbia proper and in Kosovo should consider including into their respective negotiation platforms concrete and status-neutral modalities of mutual cooperation with regard to authorization[130] and legalization[131] of official certificates which are placed on documents signed by persons in their private capacity.

3. If such arrangement has not been already agreed, EULEX should consider facilitating legal cooperation between the authorities in Serbia proper and the authorities in Kosovo until they reach an agreement to that effect. Any temporary or permanently established mechanism for the authorization and legalization of official certificates which are placed on documents signed by persons in their private capacity should be devised to operate in accordance with the fair trial guarantee, in particular with its "reasonable time" requirement.

[129] See OSCE Mission in Kosovo, *Legal Representation in Civil Cases*, June 2007 and OSCE Mission in Kosovo, *Fraudulent Property Transactions in the Pejë/Peć Region*, 2009.
[130] Confirming that a signature, seal or stamp appearing on the document is genuine.
[131] Authenticating it for the purpose of making it acceptable to a local court or administrative body.

7. Conclusion

There is no sustainable peace without a justice system based on logics of consistency and fairness. Rebuilding it is a core peacebuilding activity. To win over the arbitrary logics of power, which reins in times of war, means to make sure that each and everyone has access to an impartial court of law.

The reestablishment of the justice system after a conflict demands more than adopting legal standards existing in developed democracies. Apart from overcoming the tangible and intangible barriers characterizing the post-conflict periods, such as lack of physical safety, lack of resources, lack of confidence in the fair application of the law, another important issue might be how to accommodate the specific needs of displaced population and, in general, of all those persons who were victims of the conflict.

For IDPs, as the case of Kosovo shows, the ordinary fair trial guarantees are often not enough to ensure their adequate access to court since those who are displaced might face a number of obstacles to even reach the court. The right of access to a court is a logical precondition of the right to fair trial. If the justice system did not recognize the specific obstacles faced by certain segment of the population, in Kosovo this being the needs of its displaced population, the right to fair trial and most of the substantive rights guaranteed by the domestic law, become an empty promise.

Moreover, the hindered access to a court for a segment of a population that can be identified by its particular status can indicate presence of discrimination. Where a rule or condition, which is applied equally to everyone, can be met by a considerably smaller proportion of people from a particular group and cannot be justified on other grounds there is indirect discrimination. In the case of IDPs from Kosovo, the instances of indirect discrimination are further compounded by the fact that IDPs can be also distinguished from the general population through their belonging to particular ethnic groups.

As shown above, IDPs from Kosovo face a number of barriers in approaching the local courts. Although some of the obstacles are affecting other segments of Kosovo inhabitants as well, majority of the obstacles identified throughout the report are the consequence of their specific status and/or ethnic belonging.

For various reasons the legislative and institution-building processes undertaken in Kosovo in the previous years did not recognize the specific needs of IDPs in relation to their access to justice or did not provide for an adequate institutional response. At the same time, the displaced are the group with the greatest number of property related claims lodged before the regular courts and quasi-judicial bodies.[132] Most of these claims are conflict related. The fact

[132] OSCE Mission in Kosovo, *Challenges in the Resolution of Conflict-Related Property Claims in Kosovo,* June 2011, p. 3.

that almost thirteen years after the end of the conflict the process of property restitution is not over signals that a more systemic approach to the issues affecting the access to justice of IDPs is necessary.

By indicating some of the barriers to the effective enjoyment of the equal protection by the law for the internally displaced persons the present report just scratches the surface of the problem. The complexity of the issues at stake shows that only a well-defined strategy with the involvement of all the relevant stakeholders could bring the necessary improvements.

General recommendations:

1. A firm agenda should be developed though an Action Plan on Access to Justice for Internally Displaced Persons to be adopted by the Kosovo Government. The Action Plan should contain the verifiable goals and clear time frames.

2. The implementation of the Action Plan should be conferred to an executive-level coordination body that would provide for the achievement of these goals in a systematic, comprehensive, and coordinated manner.[133]

[133] See also the 16-point agenda for access to justice developed by the UNDP Mission in Kosovo in: UNDP Mission in Kosovo, *Assessment Report on Access to Justice in Kosovo*, 2008, available at: http://www.kosovo.undp.org/repository/docs/Eng_UNDP_Access_to_Justicereport.pdf?phpMyAdmin=cjLbKgrbLNEWWbB34SogbjqR18d (last accessed on 1 June 2012)