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**KOSOVO : THE HUMAN RIGHTS SITUATION
AND THE FATE OF PERSONS DISPLACED FROM
THEIR HOMES**

REPORT BY

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For the attention of the

Parliamentary Assembly and the Committee of Ministers
of the Council of Europe

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I. Introduction

In Paragraph 16 of Recommendation 1569 (2002) the Parliamentary Assembly of the Council of Europe recommended that I "visit the Federal Republic of Yugoslavia and Kosovo with a fact-finding mission with the aim of examining the human rights and refugees situation in Kosovo on the whole and elaborating appropriate recommendations". By letter of 5th July 2002, I was requested by the Secretary General of the Parliamentary Assembly "to note in this context that the Assembly [was] scheduled to debate the report on the accession of the FRY to the Council of Europe" during its session from 23 to 27 September 2002.

Having regard to the nature of the recommendation, formulated in the context of the accession of the Federal Republic of Yugoslavia to the Council of Europe, and Articles 3g¹ and 8,1² of the Commissioner's mandate, I informed the Secretary General of the Parliamentary Assembly of my decision to accept the recommendation by letter of 10th July 2002.

Two visits were undertaken to this end - the first, from 23 July to 6 August, to Serbia³ and Kosovo, Montenegro and "the Former Yugoslav Republic of Macedonia", by Mr. Markus Jaeger, the Deputy Director of my Office, and Mr. John Dalhuisen, my Private Secretary, and a second, to Serbia and Kosovo and Montenegro, from 4 to 11 September, on which I was accompanied by Mr. Christos Giakoumopoulos, the Director of my Office and the above mentioned persons.

These visits included meetings with all the principal authorities and leading agencies concerned. The members of my office and I were able, in addition, to visit both privately accommodated IDPs and IDP centres in Serbia and Montenegro as well as prisons, enclaves, return programs and other relevant sites in Kosovo (see Appendix C). These meetings and visits could not have been arranged without the cooperation of numerous authorities, agencies and individuals (see Appendix B). I would like at the outset, therefore, to express my gratitude for the openness with which I was uniformly greeted and without which it would have been impossible to arrive at even a superficial comprehension of the complex issues and delicate questions arising as a result of the Kosovo conflict.

I would like lastly to express my gratitude to the Swiss and Finnish authorities, whose financial contributions to the functioning of my Office, enabled me to positively respond to the Parliamentary Assembly's unforeseen request.

This final report for the attention of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe outlines in greater detail the findings first presented to the Committee on Migration, Refugees and Demography of the Parliamentary Assembly immediately prior to the Parliamentary Assembly's decision on the accession of the Federal Republic of Yugoslavia to the Council of Europe on 24th September 2002.

* * *

¹ "The Commissioner shall: [...] respond, in the manner the Commissioner deems appropriate, to requests made by the Committee of Ministers or the Parliamentary Assembly, in the context of their task of ensuring compliance with the human rights standards of the Council of Europe."

² "The Commissioner may issue recommendations, opinions and reports."

³ See glossary (Appendix A)

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1. Large numbers of displaced persons and the need to establish stable governance in a rapidly evolving post-conflict situation inevitably bring with them significant difficulties. It is not my intention in this report to enter into historical justifications or propose solutions or alternatives to problems whose political implications put them outside my mandate to consider. I would, however, like to examine the situation as it is currently to be found and to draw attention to a number of issues, which, from a human rights perspective, seem to me to admit of improvement.

2. In June 1999, NATO secured the withdrawal of the Yugoslav armed forces from the territory of Kosovo. On 10 June, the United Nations Security Council passed Resolution 1244 (UNSCR 1244), which laid down the framework for, and the responsibilities of, the current international interim administration in Kosovo. Supreme executive and administrative authority were and remain, despite subsequent developments, vested in the United Nations Mission in Kosovo (UNMIK), with, at its head, the Special Representative of the Secretary General for Kosovo (the SRSG).

3. Whilst UNSCR 1244 requires UNMIK to protect and promote human rights, and universal human rights standards serve, in virtue of UNMIK Regulation No. 2000/59, as applicable law in Kosovo, it is clear that the very structure of the international administration, as well as certain powers retained by its various branches, substantially deviate from international human rights norms and the accepted principles of the rule of law. In so far as UNMIK both promulgates and enforces new regulations in Kosovo, there is, for instance, no separation of powers as traditionally conceived. Whilst UNMIK enjoys considerable influence over the judiciary, it has, despite being the supreme civil authority in Kosovo, no control over the international armed forces. The SRSG enjoys special executive powers to detain individuals despite judicial orders for their release. NATO forces in Kosovo (KFOR) may detain individuals for indefinitely renewable periods of 30 days without judicial supervision. All international personnel enjoy, furthermore, immunity from prosecution in Kosovo.

4. Whilst such anomalies might have their place in the aftermath of a fraught ethnic conflict, during which the restoration, in an administrative vacuum, of peace and order must remain the first priority, the time has come, I think, three years on, to reconsider their continued necessity. Whilst I am not, myself, after a visit of only four days, sufficiently well placed to judge, I was repeatedly informed by the competent authorities of the improvement in the security situation over the last three years. In the meantime, as UNMIK is itself keen to point out, the establishment of local authorities and the Provisional Institutions of Self-Government (the PISG) has helped to stabilise the political landscape. Progress has also been made regarding local police and judicial structures. It is questionable, therefore, whether, in the light of such progress, all the special powers retained by the international administration can continue to be justified. It ought, in this respect, to be borne in mind that, independently of the decision on the final political status of Kosovo, UNMIK's long-term ambition is progressively to transfer executive and legislative authority to local institutions. Moreover, UNMIK placed considerable emphasis, in the Constitutional Framework drawn up in May 2001, on the obligations of local institutions to respect international human rights standards. It cannot in the long run, as the situation continues to stabilise, be a salutary example to budding democratic institutions, to continue to be answerable to an ultimate executive authority, which does not itself adhere to these norms.

5. The situation regarding persons displaced from Kosovo remains, three years on, a cause for concern. Whilst UNSCR 1244 places an obligation on the international administration to provide for the safe and secure return of all refugees and persons displaced from their homes in Kosovo, success has to date been achieved only in respect of the approximately 850,000 Albanian Kosovans who fled their homes in early 1999. Of the 230,000 Serbian, Roma and other minority internally displaced persons (IDPs) officially registered in Serbia and Montenegro and the 3300, predominantly Roma, refugees in "the Former Yugoslav Republic of Macedonia", the vast majority of whom fled after the arrival of KFOR ground troops, only a few thousand have so far returned. Indeed, only this year has the number of returning non-Albanian Kosovans begun to exceed the number of those still leaving.

6. It is clear that the primary principle governing the situation of IDPs ought to be the right of each individual person to choose between remaining at a location of their choice elsewhere within their country or returning to their region of origin. It is equally clear that a host of factors, ranging from the political and historical to the economic, frequently obstruct the free exercise of this choice. Certainly, the situation in Kosovo is far from propitious for the large-scale return of all those who might wish to do so. The security situation for ethnic Serbs, and to a lesser extent, for returning Roma, Egyptian and Ashkalies remains difficult. Indeed, except for returns to established Serbian enclaves, returnees effectively require round the clock KFOR protection and are barely able to travel without escort. Economic opportunities are, moreover, extremely limited, as is the availability for minorities of adequate schooling and access to other social services. Reconstruction aid, following three years of financial assistance to Kosovan Albanians returning to their own destroyed houses, is increasingly scarce for Kosovan minorities now wishing to do the same. The possibility of returning on an individual, spontaneous basis, is likely, therefore, to appeal only to the most desperate. At the same time, organised returns, whereby aid and security arrangements are guaranteed and the local authorities and resident Albanian neighbours consulted in advance, require lengthy preparation (in excess of one year for a program I witnessed), cater for very small numbers and, in any case, currently depend on the availability of donor aid, which, moreover, rarely extends to Roma returnees. Organised returns to locations other than the precise place of previous residence, are, in contravention of the right to freely choose one's place of residence, actively discouraged.

7. Whilst UNMIK has begun to take a more active interest in return than was, perhaps understandably, evident in its early years, it must at once be more realistic regarding the numbers that are likely to be able to return in the near future and do more, notably financially, to enable it. Excessive optimism regarding the return process, whilst perhaps politically expedient, is both unfair to IDPs themselves and masks the increased efforts that will have to be made, both by UNMIK itself and the Kosovan institutions of self-government, to enable IDPs to return should they wish to do so.

8. Calculating the number of individuals who might wish to return, indeed assessing any one individual's desire to return, is difficult. It depends, inevitably, on both push factors – the living conditions and prospects in their current place of residence – and pull factors – the situation they expect to find should they return. These factors are, moreover, particularly sensitive to time, which, whilst allowing for the conditions in Kosovo to improve, also tends to encourage integration elsewhere. It should not, in any case, be anticipated that all 230,000 registered IDPs will one day wish to return. The young and, especially, the urban, can be expected to integrate far more rapidly than the old and rural, whose skills are less adaptable and

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whose attachment to their places of origin is generally higher. Whilst property sales ought not, owing to the possibility of economic duress, to be taken as a definitive indicator of future intentions, it is worth noting that reliable estimates put the proportion of IDPs who have sold their property in Kosovo at about one third.

