COMMENTS on UNMIK's Protection of ICCPR-guaranteed Rights in Relation to Certain Aspects of Private Immovable Property Claims Resolution in Kosovo

Submitted by PRAXIS on 29 June 2006
to the United Nations Human Rights Committee

PRAXIS submits the present Comments for consideration by the UN Human Rights Committee (HRC) of the topical issues in the light of International Covenant on Civil and Political Rights (ICCPR), on occassion of HRC's review of the 2006 UNMIK Report on the human rights situation in Kosovo since 1999[1].

The situation vis-à-vis access to effective legal remedies and the fair trial guarantees in Kosovo has been perceived as highly critical. The complexity of the applicable law, ambiguities within available legal texts and the very divergent practice of application of the legal corpus have yielded a substantial legal uncertainty. Also, there is a chronic unavailability of timely and adequate translations of new regulations' texts into the Serbian language, despite the provisions of compulsory publishing of all UNMIK regulations into Albanian, English and Serbian. PRAXIS has in numerous occasions pointed out these problems and advocated for a more considerate approach in drafting and implementing the legislation.

The present report addresses key procedural issues related to private immovable property claims resolution *fora* in Kosovo. It offers an insight into the practical, legal and administrative procedural deficiencies concerning the mechanism for resolution of the residential property claims brought before the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC). PRAXIS is concerned about a number of flaws in the legal framework for the Kosovo Property Agency (KPA), as a newly-established HPD-subsuming/successor instance for immovable property, including agricultural and commercial property claims.[2] In the current critical situation, the arrangements established under HPD/HPCC and KPA add to what the former Ombudsperson for Kosovo, Mr. Marek Antoni Nowicki, has labelled as "legal chaos".

Notwithstanding the fact that ICCPR does not guarantee direct/explicit protection of property rights, PRAXIS is concerned that maintaining certain flaws and building further practice upon them can, under the present circumstances, may directly contravene principles enshrined in **articles: 2** (an effective remedy before a competent authority, non-discrimination), **7** (prohibition of inhuman treatment), **12** (choice of residence), **14** (fair trial by a competent, independent and impartial tribunal), **17** (non-interference with home) and **26** (non-discrimination) **of ICCPR**.

PRAXIS would like to thank HRC for the possibility to contribute to ICCPR implementation and rests available for any eventual request of clarification. PRAXIS also rests available to provide expert advice to the UNMIK and the Kosovo Provisional Institutions of Self Government (PISG) on the way to eliminate, through changes in the available legal procedures and practice, the noticed irregularities.

---

[1] UNMIK, "Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999", 07 February 2006 (hereinafter: UNMIK Report), CCPR/C/UNK/1 (13 March 2006).

[2] Even though aware of the fact that the regular judicial mechanism competent for a certain number of property-related types of cases has been deeply flawed (in the sense of, most notably, manifestly unreasonable length of procedures and lenient acceptance of non-credible/forged evidence), for the purpose of this thematic report, PRAXIS excludes focus on it.

PRAXIS

PRAXIS[3] is a national non-governmental organization established in 2004 as a continuation of the Norwegian Refugee Council's Civil Rights Project in Serbia (1997-2004) and dedicated to protection and promotion of human rights of refugees and internally displaced persons (IDPs). The mandate has been strongly supported by the Royal Norwegian Ministry of Foreign Affairs, United Nations High Commissioner for Refugees (UNHCR) and the European Union (EU) through the European Reconstruction Agency (EAR), as PRAXIS' main donors.

Striving to enable the displaced to reach durable solutions, including sustainable return to Kosovo, PRAXIS' staff has been providing legal protection through free legal assistance (including in-court representation), information and counselling in solving a number of conflict-related legal issues – protection of property rights being the most compelling one.

Along the path of performing the mandated activities, PRAXIS faces multiple systemic challenges. There have been severe difficulties in accessing needed documentation and services from Kosovo institutions and companies, and from dislocated administrative and judicial authorities in the Serbia proper, due to destroyed/missing archives, unreliable/false information and/or unequal practice pursued. Aside to the general problem of insensitivity of the authorities to the problems of the displaced, there has also been a serious lack of security guarantees for an effective in-court representation before the courts in Kosovo. However, despite past and current challenges, PRAXIS has ensured so far, by means of legal assistance, access to status and property rights for more than 22,000 of its clients. PRAXIS further maintains advocacy campaigns with the aim of improving realization of human rights of the mentioned disadvantaged groups.

Bearing in mind the legal complexity and substantial legal uncertainties in Kosovo, there is a strong need for further provision of free legal aid.

[3] *See* the enclosed information letter.

I Housing and Property Directorate and Housing and Property Claims Commission (HPD/HPCC) – Residential Property

1. HPD/HPCC Legal Framework

By virtue of UNMIK Regulation 1999/23[4], the Special Representative of the Secretary-General (SRSG) had established HPD/HPCC. On the grounds of the subsequent UNMIK Regulation 2000/60[5], HPD/HPCC gained exclusive jurisdiction for adjudication of **three types of non-commercial property claims**:

1. Claims by persons "whose property right was lost between 23 March 1989 and 24 March 1999 as a result of discrimination" (so called **A**-claims),

2. Claims by persons who entered into informal transactions based on the free will between 23 March 1989 and 24 March 1999 but which were unlawful under the existing law at the time (**B**-claims) and

3. Claims by persons who were involuntarily deprived of ownership, protected tenancy or possession of residential immovable property after 24 March 1999 as a result of the conflict (**C**-claims).

Out of the three categories, C-claims have been by far numerically prevalent (27.178 C-claims out of 29.155 total claims)[6] and submitted by IDPs.[7]

The rejection of any of the claims submitted under the Regulation, could have been reconsidered upon timely lodging of a Reconsideration request. Therefore, HPCC has had the exclusive possibility to address and remedy any unlawful/coerced deprivation of property rights that had occurred at the provided time periods.

The proper functioning of HPCC, which continues to work with the claims currently pending before it[8], has been of enormous importance for the protection of residential property rights in Kosovo, whose realization has been a direct determinant of enjoyment of a range of all other applicable human rights in Kosovo, including those under the domain of ICCPR.

---

[4] UNMIK REG/1999/23 on the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), promulgated on 15 November 1999.
[5] UNMIK REG/2000/60 on Residential Property Claims and the Rules of Procedure and Evidence of the Housing and Property Claims Commission, promulgated on 31 October 2000.
[6] HPD/HPCC official web-site – section of Statistics on Claimed Properties, available at: www.hpdkosovo.org/statistics_m.asp, retrieved on 18 May 2006.
[7] When discussing about "*legal framework for the protection of human and minority rights*", UNMIK notes that the "*C claims in particular were intended to remedy the interference in refugees' and IDPs' property rights by illegal occupancy*" and expressed belief that "*most category C claims are filed by IDPs*". UNMIK Official Report submitted on 02 June 2005 to the Advisory Committee on the Framework Convention for the Protection of National Minorities (FCNM), p. 24.
[8] *See supra* note 3. *See also* HPD/HPCC official web-site – section of Statistics on Claims Decided, available at: www.hpdkosovo.org/stat_cat.asp, retrieved on: 18 May 2006.

2. Situation in Practice – PRAXIS' Evidence

Presently, PRAXIS follows 110 cases of mainly Kosovo Serbs who had submitted **C-claims** to HPD/HPCC and received negative decisions (all during the year 2005), despite having submitted sufficient evidence for resolving the claim in their favour. In all these cases, PRAXIS drafted **reconsideration requests** which have still been pending before HPCC.

PRAXIS believes there have been two crucial problems concerning the HPCC adjudication:

- Notwithstanding the legal obligation to "*deliver copies of the reply to Claim to the other parties*"[9], HPD/HPCC has **not delivered to the C-claimants the respondent's response** or the submitted supporting evidence.