9. It is, in the meantime, incumbent on the authorities in Belgrade and in Podgorica to do their utmost both to improve the immediate living conditions of IDPs, notably of the Roma, currently residing in Serbia and Montenegro and to facilitate the integration of those IDPs that have given up hope or no longer wish to return to Kosovo. These tasks will, it is true, fall hard on societies already struggling to cope with waves of refugees from previous Balkan conflicts and in which economic activity remains low. The progressive scaling down of international emergency aid will render this obligation harder still to fulfil. Kosovan IDPs are, however, citizens of Yugoslavia and the primary responsibility for their welfare must reside with the Serbian and Montenegrin authorities. Bureaucratic and other obstacles to the full enjoyment of civil, political and economic rights must, therefore, be overcome and proportionate assistance offered.

10. These, and other matters, are elaborated at greater length in this report. I would like, however, briefly to mention a final concern, which seems to me to be of the utmost urgency. I refer to the problem of missing persons. The fates of some 3700 persons, of all ethnicities, remain, some three years after the arrival of the international community, unresolved. That this problem, which remains a desperate and tragic concern for the families affected and continues to undermine both the possibility of reconciliation and the confidence of all communities in the international administration, has not yet been adequately addressed, represents something of a black mark on UNMIK's record. The SRSG's creation in June of this year of a new Office on Missing Persons and Forensics and the appointment of an experienced and highly capable head, should therefore, be congratulated. It remains the case, however, that this office, is, for its immediate purposes, and on its own estimation, under funded to the tune of some 300,000 euros. The paucity of the sum in relation to the significance of the issue has encouraged me to appeal to all member States of the Council of Europe to rapidly contribute to the resolution of this matter.

II. Background⁴

11. Until 1989, Kosovo enjoyed a regime of substantial autonomy within Serbia, guaranteed under the 1974 Serbian Constitution. Through amendments in 1989, followed by the adoption of a new Serbian Constitution in September 1990, that regime was altered and Kosovo's autonomy severely curtailed.

12. 1998 saw an escalation of the armed actions of the local guerrilla, soon unified under the KLA (Kosovo Liberation Army), and of repression by the FRY and Serbian police, military and paramilitary forces in reaction to the KLA's struggle for independence. The Milosevic regime frequently resorted to violence against civilians and rejected an international peace plan. NATO air strikes against Serbian and FRY targets in Kosovo and in Serbia took place from March to June 1999, resulting in yet increased repression against Albanian Kosovans on the ground. In June 1999, the Yugoslav and Serbian forces withdrew from Kosovo.

⁴ Cf. Council of Europe document AS/Bur/Yugoslavia (2001) 1, paragraphs 16-26.

13. On 10 June 1999, the UN Security Council adopted UNSCR 1244 under Chapter VII of the UN Charter. It reaffirmed, on the one hand, the commitment of all UN member States to the sovereignty and the territorial integrity of FRY. On the other hand, it foresaw the deployment in Kosovo, under UN auspices, of international presences in order to provide security and an interim administration under which, pending a final settlement, the people of Kosovo could enjoy substantial autonomy within FRY.

14. The interim administration of Kosovo (UNMIK) is headed by the SRSG (presently Mr. Michael Steiner) who holds the supreme legislative and administrative authority in Kosovo. UNMIK consists of four "pillars": interim civil administration (UN-led), humanitarian affairs (UNHCR-led), reconstruction (EU-led) and institution building (OSCE-led). UNSCR 1244 also provides for an international security presence through a NATO-led force (KFOR) under unified command (COMKFOR).

15. According to UNSCR 1244, UNMIK's main responsibilities are – in the following order⁵ – to promote the establishment of substantial autonomy and meaningful self-administration in Kosovo; to organize and oversee the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; to perform basic civilian administrative functions where and as long as required; to facilitate a political process designed to determine Kosovo's future status; to support the reconstruction of key infrastructure and other economic reconstruction; to support, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; to maintain civil law and order; to protect and promote human rights and to assure the safe and free return of all refugees and displaced persons to their homes in Kosovo.

16. In the FRY, the growing domestic opposition to Mr. Milosevic resulted in the victory of Mr. Kostunica in the federal presidential elections of 24 September 2000. Popular protest and strikes, culminating on 5 October 2000 when demonstrators took over the Federal Parliament, prevented Mr. Milosevic from annulling the results of the elections. On 7 October 2002, Mr. Kostunica was sworn in as the FRY's new president. On 23 December 2000, free parliamentary elections were held in Serbia, followed by elections in Montenegro in April 2001. New governments, committed to reform, took office.

17. In Kosovo, local elections were held in October 1999. The participation of Serbian Kosovans living outside Kosovo was rendered possible by a registration campaign organised by the OSCE in Serbia proper, Montenegro and "the Former Yugoslav Republic of Macedonia".

18. In January 2000⁶, the Joint Interim Administrative Structure was established (JIAS), a predecessor to the PISG (see below). The three largest political parties to have emerged from the local elections, as well as Serbian Kosovan representatives sat in the Interim Administrative Council (IAC), a consultative mechanism between UNMIK and Kosovo's local leaders.

19. On 15 May 2001, the SRSG promulgated the Constitutional Framework⁷ under which provisional institutions for democratic and autonomous self-government (PISG) were to be set up, pending the decision on the final status of Kosovo.

⁵ See Paragraph 11 of UNSCR 1244. The protection and promotion of human rights are mentioned as the last but one of UNMIK's responsibilities.

⁶ UNMIK Regulation 2000/1, On the Kosovo Joint Interim Administrative Structure.

⁷ UNMIK Regulation 2001/9, Constitutional Framework for Provisional Self-Government.

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20. Elections for the 120 seats of the provisional parliament of Kosovo were held on 17 November 2001⁸, resulting in Mr. Rugova's Democratic Alliance of Kosovo (DSK) holding 47 seats, Prime Minister Rexhepi's and Mr. Thaci's Democratic Party of Kosovo (DKP) 26 seats, Mr. Haradinaj's Alliance for the Future of Kosovo (AAK) 8 seats, the Bosnian Vatan party a few seats and the Serbian Povratak ("Return") party 22 seats⁹.

21. The formation of the PISG took place on 4 March 2002. The PISG are composed of the Prime Minister, ten ministries and the Inter-Ministerial Co-ordinator for Returns. According to the Constitutional Framework and the UNMIK regulation which defines their composition and powers, the PISG exercise their functions under the ultimate authority of the SRSG, who has retained exclusive competence in certain key areas (reserved powers)¹⁰.

22. While the main Albanian parties have shared most of the ministries among themselves, Vatan holds the Ministry of Health in the provisional government, and Povratak the Ministry of Agriculture. Povratak had pressed, without success, for the creation of a special ministry for the return of refugees and displaced persons. It did, however, obtain, the nomination of a Kosovan Serb representative as Inter-Ministerial Co-ordinator for Returns in the Office of the Prime Minister and of another as Special Advisor on Returns in the Office of the SRSG. The members of the PISG were sworn in on 12 June 2002.

23. In conformity with UNSCR 1244 and the Constitutional Framework, UNMIK will gradually transfer its administrative responsibilities to Kosovo's provisional local institutions and support their consolidation and, in the event of a final settlement of the status of Kosovo, oversee the transfer of authority from the provisional institutions to institutions established under a political settlement.

24. The current SRSG has made the gradual transferral of more responsibilities to the PISG conditional on good performance within the already transferred areas, and has set "benchmarks" for measuring the maturity of Kosovo society¹¹. It would appear that not only the pace of the transferral of responsibilities, but also the answer to the question of the final status of Kosovo, is dependent on such progress. The slogan is "standards before status".

⁸ Serb participation in the election was threatened by a proposed boycott, harassment from some sections of the Serb community and attacks by ethnic Albanians. Eventually, 49% of the Serbs eligible to vote participated, encouraged by the signing, on 5 November 2001, of an UNMIK-FRY common document which seeks to address outstanding rights concerns of the Serb community. There was also pre-election violence against moderate Albanian politicians, including killings (cf. Amnesty International, *Concerns in Europe*, July-December 2001, page 82).

⁹ The 22 seats in the Parliament held by Serbian Kosovans do not correspond to the approximately 11% of votes cast on Povratak, but were allotted in advance, in accordance with the Constitutional Framework.

¹⁰ Cf. in particular the Preamble of the Constitutional Framework, as well as its Article 4.6, its Chapter 6 and Chapter 8 on the "Powers and Responsibilities Reserved to the SRSG", Articles 9.1.45, 9.4.8, Chapter 12 on the "Authority of the SRSG" and Article 14.3. Cf also Sections 6, 7 and 8 of UNMIK Regulation No. 2001/19 of 13 September 2001, On the Executive Branch of the PISG in Kosovo.

¹¹ See Mr. Steiner's address to the 4518th Meeting of the United Nations Security Council, Wednesday 24th April 2002.

III. The human rights situation in Kosovo

1. Which human rights ?

25. According to a decision taken by the SRSG in December 1999, the applicable law in Kosovo is the law that was applicable in the province up till 22 March 1989 (the day on which Kosovo lost its autonomous status within the SFRY) unless or until overridden by UNMIK regulations promulgated by him. In case of conflict, universal human rights standards take precedence¹².

26. The applicability in Kosovo – by UNMIK, KFOR and the provisional local institutions – of at least those UN Human rights norms that the FRY has undertaken to abide by, should not be in question.