- The negative primary HPD/HPCC **decisions are patterned and insufficiently explained**. The HPCC has repeatedly not elaborated on why it gave credence to the respondents' claims and not to the absolutely overwhelming evidence in favour of the C-claimants. The provided unsubstantiated/patterned rationale of the negative decisions, despite the valid evidence on the side of the C-claimants, was that (alternatively):

  1. the C-claimant had sold his/her property.

  The explanation of the decision, most certainly solely based on the respondent's allegations, states that the C-claimant was actually unsatisfied with the achieved price that was below the market value of the residential property, or with the fact that he/she had never received the agreed purchasing price, or because an unjust property-exchange contract had been concluded.[10]

  2. the C-claimant did not prove the right of ownership or disposal of the property.

  There were no explanations in those decisions as to why all the submitted valid evidence was rejected, which prevented the C-claimant from appealing negative decision successfully.

  3. the C-claimant did not prove that the right of possession of the material property was lost "as a consequence of NATO air-strike circumstances".

  The "*consequence of NATO air-strike circumstances*" syntagma has been susceptible to arbitrary interpretations. HPCC has held a high level of discretion power when deciding whether the claim is related to the conflict, which appears to be the consequence of insufficient clarity in the legislation. The significance of this issue should be additionally stressed if considering that exactly the same problem might appear in the KPA procedure (see *infra* text, p. 7).

  4. the A-claimant had had the tenancy right that was revoked/terminated as a result of discrimination in the period from 23 March 1989 to 24 March 1999.

[9] UNMIK/REG/2000/60, Article 9.7.

[10] In these cases HPD/HPCC proclaimed its lack of jurisdiction and referred the claimants to seek determination of their property rights before Kosovo courts.

The C-claims were connected to A-claims and the A-claimants (respondents) were obtaining positive decisions, despite the fact that none of the C-claimants were informed about the existence of the submitted A-claims, therefore despite them being unable to respond to the claims.[11]

3. Concerns

Article 14 ICCPR

As a consequence of the procedural flaws, the C-claimants cannot successfully argue their respondents' grounds, being deprived of essential information. Since they were not provided with their respondents' replies (who, on the other hand, had been duly served copies of the C-claims), the two parties were not able to equally participate in the (fair) procedure.

The unjustified negative decisions added the element of further procrastination instead of the expected claims resolution. The whole procedure before HPD/HPCC has already lasted, in some cases, more than four years, despite the relatively low level of factual and legal complexity of the scrutinized cases, while an unjustified negative outcome adds only more burden of waiting and uncertainty to claimants.[12]

The presented facts give rise to issues in the domain of Article 14 ICCPR, *i.e.* the right to fair trial in terms of, among the rest, procedural equality, an adversarial process, a reasoned decision, public hearing and decision in a reasonable time.

Articles 2 and 26 ICCPR

Furthermore, the HPD/HPCC practice of issuing the flawed negative decisions *de facto* discriminate a large portion of persons on nationality grounds.

While the wording of the law (the Regulations) itself cannot be said with certainty to infringe non-discrimination / equal opportunities principles in this particular aspect, the infringement (restriction, impairment or nullification of the rights) was enabled indirectly, in the field of the law's application, especially in relation to the cases of the connected C- and A-claims. Namely, it has been acknowledged by the relevant institutions and embodied into the applicable law in Kosovo that the Kosovo Albanian population had been gravely discriminated during the 1990-ies by Serbian authorities. Therefore, A-claims could have been submitted, in practice, almost only by Kosovo Albanians.

Such a *prima facie* recognition of the property rights of the Albanian majority, without full detailed consideration of the presented evidence by the opposing party, amounts to discrimination of the non-Albanian population. These facts raise the issues of equal protection of the law and the effectiveness of the formally available remedy, as guaranteed in Article 2 ICCPR (in close relation to fair trial and non-interference with home guarantees) and, especially, by the independent Article 26 ICCPR (in relation to socio-economic rights to property and housing, outside the ICCPR scope).

---

[11] *See infra* Appendix – Case Example.

[12] In general, even when positive HPD/HPCC decisions were issued, there were frequently reported immense obstacles in implementing them, in the sense of unreasonable delays in serving the decisions (on the basis of which one can proceed with direct implementation) and in conducting evictions of illegal occupiers.

Article 17 ICCPR

As the arbitrary negative decisions on their assets in Kosovo continue to deprive the C-claimants of the possibility to return to their unwillingly left homes, any passivity and undue delay in properly addressing this issue would imply a continuation of arbitrary interferences with privacy/home and would, therefore, run against the wording of Article 17 ICCPR.

Article 12 ICCPR

The continuing lack of the C-claimants' access to their homes contravenes the guarantee of free choice of residence as provided in the article 12 ICCPR, since the article not only enshrines protection against all forms of forced internal displacement, but also precludes preventing the entry or stay of persons in a defined part of the Kosovo territory.

Article 7 ICCPR

Bearing in mind the psychological impact of not being able to access one's own property, the continuing arbitrary claims adjudications, which have persistently deprived the claimants of their homes/property under circumstances of high existential uncertainties, may be said to have amounted to inhuman treatment of the disadvantaged population, in terms of Article 7 ICCPR.

II Kosovo Property Agency (KPA) – Private Immovable Property, Including Agricultural and Commercial Property

1. KPA Legal Framework

By virtue of UNMIK Regulation 2006/10[13], SRSG established the Kosovo Property Agency (KPA), which is to operate under the authority of the courts of Kosovo. The Regulation has introduced a belated and hybrid legal structure in the domain of property claims resolution.

The KPA's mandate includes private immovable property comprising residential property, which was previously an exclusive domain of the HPD/HPCC adjudication, and agricultural and commercial property, which used to be under material jurisdiction of the regular courts of Kosovo. The KPA is envisaged to adjudicate ownership claims and claims involving property use rights with respect to private immovable property, including agricultural and commercial property, originating from the temporally precisely defined armed conflict.

The Regulation establishes a strong connection with the HPD/HPCC mechanism. The KPA practically is a transformed HPD, as it inherits HPD's staff and assets, while HPCC is to continue adjudicating a number of remaining unresolved claims. Many of the procedural rules regarding HPD/HPCC have been repeated, with due modification of the KPA's mandate. Unlike the HPD/HPCC procedure, the findings and conclusions of the KPA will not be final (in principle), but

[13] UNMIK/REG/2006/10 on the Resolution of Claims Relating to Private Immovable Property, Including Agricultural and Commercial Property, promulgated on 04 March 2006.

will be forwarded to the municipal courts in Kosovo for approval in a manner which may be observed as derogating the role of the Kosovo judiciary (see *infra* text, p. 8).

2. Foreseeable Problems and Concerns

There are sound indications that the HPD/HPCC's procedural flaws/incompatibilities with international human rights legal corpus (including ICCPR) will transcend its own legal framework. This implies that they will further adversely affect the already questionable effectiveness and expeditiousness of KPA, as a successor institution, in addressing the property claims as determined by the legal framework.

Following are only some of the concrete challenges PRAXIS has identified which, if not urgently remedied would have an immediate negative effect on a range of ICCPR-guaranteed human rights of Kosovo population, as mentioned above, most notably under Article 14 ICCPR:

- **Uncertain jurisdiction *ratione temporis*.** There is KPA's very wide discretionary power in this respect, due to lack of defined/definable criteria for determining whether the claim results from the armed conflict that occurred between 27 February 1998 and 20 June 1999 (Section 2.1. of the Regulation) and uncertainty regarding the applicable evidence that would substantiate the claim in this respect.

- **Dubious independence of the tribunal**. The KPA's Supervisory board, consisting of five members appointed by the SRSG, representing interests of UNMIK, PISG and the donors, will supervise the KPA's and provide "*administrative oversight, overall direction and policy guidance*" (Section 4). Additionally, the impartiality is placed under a question mark in respect of the Executive Secretariat duty to "*provide a dissatisfied party information and guidance ... in the preparation of an appeal to the Supreme Court of Kosovo*".

- **Lack of definitive or determinable deadlines** leading to arbitrary procrastinations and unjustified delays in the procedure.