27. These include the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (including the acceptance of the jurisdiction of the Committee against Torture to hear inter-State and individual petitions); the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Prevention and the Punishment of the Crime of Genocide; the Convention on the Elimination of All Forms of Discrimination Against Women. It is to be noted, however, that the Constitutional Framework enacted on 15 May 2001 by the previous SRSG, omits mentioning the UN Covenant on Economic and Social Rights and the UN Convention Against Torture, as applicable law in Kosovo. I concur with the previous United Nations High Commissioner for Human Rights, Mrs. Robinson, that these norms “*should be part of any legal framework established by a UN administration*”¹³.

28. The situation with respect to European (i.e. Council of Europe) Human rights norms is the following. The Constitutional Framework, in its Article 3.2, obliges the PISG to “*observe and ensure internationally recognized human rights and fundamental freedoms, including*” those laid down in a number of Council of Europe instruments which are listed in the article. These are: the ECHR “*and its protocols*”; the European Charter for Regional or Minority Languages, and the Council of Europe Framework Convention for the Protection of National Minorities.

29. Article 3.3. states that: “*The provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as part of this Constitutional Framework*”. Notwithstanding the fact, therefore, that the international interim administration is not a party to these instruments, this article creates an obligation on it vis-à-vis the citizens of Kosovo to ensure the respect for the rights guaranteed by the above mentioned Council of Europe instruments.

2. Who is accountable ?

30. The legal situation and the administrative features of Kosovo, as set out above, are unique: Kosovo is provisionally administered by the international community, ie the United Nations (UNMIK) and NATO (KFOR).

¹² UNMIK Regulation 2000/59, On the Law Applicable in Kosovo.

¹³ Letter by Mrs. Robinson to Mr. Steiner, dated 14 March 2002, emphasis added.

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31. From this, one could conclude that responsibility for the human rights situation in Kosovo lies not in the hands of the FRY or Serbia, but exclusively with the United Nations and NATO as well as, though to a much lesser extent, with the fledgling local institutions (PISG).

32. However, Belgrade still exercises influence in those parts of Kosovo where Serbs are a majority¹⁴. There, health staff and teachers receive instructions, pay and supplies from Belgrade. There are five Serbian-run parallel courts in Kosovo, and the District Court for these lower courts is located in Kraljevo, Serbia, where the (parallel) District Court of Mitrovica was relocated in 1999 to hear cases from Kosovo. These parallel courts employ a total of 34 judges, paid by Belgrade, and create an overlapping jurisdiction, which leads to the possibility of double jeopardy and general public confusion. Belgrade has also supported the so-called "Bridge-Watchers", a sort of militia that physically prevents Albanian Kosovans from entering North Mitrovica¹⁵. Belgrade sponsors return projects selected and designed by it, pays for constructions and repairs according to its criteria, etc. The result is that the FRY (or rather Serbia) still remote controls large parts of public activity in certain parts of Kosovo.

33. On various occasions, UNMIK has officially objected to these "parallel structures", finding such activity to be in violation of UNSCR 1244. Work is under way, especially in the FRY/Serbian-UNMIK High Ranking Working Group (HRWG), to progressively dissolve such parallel structures¹⁶. Be this as it may, it is important, for the scope of this report, to recall that, by exercising power and influence in parts of Kosovo, the politicians and authorities in Belgrade retain a share of responsibility for the human rights situation in Kosovo¹⁷.

34. With the above provisos there is, however, no doubt that the legal responsibility, and the main political responsibility, for the respect of human rights standards in Kosovo lies, for the time being, with UNMIK.

35. This is also true as concerns the way in which the PISG abide by human rights standards, because these were set up by and operate under the close supervision of UNMIK (see above).

¹⁴ See, however, the conclusions drawn by Professor Bernard and Mr. Pekkannen, in their « Report on the conformity of the legal order of the FRY with the Council of Europe standards » (Council of Europe document AS/Bur/Yugoslavia (2001) 1, 5 November 2001). For the purposes of their report, designed to help the Parliamentary Assembly assess the appropriateness of FRY's admission to the Council of Europe, they state: "There is no doubt [...] that in reality, from June 1999 to the present day, the Serbian and FRY authorities have not exercised jurisdiction in Kosovo" (paragraph 34, see also paragraph 35). This is not the view expressed in the report by Mr. Frey for the Political Affairs Committee (AS/Pol (2002) 07 Rev. 2, 12 June 2002, at paragraph 19 nor in paragraphs 13, 14, 19 and 30 of the report by Mr. Lippelt, the Rapporteur of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly.

¹⁵ "The local population in Mitrovica should also take over the responsibility of their own safety [...] [W]e believe that the condition for the creation of a positive climate in the proces of integration is, above all, the demystification of the bridge watchers [...]" (Statement by Dr. Covic before the UN Security Council, New York, 30 July 2002).

¹⁶ OSCE Mission in Kosovo : Quarterly Trends Report No. 2 : 1 April - 30 June 2002 (SEC.FR/431/02, 30 July 2002).

¹⁷ In this context I note that the CCK has commissioned an expert team to produce a report entitled: Base of the Strategy of Decentralization of Kosovo and Metohija and Strengthening of Self-Government of Local, National and Regional Communities (The Project: Building and Development of Local Self-Government in Kosovo and Metohija), Belgrade, July 2002.

36. Lastly, I find the view that UNMIK is not to be held responsible for the respect of human rights standards by KFOR problematic¹⁸. Were this the case, then one of the basic principles governing the functioning of any democratic State (or "entity") respectful of human rights and the rule of law, would not be respected in Kosovo: the principle that the military is not a separate power operating outside the realm of law and that it must fall under the full control of civilian power (see below Chapter III, 3, h).

3. Main human rights issues

a. Immunities of the international presence

37. UNMIK Regulation 2000/47¹⁹ grants, on the one hand, UNMIK and KFOR immunity from any legal action wheresoever and, on the other hand, grants their personnel immunity from jurisdiction in Kosovo in respect of any civil or criminal act performed or committed by them in their official capacity within the territory of Kosovo.

38. Immunity for UN missions derives from the UN Charter and the Convention on Privileges and Immunities of the UN. The purpose is to ensure the independent and effective exercise of missions free from the improper interference of host authorities.

39. In Kosovo, however, the UN mission is itself the (interim) government, insofar as the main government functions are fulfilled by it and the SRSG retains the supreme executive authority over the PISG. Kosovo's judiciary has been created and shaped by the international administration and remains under its control and international judges are available. The *rationale* for the immunities is consequently unclear. Indeed, in respect of Kosovo, the immunity of UNMIK is tantamount to immunity against itself and against authorities created and controlled by it. Likewise, the immunity of its and KFOR's personnel amounts to internationals being granted immunity against other internationals (or against nationals under their authority).²⁰

40. As the Ombudsperson and OMIK have pointed out, UNMIK's and KFOR's immunity from legal process deprives Kosovans of judicial protection and legal remedies against legislative and executive acts by the present executive or administrative authorities which might infringe their rights. In addition, the fact that the judiciary in Kosovo does not have the power to exercise control over the actions of governmental bodies undermines the independence of the judicial system.

41. As a logical corollary to the immunity of the administration, there are no administrative tribunals or specialised courts in Kosovo. With the important exception of the Ombudsperson's Office, channels of administrative appeal are rare and, in any event, not very visible.

¹⁸ This attitude by UNMIK is reflected, for example, in the view that separate agreements will have to be negotiated with KFOR as regards the implementation of Council of Europe human rights standards in Kosovo, as well as in the fact that UNMIK does not provide any information on the detention of individuals by KFOR.

¹⁹ On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, 18 August 2000.

²⁰ Comp. Ombudsperson Institution of Kosovo, Special Report No. 1 On the Compatibility With Recognized International Standards of UNMIK Regulation No. 2000/47, 26 April 2001; and OMIK, Department of Human Rights and Rule of Law, Kosovo, Review of the Criminal Justice System, September 2001-February 2002, Themes: Independence of the Judiciary, Detention, Mental Health Issues, pp- 38-42.

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42. With respect to the immunity from jurisdiction in Kosovo that UNMIK and KFOR personnel enjoy, it is to be noted that it can be waived by the SRSG under Section 6 of Regulation 2000/47, as such immunity is considered to be for the benefit of UNMIK and KFOR, and not for the individual. Indeed, it would appear that the SRSG has waived it where appropriate. Therefore, the immunity of international personnel is not necessarily tantamount to impunity. However, as OMIK put it, *"[t]he justice system in Kosovo, in terms of both its independence and its authority to enforce the law, has not had a positive experience with regard to the exercise of the immunity privilege, especially when it has related to criminal cases"*; OMIK has monitored five cases of criminal investigations against international employees of UNMIK. None of them has lead to the establishment of criminal liability of the officer²¹.

43. The fundamental right to access to court, an essential element of the rule of law, is seriously curtailed by such immunity. Furthermore, such an exception cannot fail to set a poor example to nascent domestic institutions and undermine the confidence of all Kosovans in the fair and efficient functioning of the interim international administration.

b. Security and policing

44. Policing in Kosovo is being conducted, for the time being and exceptionally, by the armed forces (KFOR) as well as by civilian police (UNMIK police and the local Kosovan Police Service (KPS)). Policing by armed forces can pose problems in terms of civilian control over the armed forces, an issue addressed in Chapter III, 3, h of this report.

45. The most important challenge for policing in Kosovo is security, especially the security of the ethnic Serb and, to a lesser extent, the ethnic Roma, Egyptian and Ashkalie minority. All observers agree that the situation is still far from satisfactory, although it has much improved. Serb Kosovans by and large can still not enjoy their freedom of movement in Kosovo. They are confined to their KFOR protected enclaves or to the region of North Mitrovica where they are the majority population. Only very few multi-ethnic localities exist. When they leave their enclaves, ethnic Serbs and Roma are felt to need police or KFOR escorts. This puts a terrible constraint on their lives as regards their access to public services (schools, health care, social services, administrations, ...) and their private lives (visiting friends, relatives ...). The majority of elected Serbian Kosovan representatives use armed escorts all the time.

46. In addition to the threat of inter-ethnic and political violence, there is also the danger coming from criminals, often well armed, as well as the whole range of problems of policing that one encounters in most countries. In particular, serious organised crime, often with international ramifications (weapons smuggling, drug trafficking, trafficking of human beings²², money laundering ...), still seems to have Kosovo as one of its strongholds²³.

²¹ OMIK, Department of Human Rights and Rule of Law, Kosovo, Review of the Criminal Justice System, September 2001-February 2002, Themes: Independence of the Judiciary, Detention, Mental Health Issues, p. 40.

²² IOM and others report that there are about 1,000 women and young girls forced to prostitute themselves in some 100 brothels in Kosovo, out of whom some 60% come from Moldova, 20 % from Romania, 10 % from Ukraine. Ten percent of them are under 18 years of age. The living and working conditions in the Kosovo sex industry are judged *"abhorrent, exploitative and akin to slavery"*; *"members of the international community constitute a sizeable 40 percent of the clientele, mostly KFOR soldiers. There is a suspicion that UNMIK international police officers might be involved in trafficking – some members of the international police were repatriated for suspected involvement [...]* According to local NGOs, prior to the war in 1999 and the consequent international presence in Kosovo, not only trafficking but also prostitution was very uncommon" (Trafficking in Human Beings in Southeastern Europe: The UN Administered Province of Kosovo, UNICEF/UN OHCHR/OSCE-ODIHR, June

47. Having had to rely exclusively on international staff (UNMIK Police, also called CIVPOL) in the beginning of its mandate, UNMIK has succeeded in rapidly establishing a local, multiethnic police force, the KPS. At the end of 2001, there were some 4500 CIVPOL and roughly the same number of KPS officers. 15 % of the latter come from minorities (8% Serbs, 6% Bosniaks, as well as some Turks and Roma), 18 % are female officers. Serbian officers are mainly located in the Serbian enclaves. KPS is still largely selected, trained and monitored by UNMIK, but is becoming increasingly autonomous. The target number of KPS officers for eventually taking over law enforcement in Kosovo is 8,000 to 10,000 officers.

48. UNMIK cites a 60% clear-up rate for major crimes, as well as the fact that the number of murders fell by half in 2001 as compared with the previous year, though rape, attempted murder and assault rates increased²⁴.

49. However, the overall performance of international and local police in crime prevention and repression is still judged poor by many²⁵, and certain allegations regarding their own behaviour give rise to concern. I am particularly worried by references to complaints of ill treatment/torture inflicted while in police custody, including by UNMIK agents²⁶. Moreover, there are disturbing allegations of corruption and other illegal acts committed by police, some relating to the disappearing of private vehicles while in the custody of police, others to the "loss" of firearms deposited with the police for the purpose of official registration. Indeed, the relatively low wages of KPS officers (an apparently inadequate 300 euros a month), and the personal immunity of international ones, are unlikely to always encourage scrupulousness.

50. It is true that the attitudes of local Kosovans do not render policing easy. Many, from all communities, are extremely distrustful towards the police. But the problem is wider: there is a general lack of cooperation with law enforcement in Kosovo, where locals hesitate to provide necessary information both for fear of the police leaking information and due to the absence of serious witness protection programmes²⁷.

51. At the same time, it is evident that the variable standards inherent in international police forces and the relatively short periods of service of individual officers undermine operational efficiency. Linguistic barriers and the lack of experience of local customs inevitably exacerbate the difficulties faced by international police officers. The apparent success of the KPS²⁸ is consequently to be welcomed.

2002, pp. 95-106, at p. 96). See also: Return & Reintegration Project, Situation Report – Feb. 2000 to April 2002, IOM Kosovo Counter-Trafficking Unit and Vanity Fair, July 2002, pp. 112-117, 162-166.

²³ Comp. ICG Balkans Report No. 125, A Kosovo Roadmap (II), Internal Benchmarks, 1 March 2002, page 13.

²⁴ "The police, however, believe that this reflects the increased willingness of individuals to report crimes, rather than increase in the crimes themselves" (ICG Balkans Report No. 125, *op. cit.*, page 14). "It has been reported [that] there were fewer murders and fewer attacks on Serbs and other non-Albanians [...] I emphasise that this result is only a consequence of the fact that [they] have been forced to live in enclaves and ghettos, and that they have learned to stay away from the harm" (Statement by Dr. Covic before the UN Security Council, New York, 24 April 2002, p. 4).

²⁵ Cf. The Ombudsperson of Kosovo, Presentation to the Rapporteur Group for Democratic Stability (GR-EDS) of the Committee of Ministers of the Council of Europe, 10 June 2002; Amnesty International, Concerns in Europe July-December 2001, page 82; IHF, Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America, Report 2002, Yugoslavia, Kosovo; see also ICG Balkans Report No. 125, *op. cit.*, pages 12,13 and Statement by Dr. Covic before the UN Security Council, New York, 17 September 2001, p. 7.

²⁶ Cf. Finnish Human Rights Project, Report NGO Prison Monitoring Mission, November 19-24, 2001, Kosovo, pages 12, 13, 16.

²⁷ Cf. IHF, Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America, Report 2002, Yugoslavia, Kosovo.

²⁸ ICG Balkans Report No. 125, *op. cit.*, page 14.

c. Investigations into crimes committed in the beginning of the international mandate

52. "Post-war Kosovo was characterised by a climate of impunity: crimes were not investigated and criminals went unpunished"²⁹. The victims were mostly ethnic Serbs and Roma, as well as Albanian Kosovans suspected of collaboration with the Serbs. We have read and heard numerous reports, including by international personnel, of serious crimes, including murder, arson, assault, that were committed during the first few months of the international presence³⁰, sometimes in front of international personnel. When victims or their families came to report to KFOR, their depositions were frequently heard, but rarely acted upon³¹. Indeed, only very few successful investigations into such serious crimes committed in retaliation have been reported to date. This has gravely undermined the ethnic minorities' trust in the protection offered by KFOR and UNMIK, as well as in their impartiality.

53. It is urgent that serious investigations into crimes committed against minorities since the beginning of the international administration of and responsibility for Kosovo in June 1999, including abductions and disappearances, be given a higher attention by the police and the judiciary, than they have to date. Investigations should take place by all available means, and make use of the declarations that have been made over the years to KFOR, UNMIK, and all kinds of other authorities (the ICTY, the OSCE, various embassies, etc.)³². To me, this appears to be the only way in which the confidence of the minorities in the non-discriminatory, fair and efficient functioning of the international administration of Kosovo can be regained. Also, as UNMIK's Office of Returns & Communities rightly points out, "*full reconciliation [between the communities] cannot take place in the absence of accountability for past crimes*"³³.

54. The police have started to make some sensitive arrests, including of members of the Kosovo Protection Corps (KPC), who were former members of the KLA³⁴. I welcome that new development very much and commend UNMIK and KPS for it. However, for the time being, most arrests of Albanian Kosovan suspects are still confined to cases where the victims were also ethnic Albanians³⁵. Voices within the Albanian Kosovan community, including a number of politicians, have regrettably shown hostility to these arrests. But this should not hinder police and justice from taking action as required.

²⁹ ICG Balkans Report No. 125, *op. cit.*, page 3. For an overview of abuses, see OMIK, Kosovo/Kosova: As Seen, As Told - Part II (June to October 1999), 1999.

³⁰ See, for example: Review of Certain Violations of Human Rights in Kosovo and Metohija 06.1999.-06.2002, CCK, Belgrade, June 2002.

³¹ For a comprehensive analysis of the situation as regards the prosecution of war crimes and post-war crimes committed in retaliation, see ICG Balkans Report No. 134, Finding the Balance: The Scales of Justice in Kosovo, 12 September 2002, pages 16 to 26.

³² Comp. Statement by Dr. Covic before the UN Security Council, New York, 30 July 2002.

³³ The Right to Sustainable Return, Concept Paper, UNMIK, Office of the SRS, Office of Returns & Communities, 17 May 2002, p. 4. This point of view is expressly shared by the President of the CCK: Statement by Dr. Covic before the UN Security Council, New York, 30 July 2002.

³⁴ In August 2002, a prominent former KLA commander was arrested and charged with the unlawful detention, torture and murder of five persons, while six other former KLA members were charged with unlawful detention and serious bodily injury and one former KLA member with murder.

³⁵ Comp. Neithart Höfer-Wissing: UNMIK und die Selbstverwaltung im Kosovo – Szenen einer Ehe, SOE-Monitor, Juli 2002, page 4.

d. Missing persons

55. Missing persons are an urgent issue in Kosovo. The ICRC has documented the names of some 3700 persons that have gone missing in Kosovo, of which approximately 2750 are ethnic Albanian and 850 Serb, with the remainder belonging to other minorities. This painful matter affects all the communities involved and is a concern that they all have a keen interest in seeing resolved³⁶. Indeed, one cannot start building peace in the minds of people who await news of their beloved, as long as they are tortured in their hearts and in their minds by such unbearable uncertainty. To put an end to this situation is of the utmost urgency.