  Namely, in Sections 8-9, the Regulation prescribes no deadlines for the Executive Secretariat to send a copy of the submitted claim to the competent court and to notify the other party. By implication, there is no deadline for the other party to inform about the intention to participate in the proceedings (within 30 days of being notified) and there are no stipulated consequences of the latency in joining the proceedings. Likewise, in the Section 10.3, there is no timeframe for KPA's Commission to submit the reached conclusions to the competent court and to serve their copies to the parties - the KPA procedure could, theoretically, have unlimited lasting.

  Pursuant to Section 12.2, the courts do have the strict 45 days deadline to decide upon receipt of the KPA's Commission's conclusions and deliver the decision, but as the deadline for KPA itself is missing, it is of lesser practical significance and may even impair the ability of the courts to implement fair hearing guarantees. Furthermore, no deadlines have been envisaged in the Section 13.7 enabling the Supreme Court of Kosovo to render a decision on appeal, after having received all the required evidence.

- **Lack of an effective participation in the procedure**. The KPA practically inherited the flaw, as this has also been an immense problem with the HPD/HPCC mechanism. For example, the Regulation prescribes the following:

1. No stipulation that the claimant shall receive the reply to the claim from the opposite party (as opposed to UNMIK Regulation 2000/60).

Without receiving the reply to the claim and, thus, being able to examine the arguments and evidence of the opposite party to effectively respond to the reply, the claimant is *de facto* excluded from participating in the procedure.

2. The Commission shall reach its findings and conclusions on the basis of the claim and the reply/replies. Only where the interests of justice so require, the Commission may request and consider further written submissions from the parties or hold a hearing of all parties involved, including witnesses and experts. In such cases the Commission shall act expeditiously (Section 10.1 and 10.2).

It should be noted that decisions on these conclusions would be made under the authority of the courts of Kosovo (Section 1). However, the weak point of the KPA mechanism is that competent courts will make the decisions on property claims, although they were not directly involved in the evaluation of evidence and arguments of the parties, as well as questioning of the parties and witnesses in hearings. The courts can only request from the Commission a clarification which may take the form of a question or questions with regard to the basis for the Commission's conclusions. They can also direct the Commission and/or the Executive Secretariat on the proper application of the law and/or on the provision and evaluation of additional evidence and arguments and/or on the conduct of further examination or assessment (Section 12.2).

Furthermore, the competent court may render a decision rejecting the Commission's conclusions on the grounds that the conclusions contain a material breach of the applicable law or the conclusions rest upon incomplete facts or a wrong evaluation of the facts (Section 12.6) although it does not deal itself with this case directly. At the same time, there is a strict 45-day deadline imposed upon the court to serve the decision, which may not be sufficient for the court to conduct a fair investigation and adjudication on the matter. The right to fair trial is very restricted and the court is practically rushed into rendering its decisions just on the basis of indirect insights into a case.

There are further serious concerns regarding the **sustainability** of the whole mechanism/process. Among the others, the issue yet to be scrutinized is the fate of the courts in the aftermath of the KPA's mandate completion (after an uncertain, but presumably relatively short period of time). There would be a significant legal gap, similar to the one that had existed at the time when HPD had stopped collecting new claims, while the Regulations were continually valid and formally preventing the possibility of the courts' involvement into the process of property claims resolution.

Recommendations

PRAXIS urges HRC to undertake all necessary measures within its mandate in respect to UNMIK to appropriately address the mentioned issues with the purpose to:

- Repeal the Regulation 2006/10 (04 March 2006) and replace it with clear and credible legislation.

- Alternatively, remedy the existing Regulation, upon taking into due consideration the hereby presented issues, by issuing an Amendment.

- Alternatively, as a minimum, clarify in reasonable detail the material and temporal scope of the whole private immovable property mechanism by means of an Administrative Direction.

- Promptly design and implement an effective awareness campaign among the IDP population in Serbia (as well as in other countries where minorities remain displaced) regarding the availability of the existing procedures.

- Ensure proper adjudication of the remaining caseload before HPCC and ensure timely and unimpeded implementation of the decisions by the successor, KPA.