56. There are various issues involved as regards missing persons. One is the right to life of those who went missing (Article 2 of the ECHR). Although many people consider that almost all of those missing out of Kosovo have probably been killed, investigations into cases of "appearances" of alleged survivors must be made rapidly and thoroughly and families be informed of their outcome. Moreover, under Article 8 of the ECHR (and possibly also under Article 3³⁷) the families of missing persons have a right to know about that person's fate. This encompasses their right to an accurate identification of all the bodies found so as to make sure whether or not their relative is among the dead, as well as, if so, information on where the body was found and how the person was killed, etc. The family also has a right to bury the body of the dead relative, if and when recovered. The main action needed to address the above aspects of the problem is forensic work. It includes searches of alleged graves, exhumations, autopsies, the comparison of ante- and post mortem data, DNA tests, information from families, the return of bodies and belongings found to the families, etc.

57. In addition to the right of the families concerned to know the fates of their relatives, and to put an end to long years of anguish, the resolution of the outstanding cases represents an important factor in the reconciliation of the communities involved. For so long as such cases remain unresolved resentments and recriminations will continue to fester on all sides, whilst rumours of secret slave camps and ongoing abuses will continue to circulate³⁸. The issue also impacts heavily on the confidence of all communities in the international administration, with, at present, both Serbs and Albanians suspecting it of bias and discrimination and all sides doubting its commitment to resolve justly the issues it intervened to rectify.

58. Sensitive to these concerns, the SRSG created a new Office on Missing Persons and Forensics in June this year, with the instruction to carry out the exhumation of all the remaining identified gravesites (some 270) by the end of the year. The full scale of the office's tasks, however, is easily told in figures: since 1999, some 4600 bodies have been exhumed, of which only 2100 have been identified. 2500 remain, therefore, to be DNA tested, leaving a further 1200 still to be located and exhumed. Whilst the full resolution of all these cases will undoubtedly take some time, it is of the utmost importance that progress should begin, and be seen, to be made.

59. The resources, both human and material, available to the Office on Missing Persons and Forensic are, however, manifestly incommensurate with the task of rapidly resolving all these

³⁶ For the Serb side see: Statement by Dr. Covic before the UN Security Council, New York, 24 April 2002, p. 3.

³⁷ See EurCourtHR, judgment in the case of Cyprus v. Turkey of 10 May 2001 : "the silence of the authorities in the face of the real concerns of the missing persons attains a level of severity which can only be categorised as inhuman treatment".

³⁸ See Statement by Dr. Covic before the UN Security Council, New York, 17 September 2001, p. 8.

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cases. The Office estimated at 300,000 euros the sum required to complete the task it was set by the SRSG and to continue the process of the identification of the remaining corpses. This sum would contribute to the contracting of the necessary technical personnel and the purchase of basic equipment.

60. The paucity of the sum in relation to the importance of the issue has encouraged me to appeal to member States of the Council of Europe to contribute urgently to the resolution of this problem. A document entitled "Missing Persons in Kosovo, Note by the Commissioner for Human Rights"³⁹ was presented to the Committee of Ministers of the Council of Europe on 18th September 2002.

e. Functioning of the judiciary

61. Establishing an effective justice system represents one of UNMIK's biggest challenges. When UNMIK arrived in Kosovo, the previous system, including personnel, court equipment, files and records, had left for or had been removed to Serbia. Most ethnic Albanians, except attorneys, had been prevented from working in the judiciary during the Milosevic era and thus lacked experience and up-to-date knowledge of the law⁴⁰. Ten years of discrimination and institutionalised prejudice within the courts had "*generated disregard and disrespect for the judiciary among society as a whole*". After the collapse of the system a "*climate of revenge, general lawlessness, and impunity added to the challenge of establishing a fair and independent judiciary*". Moreover, "*the UN had never before had the responsibility for establishing a judicial system from scratch*".⁴¹

62. UNMIK has achieved that in Kosovo "*there is now a fully functioning court system complete with support staff, materials, and prosecutors and judges*"⁴². OMIK judged in October 2001 that "[t]he current system has been endowed with the necessary mechanisms to ensure an efficient case-flow management whilst, on the one hand, guaranteeing individuals due process and, on the other hand, holding the members of the judiciary accountable for their performance"⁴³.

63. Whilst progress has undeniably been made, shortcomings remain, however, with respect to vulnerability to ethnic and political bias, as well as to intimidation and political influence, slowness and a general shortage of judicial personnel. (Other problems, like interference by UNMIK and confusion about applicable laws are addressed elsewhere in this report: see Chapters III, 2, f and g).

64. UNMIK has made efforts to create a multi-ethnic judiciary. This is not an aim as such. It is a means considered to create the best conditions for having an impartial judiciary in which the communities may place trust. This is important, if one wants to avoid the recourse to private justice. Until recently, interference from Belgrade has hampered UNMIK's efforts in this field. Appointed ethnic Serbian judges and prosecutors did not take up their posts, because Belgrade appears to have threatened them with the withdrawal of their FRY pension rights if they accepted to work for UNMIK (see also above Chapter III, 2). The problem has been addressed

³⁹ Document CommDH(2002)9, 18 September 2002.

⁴⁰ The discrimination of ethnic Albanian resulted in a justice system where only 30 out of 756 judges and prosecutors were Albanian (ICG Balkans Report No. 134, *op. cit.*, p. 3).

⁴¹ ICG Balkans Report No. 134, *op. cit.*, p. 1.

⁴² ICG Balkans Report No. 125, *op. cit.*, page 9.

⁴³ OMIK, Department of Human Rights and Rule of Law, Kosovo: Review of the Criminal Justice System, 21 October 2001, p. 54.

by an agreement concluded between OMIK and Belgrade in July this year that will hopefully bring the number of Serbian judges and prosecutors who actually work from 4 to maybe 40, out of a total of more than 420 posts⁴⁴. The screening of candidates, as is done for ethnic Albanians, should avoid the recruitment of ethnic Serbian judges with records of politicised convictions against Albanians during the 1990s.

65. However, the main means for avoiding that bias and intimidation influence judicial decisions in sensitive cases, has been sought in the employment of well protected and well paid international judges and prosecutors, as well as in the establishment of international panels with an international prosecutor. These measures are not a panacea. It has been hard to find qualified practitioners, who are fluent in English, ready to live in Kosovo and who possess the requisite cultural sensitivity⁴⁵. Also, the relatively small number of internationals in the justice system has not reduced the risk of bias in minor cases and municipal courts⁴⁶. Moreover, the solution is not sustainable in the long run.

66. The fact that international judges can be appointed to sit on cases at any stage of the proceedings is problematic. There are UNMIK Department of Justice guidelines (which have never been officially publicised, it seems), but the decision is ultimately taken by the SRSG. It is arguable that this sort of permanent umbrella does not favour capacity building of the local judiciary, as they are not given the opportunity to take on sensitive and difficult cases to build their competence, prove their impartiality and, ultimately, gain respect.

67. Indeed, *"there is a tension between the immediate need to secure justice using international judges, prosecutors, and police and the effort to strengthen capacity to build a justice system for the future"*⁴⁷. Continued efforts in terms of training and support of the judiciary, coupled with administrative oversight, may slowly help find a way out of the dilemma.

68. Administrative oversight (which must not be used as an occasion to try to influence individual judicial decisions) has to monitor individual performance in terms of quantity and quality, leading to the sanctioning of individual members of the judiciary, whether nationals or internationals, were appropriate and with due respect for their right to defence. A delicate balance has to be struck between judicial independence and accountability. UNMIK is trying to address this problem through two mechanisms set up in mid-2001. The Judicial Investigation Unit (JIU) holds disciplinary hearings against Kosovan judges and prosecutors further to accusations that may be levied by the police, OMIK, other judges and prosecutors, defence counsel or citizens; it has taken disciplinary action in several cases. The Kosovo Judicial and Prosecutorial Council (KJPC), advises the SRSG on matters related to the appointment of judges, prosecutors and lay-judges and hears complaints that are handed over to it by the JIU. The composition and close relation to the SRSG of these oversight bodies has been criticised by OMIK⁴⁸, but UNMIK hopes that these mechanisms will respond to all kinds of accusations against judges and prosecutors.

⁴⁴ Presently, there are also 9 ethnic Bosnians, 7 ethnic Turks and 2 ethnic Roma working in the judiciary.

⁴⁵ As a result, the quality of those found has been qualified as "variable": ICG Balkans Report No.134, *op.cit.*, p. 4.

⁴⁶ As of June 2002, there were 14 international judges and 10 international prosecutors. The court system comprises a Supreme Court (14 judges), a Commercial Court (10 judges); 5 District Courts (43 judges), 22 Municipal Courts (131 judges) and 22 Municipal Courts of Minor Offences (107 judges); appeals from the latter are heard by the High Court of Minor Offences (ICG Balkans Report No. 134, *op.cit.*, p. 6).

⁴⁷ ICG Balkans Report No. 134, *op.cit.*, p. 2.

⁴⁸ OMIK Department of Human Rights and the Rule of Law, A Review of the Criminal Justice System, September 2001 to February 2002.

69. In any event, adequate salaries for all personnel, good working conditions, and sufficient protection, are needed to allow for recruiting and retaining qualified personnel in sufficient number. There are, at present, some 80 vacancies for the 420 posts for judges and prosecutors foreseen in the budget.