Appendix

Case Example – Connected C- and A-claims:

Z.D., an IDP from Peć (C-claimant) *versus*
S.D., former SFRY Consul General in Zürich (A-claimant)

PRAXIS' client, Z.D., owner of the apartment in Peć, submitted a C-claim to HPD/HPCC on 14 February 2002. G.D., son of S.D., submitted an A-claim for the same apartment in Peć. HPD/HPCC did not deliver to Z.D. the A-claim with supporting documents for responding.

HPD/HPCC issued a decision upon the C- and A-claims on 30 April 2005 and delivered it to Z.D. on 01 August 2005.

In its decision, HPD concluded that the C-claim was valid, but rejected it because the A-claim was approved with the explanation that the A-claimant had the tenancy right which had been revoked/terminated as a result of discrimination in the period from 23 March 1989 to 24 March 1999. According to the HPD/HPCC decision, C-claimant is not entitled to possess the apartment, but only to submit a compensation claim to HPD/HPCC requesting the compensation for the amount paid for purchasing the property, or more precisely, the percentage of current property value according to the decision and estimate of HPD.

Relevant facts – A-claimant:

The material apartment was allocated to S.D. for use in 1966 by his employer, the Leather and Footwear Plant ("Kombinat kože i obuće"), in accordance with the Plant's Decision on Allocation of Apartment for Use dated 15 January 1966. It is stated in the Decision that the right to use the apartment ceases with the termination of employment in the Plant.

After that, S.D. graduated from the Faculty of Law in Priština and towards the end of 70-ies he got an employment in the federal administrative body in Belgrade and was allocated an apartment in Belgrade by his new employer (Contract on Use of Apartment dated 07 December 1977). The Contract defines that he would use the apartment with his family members (wife, daughter and two sons).

In mid-1978 S.D. was employed by the SFRY Federal Ministry of Foreign Affairs and until his retirement he worked as Adviser in SFRY Embassy in Jakarta and as SFRY Consul General in Zurich.

In 1991 S.D. purchased his apartment in Belgrade with the previous approval given by the Ministry of Foreign Affairs in Belgrade (Decision/Approval of the Federal Executive Council for Purchasing Apartment dated 30 September 1991).

Relevant facts – C-claimant:

Z.D. and his wife had worked in the Leather and Footwear Plant in Peć for many years and in May 1992, an apartment was allocated to Z.D. He purchased the material apartment in December 1992 and lived in it with his family until 1999 when he fled to Serbia.

Z.D. submitted a reconsideration request to HPD/HPCC on 15 August 2005.

In his reconsideration request Z.D., the C-claimant, cites that S.D., the A-claimant, has not been a victim of discrimination and submits relevant evidence:

- The Leather and Footwear Plant's Decision on Allocation of Apartment for Use, dated 15 January 1966
- Contract on Use of Apartment, dated 7 December 1977
- Decision/Approval of the Federal Executive Council for Purchasing Apartment, dated 30 September 1991.

In addition to disputing the allegation that S.D. was a victim of discrimination, in his reconsideration request, Z.D. indicates that S.D. tenancy right over the apartment in Peć ceased long time ago on two purely LEGAL grounds, as follows:

1. He stopped working in the Plant (it is stated in the Decision that the right to use the apartment ceases with the termination of employment in the Plant) and

2. He acquired the tenancy right over the apartment in Belgrade in 1977 (relevant legal regulations prescribed that the tenancy right over one apartment ceases in the moment of acquiring the tenancy right over another apartment).

Although the reconsideration request was submitted more than nine moths ago, up to the moment of writing this report, Z.D. has not received the sought second level decision from HPD/HPCC.

In January 2006, Z.D. contacted HPD Priština and received information that his appeal/reconsideration request would be decided upon in February 2006. In February he was told it would be in March and in March he was told it would happen in June 2006.

Even after more that 4 years of submitting his C-claim to HPD/HPCC, Z.D. has not solved his property problem and has not repossessed his property.

***

(The end)