70. This shortfall, combined with the lack of efficiency and complications caused by translation, has caused an important backlog of cases. This, in turn, results in the prolongation of pre-trial detention (sometimes for more than a year) of many suspects – a serious breach of the fundamental rights of the accused.

f. Legal certainty

71. The law applicable in Kosovo is a complex and rapidly evolving mix of old law of the province of Kosovo prior to 22 March 1989 (see above, Background), UNMIK regulations (some of which have already been amended) and international human rights standards, whether universal or European. Those who have to be aware of the applicable law are not only judges, prosecutors, attorneys and police, but also civil administrators, politicians and the public at large. These persons work in Albanian, English or Serbian. Consequently, an early UNMIK decision provided that all UNMIK regulations should be published in English, Albanian and Serbian.

72. The situation poses three challenges in terms of legal certainty: the availability of texts, their translation, and their explanation. All three tasks have to be performed rapidly and continuously.

73. It seems that there are some shortcomings in the present situation. The office of the SRSG is said to have difficulties in promptly providing translations of new regulations and in distributing or otherwise publishing them. In the absence of a Constitutional Court, there is quite often confusion over the applicable law. As a result, judges and prosecutors (not to speak of others) are not always aware of the applicable law, and a number of them are not familiar with human rights law and its application.

74. Enhanced efforts appear necessary to constantly keep the members of the judicial professions as well as, ultimately, the public at large, informed in a timely and clear fashion of the law applicable in Kosovo, at any given moment of time. Legal certainty requires fast translation and diffusion of all legal texts (including the most significant case-law), as well as clear explanations and the offer of training to the members of the legal professions. It also requires that members of the legal professions in Kosovo make efforts themselves to get acquainted with developments of the law.

75. The SRSG's possibility at any time to annul or overturn legal acts performed by UNMIK or the PISG, or to set aside court decisions, generates further uncertainty over which legal rule is applicable and will be enforced, and which will not.

g. Relations between the executive and the judiciary

76. According to his interpretation of UNSCR 1244 and of the Constitutional Framework he has promulgated, the SRSG has granted himself the power to override valid judicial decisions.

77. The most serious cases are those where the SRSG has decided, by executive order, to maintain individuals in detention, despite formal judicial decisions, whether by Kosovan or international judges, ordering their release⁴⁹ (the present SRSG, in office since March 2002, has to be credited for never having resorted to extra-judicial detention).

78. Detention by decision of the SRSG is not formally authorised or foreseen in any legal instrument. It has been explained that the legal basis for his power is to be found in Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, dated 25 July 1999, the pertinent part of which reads: "*All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the SRSG*". A report by the Ombudsperson of Kosovo, partly based on applications lodged by individuals who had been detained, has concluded that "*the absence of judicial control over deprivations of liberty imposed under Executive Orders issued by the SRSG constitutes a violation of paras. 3 and 4 of Article 5 of the ECHR*"⁵⁰.

79. Some of the concerns reflected in the Ombudsperson's above mentioned report were apparently addressed in UNMIK Regulation 2001/18, dated 25 August 2001, on the Establishment of a Detention Review Commission (DRC) for Extra-judicial Detentions Based on Executive Orders. In another Special Report, the Ombudsperson concluded, that Regulation 2001/18 had not validly addressed his concerns, because the DRC, composed of three international members appointed by the Secretary General, could not be considered to be a court in the sense of para. 4 of Article 5 of the ECHR and that the procedures under which that Commission was to operate did not meet the requirements of that provision of the ECHR⁵¹.

80. The Ombudsperson has also documented a number of other cases, where the UNMIK administration simply refused to execute court decisions that it found inadequate.

81. Such disregard by the executive for court decisions flouts all accepted principles of the separation of powers and the rule of law. The time has perhaps come, therefore, to reconsider the continuing justification for interferences by the executive into the decisions of the judiciary - a functioning judiciary, albeit still quite far from perfect, now exists in Kosovo and its authority should be respected. Other mechanisms than executive orders might be used in order to avoid and, if necessary, review decisions by prosecutors and judges taken on grounds of partiality or corruption or which gravely jeopardise the efficient administration of justice.

⁴⁹ Cf. M.Nowicki, Presentation to the Rapporteur Group for Democratic Stability (GR-EDS) of the Committee of Ministers of the Council of Europe, 10 June 2002, p. 3, as well as the example given in BHHRG, Guantanamo Bay in the Balkans: The Rule of Law in Nato-administered Kosovo, www.bhhr.org/kosovo/kosovo2000-3, at page 10; the example also tends to show the interrelation between COMKFOR and the SRSG as concerns their power to detain. See also paras. 21 and 22 of the Special Report No. 4 by the Ombudsperson Institution in Kosovo, dated 12 September 2001.

⁵⁰ Ombudsperson Institution in Kosovo, Special Report No. 3 on The Conformity of Deprivations of Liberty Under 'Executive Orders' with Recognised International Standards, 29 June 2001, para. 25.

⁵¹ Ombudsperson Institution in Kosovo, Special Report No. 4, 12 September 2001, para. 26. Amnesty International concurred in criticising the DRC (Concerns in Europe, July-December 2001, page 83).

82. It is also worth noting that UNMIK regulates by administrative decisions (taken by all sorts of commissions) various matters that would normally require either legislative action or judicial decision. As there are no administrative courts, and regular courts consider that UNMIK enjoys immunity from legal process, the inhabitants of Kosovo are denied access to judicial remedies against these areas of the administration.

h. Civilian control over armed forces

83. UNSCR 1244 contains provisions on the respective competences of the international civil presence (UNMIK) and the international security presence (KFOR). Paragraph 9 contains a list of responsibilities of the international security presence in Kosovo, some of which are entrusted to it *"until the international civil presence can take responsibility for this task"* (Paragraph 9(d) and (e)). Paragraph 9 (f) provides that the security presence will *"[support], as appropriate, and [coordinate] closely with the work of the international civil presence"*. These provisions do not express the idea of control by the civilian presence over the security presence. Nor does the list of the responsibilities of the civilian presence (Paragraph 11) include oversight of and responsibility for what the security presence does (or fails to do). Also, Paragraph 6 of UNSCR 1244 is not entirely clear: The UNSC *"Requests the Secretary-General to appoint [...] a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate toward the same goals and in a mutually supportive manner"*. One does note, however, that the above-mentioned, diplomatically worded provisions are preceded by Paragraph 5 which reads: The UNSC *"Decides on the deployment in Kosovo, under UN auspices, of international civil and security presences [...]"* (emphasis added)⁵².

84. From what precedes, I draw the conclusion that the specific texts are not clear on the relationship between UNMIK and KFOR. They do not expressly set out that KFOR falls under UNMIK's or the SRSG's civilian control. But they do not expressly exclude such control, either. There are, indeed, a number of indications in the texts that the (whole) international administration of Kosovo occurs under the auspices of the UN, which means UN (UNMIK) precedence over NATO-led KFOR.

85. In spite of the uncertainty of the texts, it is my firm view that, in any event, the provisions on the respective competences of UNMIK and KFOR as contained in UNSCR 1244 (and in the Constitutional Framework) have to be interpreted in conformity with the essential requirement of democracy according to which the military is subject to civilian control.

86. It is obvious, however, that the relationship between KFOR and UNMIK does not fulfil this requirement. The existing good and close co-operation between KFOR and UNMIK does not amount to the required democratic control over the armed forces. If, as the Ombudsperson of Kosovo put it, *"UNMIK [...] is the surrogate state of Kosovo"*⁵³, then UNMIK must also exercise control over the armed forces of that "state" and, as a corollary, accept accountability for their actions.

⁵² See also the principle contained in point 3 of the paper presented in Belgrade on 2 June 1999, as appended in Annex 2 to UNSCR 1244.

⁵³ Presentation to the Rapporteur Group for Democratic Stability (GR-EDS) of the Committee of Ministers of the Council of Europe, 10 June 2002.

87. The lack of civilian control over the armed forces in Kosovo is particularly incongruous if one considers that the Parliamentary Assembly of the Council of Europe has requested from the FRY, as one of the conditions for its admission to the Organisation, the commitment "to enact legislation or, preferably, to include provisions in the Constitutional Charter to bring the army under civilian control"⁵⁴.

1. Arrest and extra-judicial detention by KFOR

88. In Kosovo, an individual can be arrested by either KFOR or UNMIK Police/KPS. The situation would appear to be such that KFOR needs to have this possibility, not only with respect to individuals who threaten its own security, but also those who pose a threat to the security and safety of others. One major argument would be that there is still an extraordinary number of weapons, including war weapons, in Kosovo. Thus, resorting to arrests in Kosovo is still often so risky that it needs the help of the military. Indeed, the tasks entrusted to KFOR under UNSCR 1244, seem to have as a logical corollary the power to arrest individuals, at least while in action.

89. The Commander of KFOR (COMKFOR) has, however, interpreted UNSCR 1244 as granting him the power to arrest and detain individuals without any involvement of the judiciary, and no external control⁵⁵. COMKFOR orders detention in cases where, in his opinion, public safety is threatened. He does not present evidence to a court showing that detention is necessary; detainees do not receive written documentation that establishes the precise legal grounds of their detention⁵⁶.

90. COMKFOR's interpretation relies on Paragraphs 7 and 9 of UNSCR 1244, under which UN member States and relevant international organisation are authorized "to establish the international security presence in Kosovo [...] with all necessary means to fulfil its responsibilities under paragraph 9", as well as Paragraph 9 (c) according to which the responsibilities of the security presence include "establishing a secure environment in which refugees and displaced persons can return home in safety, the international civil presence can operate, a transitional administration can be established, and humanitarian aid can be delivered" (emphases added).

91. This legal basis, the policy, the process and the conditions of detention by KFOR were kindly explained to us by the Legal Advisor of COMKFOR⁵⁷. The policy, as laid down in Section 4 of COMKFOR Directive 42 dated 9 October 2001, is to detain persons "in order to

⁵⁴ Paragraph 12 iii.a of Opinion No. 239 (2002), on the "Federal Republic of Yugoslavia's application for membership of the Council of Europe", 24 September 2002.

⁵⁵ Regular cooperation with the Ombudsperson, on the basis of an agreement that could be concluded by the latter according to Section 3.4 of the Ombudsperson's mandate (UNMIK Regulation 2000/38), has apparently been refused by COMKFOR. Certain organisations are from time to time invited to inspect the detention conditions, in line with Section 7 p of COMKFOR Directive 42, updated on 9 October 2001.

⁵⁶ COMKFOR Directive 42 underlines that "[i]t must be noted that this authority to detain is a military decision, not a judicial one" (Section 2 c.). The Directive also states: "No one shall be subjected to arbitrary detention" (Section 7). Amnesty International has, however, qualified KFOR detentions as "arbitrary", indicating that out of an estimated 1500 persons who went through KFOR detention in 2001, the majority were released without charge; only 10 men were convicted of weapons possession (Concerns in Europe, July-December 2001, page 83). The ground for their detention, as notified to detainees, is: "Resolution 1244". Upon release, detainees receive a certificate that indicates the time span of their detention, which enables them to explain their absence, for example, towards their employer.

⁵⁷ Powerpoint presentation made to my team on 3 August 2002.

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constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter" (emphasis added⁵⁸).

92. "Organized ethnic violence, organized violence [at the border with Macedonia], organized crime and corruption, inability of current Kosovo legal system to face these situations: threat to a safe and secure environment in Kosovo" were given to us as the reasons for present detention orders⁵⁹.

93. It has been underlined to us that the general policy was to release at the earliest possible opportunity, to afford respectful treatment and compliance with all relevant international human rights standards and to grant transparency without compromising operational security. These principles are laid down in Directive 42.

94. As to the practicalities, extra-judicial detention by KFOR is basically a decision to keep in detention persons arrested, instead of setting them free or handing them over to UNMIK. After an initial restraint of a maximum of 18 hours by decision of the KFOR on-site commander, Multi-National Brigade (MNB) Commanders may continue to detain (in an MNB detention facility⁶⁰) the individual for no more than 72 additional hours (in exceptional cases they can apply for another 72 hours "in order to gather intelligence of evidence on the detainee"). Further detention can only be ordered by COMKFOR himself, for detention periods of up to 30 day, renewable, with no time limits for the total length of detention⁶¹.

95. Between June 2001 and June 2002 KFOR has held, on any given day, up to some 140 detainees in the American KFOR facility at Bondsteel, figures having dropped to 20 or less since December 2001. On the day on which my team visited Bondsteel, there were 13 KFOR detainees there.

96. When asked what the average as well as the maximum periods of detention (for KFOR detainees) at Bondsteel were, we were told that no statistics existed on these data. This rather surprising fact stands in contrast with practices in the civilian prisons run by UNMIK.

97. It must be recalled that, pursuant to international human rights standards, deprivation of the right to liberty may only occur for a limited series of reasons and in accordance with a procedure provided for by law. Moreover, persons arrested and detainees have a number of specific fundamental rights (see, for instance Article 5 of the ECHR). Persons detained must be informed in detail of the reasons of their detention (Article 5 par. 2 ECHR); they must be able to appeal to a judge challenging the legality of their detention, have their case dealt with speedily by a court and be released if their detention is not lawful (*habeas corpus*, Article 5 par. 4); they must also be compensated if illegally detained (Article 5, par. 5). In addition, persons who may be detained on reasonable suspicion that they have committed an offence (pre-trial detainees) must be brought promptly before a judge and shall be entitled to trial within a reasonable time or to be released pending trial.

⁵⁸ This sentence clearly shows that in the spirit of KFOR it is not the civilian, executive branch of the international presence who controls KFOR, but, to the contrary, it is KFOR who controls the executive.

⁵⁹ Powerpoint presentation made to my team on 3 August 2002.

⁶⁰ I am not aware of any visits by human rights observers to MNB detention facilities.

⁶¹ For the precise process, see the chapters « Process of Detention » and « Extending Existing COMKFOR Detentions » in COMKFOR Directive 42.

98. It is quite obvious that the system of extra-judicial detentions by KFOR as described above does not comply with the above mentioned guarantees: The legal basis for the KFOR power to detain individuals, namely the very general wording in Paragraphs 7 and 9 of UNSCR 1244, manifestly lacks the required precision, whereas norms restricting fundamental freedoms must be specific and precise. Furthermore, it is unclear whether persons arrested in accordance with Directive 42 are reasonably suspected of having committed an offence or whether they are detained for other reasons. In any case, there appears to be no judicial authority whatsoever to control the legality of their arrest and detention and to order their release in the event of the detention's being unlawful. To sum up, UNSCR 1244, as interpreted by KFOR, allows for a prolonged or even potentially indefinite detention of individuals who are thought to constitute a threat to the "safe and secure environment", without any judicial control as to the legality of their arrest, without any remedy against unlawful detention and with no obligation to bring them to trial if suspected of having committed a criminal offence.

99. It is true that in case of war or other emergency fundamental guarantees can be restricted. Indeed, detentions without judicial control might be envisaged in a war-like emergency situation, where there is no judiciary available.

100. However, after more than three years of international administration, such a situation happily no longer exists in Kosovo. KFOR itself indicates that the security situation is under control, except in very few places of the territory⁶². UNMIK underlines that important progress has been made under its rule over Kosovo over the past three years, as concerns police and the administration of justice.

101. COMKFOR accepts that progress has been made, but insists that his special powers to arrest and detain remain necessary⁶³. Whilst KFOR may, indeed, still need to be able to arrest and, perhaps even detain, individuals in order to fulfil its mandate, such powers must be specifically provided for in a normative instrument setting out at least the precise conditions for the exercise of these powers, the maximum time-limit of the detention, the independent authority that will hear appeals or other judicial remedies available to the persons arrested to challenge the legality of their deprivation of liberty.

102. It might also be added that the continuing practice of extra-judicial arrests and detentions undermines the long-term aim of developing of an effective independent judiciary in Kosovo.

⁶² For example, the commander of the US KFOR forces told us on 3 August 2002 that not one single shot had been fired by his soldiers or against his soldiers over the last 6 months. Also, we were told that the Klokot bombing incident of 31 July 2002, was "the single most violent incident we had here [in the American Sector] for the last two years". Two American KFOR soldiers were injured (cf. OMIK Weekly Report No. 31: 24-30 July 2002, p. 3).

⁶³ This continues to be COMKFOR's view of the current situation. Indeed, Directive 42 reads, in its chapter entitled "Background": "When UNSCR 1244 was passed [...] in June 1999, civil authority in Kosovo did not exist. There was no legitimate criminal justice system, no law enforcement authority, and no judicial or penitentiary systems. COMKFOR's authority to detain was essential to him to accomplish his military mission of establishing and maintaining as safe and secure environment; [Now] a civilian criminal justice system has begun to take shape in Kosovo. The stronger this system becomes, the less important COMKFOR's authority to detain under UNSCR 1244 will be [...]. Today, the civilian criminal justice system is capable of dealing with some cases that two years ago would have resulted in COMKFOR detentions. This system is not mature enough yet, however, to deal with every individual that constitutes a threat to KFOR or the safe and secure environment of Kosovo. I will continue to use the authority to detain but only in cases where it is absolutely necessary" (Section 2, b to e).

103. Finally, it should be noted that the treatment afforded to detainees held in KFOR facilities should correspond to the highest human rights standards. The KFOR detention facilities I visited in Bondsteel appeared, in this respect, quite satisfactory, although the impressive security machinery could well, in cases of prolonged detention, have considerable impact on the psychological well being of the detainees. I would stress in this respect that the possibility should be given to authorised human rights observers (such as OSCE personnel and some NGOs) to monitor the conditions of detention, as foreseen in COMKFOR Directive 42, Article 7.

j. Conditions of detention in UNMIK facilities

104. My team and I have visited two out of the seven detention facilities run by UNMIK in Kosovo. Our visits, which were hosted in an open, cooperative, manner, did not amount to full-fledged inspections⁶⁴. This is why I will limit myself to making only a few remarks on salient impressions, without claiming to be exhaustive. I wish to add that it seems that, in spite of problems that still remain to be resolved, UNMIK has brought tremendous progress to the Kosovo prison system, as compared with the situation it found when it came.

105. At the Pristina Detention Centre, the main problems we saw were: Total lack of sports facilities (indeed, there are only two walking areas, which are far too small for prisoners serving long sentences), the lack of significant recreation and rehabilitation activities, as well as the fact that there was no separation of remand prisoners from sentenced prisoners. The cells we saw had almost no daylight coming in and seemed to be poorly ventilated. Also, the Centre does not have an open-type part, which, in the light of regional habits, represents an especially severe form of detention.

106. During our own visit to Dubrava, by far the biggest prison in Kosovo, we were impressed by the resoluteness with which shortcomings that still existed at the end of last year, have since been addressed. To give just two examples: where one physician was available only 3 hours per day for some 500 inmates, there is now a small basic hospital with the necessary medical staff and offering basic dental treatment. Secondly, a vocational training programme is being set up with Swiss help, in order to use land that surrounds the prison for teaching farming to inmates with the help of an agricultural engineer ... and to save money to be reinvested elsewhere by supplying foodstuffs for the prison.

107. To sum up, the reports of qualified observers show that detention conditions have enormously improved in the (UNMIK-run) prisons in Kosovo. It seems desirable that conditions of detention continue to be improved and fully monitored at all times by the Ombudsperson's office and the OSCE. There might, where appropriate, be room for greater cooperation with relevant international or national NGO's and consideration might be given to incorporating the expertise of the European Committee for the Prevention of Torture (CPT) in the improvement of prison conditions. Certainly, special attention should be given to measures emphasising the presumption of innocence of persons in pre-trial detention, as well as to the detention conditions of juveniles and women. Also, one would like to see adequate recreational activities as well as professional training offered to detainees. Solutions might be found in order to detain ethnic Serbs in locations not too far from their families.

⁶⁴ For a wider and more systematic overview, see the report of visits conducted in November 2001 to four facilities (not including the Pristina Detention Center which we visited): Finnish Human Rights Project, Report, NGO Prison Monitoring Mission, November 19-24, 2001, Kosovo.

k. Internment of mentally handicapped persons

108. A recent report by a specialised non-governmental organisation⁶⁵ has drawn the attention to the conditions of mentally handicapped persons placed in institutions. It appears from the report that the applicable law and regulations regarding decisions on, control over and conditions of the internment of persons who are (supposed to be) mentally handicapped would deserve urgent review. Whilst I do not have first hand experience of this issue, OMIK has confirmed that it is aware of the situation and assured me of its desire to see the situation improved.

l. Establishing and securing property rights

109. There is a profound housing problem in Kosovo. Several factors explain the situation. An estimated 100,000 housing units (almost half of the stock) were destroyed during the conflict, plus many more since then. Partly as a result of such destructions and of the departure of many inhabitants of Kosovo, unlawful occupations, by all kinds of persons ranging from IIDs (see below) to international personnel unaware of the identity of the real owners, have occurred in large numbers.

110. Indeed, the establishment of property rights over real estate is highly problematic in Kosovo. In 1990, the Serbian authorities restricted the autonomy of Kosovo and adopted so-called "provisional measures". This led to a general strike by the ethnic Albanians, many of whom were subsequently dismissed from their jobs and lost the apartments that had been allocated to them by their employers. Their apartments were reallocated to Serbian employees and later privatised and bought by these or other Serbs. In addition, in 1991, the Serbian Parliament enacted legislation that restricted the sale of property between ethnic groups. However, sales continued to take place through informal contracts, which were not recorded by a court official, as required by Yugoslav law, and therefore could not be registered in the cadastre records. To complicate things further, documents have been destroyed or removed from Kosovo. As a consequence, there are many contradictory claims pertaining to property in Kosovo. Also, property transactions go on, including sales from Serbs to Albanians, often rapidly and quite informally, without adequate documentation. Which means that future problems are still being created.

111. At the end of 1999, UNMIK set up the Housing and Property Directorate (HPD, run by UN- HABITAT) and a Housing and Property Claims Commission (HPCC) as an interim measure to clarify and restore property rights and resolve long-standing claims⁶⁶. Both institutions have broadly defined functions⁶⁷, that are bound to be progressively handed over to local authorities. For the time being they have "exclusive jurisdiction to receive and settle" three specific categories of claims involving residential property disputes in Kosovo⁶⁸. These are claims by individuals who lost property as a result of discriminatory laws of the Milosevic

⁶⁵ Mental Disability Rights International, Report : Not on the Agenda: Human Rights of People with Mental Disabilities in Kosovo.

⁶⁶ UNMIK Regulation 1999/23, 15 November 1999.

⁶⁷ HPD is also in charge of, inter alia, the organisation of evictions in execution of its own eviction orders, the administration (and rental) of vacant and abandoned property, the provision of guidance on property and housing issues to UNMIK and other international actors, etc.

⁶⁸ Periodic Report April-June 2002, HPD, p. 8.

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era ("Category A Claims"), claims by individuals who entered into informal transactions on the basis of free will of the parties during that era and until October 1999 ("Category B") as well as claims by refugees and IDPs who have lost possession of their property after 24 March 1999, as a result of the conflict ("Category C").

112. However, due to the absence of rules of procedure for a long period, the fact that the applicable law on property has still not been officially compiled and published and an authoritative interpretation of it been made⁶⁹, and also due to its blatant lack of resources, the HPD has never fully functioned since its establishment three years ago. A Contingency Plan adopted by HPD's management in November 2001, in reaction to dwindling resources, even foresaw that the institution would gradually close down programmes and cease all activities by the summer of the current year⁷⁰.

113. This situation undermines both the respect for the right to the enjoyment of private property, and the international presence's declared ambitions with respect to return (see below, Chapter IV).

114. The Government of Serbia is of the view that the unresolved property issue is an "enormous problem for all those who left their homes"⁷¹. It "insist[s] on repossession of movables and real estate [which] the IDPs left behind. Where this is not possible, adequate compensation must be ensured"⁷². OMIK underlines that the success of HPD in fulfilling its mandate is essential to the return and reintegration process for Kosovo's minorities⁷³.

115. These assessments were confirmed by the results of HPD's claims intake until June 2002. With offices opened also in Serbia proper and Montenegro (and one to come, in "the Former Yugoslav Republic of Macedonia") HPD has collected some 5,000 additional claims in April and June 2002, bringing the total of claims to some 17,785 – 95 % of which are C Claims concerning loss of property by Serbs and Roma having left Kosovo⁷⁴.

116. As the deadline for submitting claims to the HPD has been set for 1 December 2002, and HPD is pursuing an active campaign for claims intake until then, the likely final caseload of claims will be out of all proportion to the means available to the HPD. Considering that up to 23 June 2002, the HPD and HPCC had resolved only 644 claims altogether, and these the least complicated, several decades seem to be necessary in order to cope with the present workload, with the present means. This has given rise to anger on the side of the Serbs and worry on the side of the internationals whom we met.

117. In 2002, the HPD has so far operated with approximately 30 % of the budget it estimates is required to carry out its functions; 2,4 million USD are needed for the remainder of the year⁷⁵, more than 8 million to finish its caseload.

118. In order to establish and secure people's property rights in Kosovo, to facilitate return of minority members to their lawfully owned property, to improve the housing situation in general

⁶⁹ Property Rights in Kosovo (January 2002), OMIK, Department of Human Rights and the Rule of Law, p. 6.

⁷⁰ *Ibid*, p. 6.

⁷¹ Government of the Republic of Serbia, National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, p. 9.

⁷² *Ibid*, p.10.

⁷³ Property Rights in Kosovo (January 2002), OMIK, Department of Human Rights and the Rule of Law, p. 7.

⁷⁴ Periodic Report April-June 2002, HPD, p. 2.

⁷⁵ *Ibid*, p. 6.

and to allow for investment in Kosovo, it is indispensable that the HPD and the HPCC be put in a position to cope within a reasonable time with the case-load of claims, without concession to the quality of their decisions⁷⁶.

119. The requirement of claims to be resolved speedily, should not lead to breaches of due process rights. Judicial appeal of decisions taken by non-judicial bodies should be possible.

m. Respect of property rights by the international presences

120. The international presences in Kosovo have inevitably appropriated buildings and land. It is, also, unavoidable that they or their personnel acting in official capacity occasionally cause injury to locals.

121. It seems logical that the use of state or other public property by the international surrogate state and its emanations, does not give rise to payment. The same applies to possible damage done to state property by the surrogate state.⁷⁷

122. However, the situation with respect to private property is different. There is no reason why the surrogate State should not have to respect private property rights, like any normal State has to. This entails, inter alia, that the use of buildings or land should give rise either to a formal expropriation together with an appropriate indemnification, or to the execution of a lease and the payment of an adequate rent. Various problems arise in Kosovo with respect to this issue.

123. Perhaps the major problem concerns property used or damage caused by KFOR. While, pursuant to UNSCR 1244, there has to be a unified command and control of KFOR⁷⁸, as was established in the form of COMKFOR, the fact is that COMKFOR does not respond to any claims against its components (the MNB, including the national components). Nor has it issued instructions to the MNB on this matter. Bearing in mind KFOR's total immunity and the corresponding absence of any courts that would hear claims against KFOR, everything depends on the good will of each component.

124. According to information received, practices vary a lot between components. In most cases some rent is paid for buildings and flats, but often not for the land used. I have, however, no indication of the adequacy of sums paid.

125. UNMIK and COMKFOR, as well as some national KFOR components, have set up claims commissions to deal with both claims pertaining to the use of property and injury suffered. Most of these commissions have been established only recently. Little information seems available on the procedures used, the standards applied, the sums awarded by these commissions and the swiftness of payment made.

126. The right of every natural and legal person to the peaceful enjoyment of his/her property being a recognized human right (see Article 1 of Protocol 1 to the ECHR), I can only underline

⁷⁶ This is also one of the main recommendations made by OMIK (Property Rights in Kosovo (January 2002), OMIK, Department of Human Rights and the Rule of Law, pages 7 and 35).

⁷⁷ The Government of Serbia, however, is of the opinion that "state property and the property of other institutions has not been protected against illegal usurpation" (Government of the Republic of Serbia, National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, p. 9).

⁷⁸ UNSCR 1244, Annex 2, Section 4: "The international security presence [...] must be deployed under unified command and control [...]".

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that UNMIK, COMKFOR and all the components of KFOR, as well as all international personnel have an obligation to respect the property rights of all owners of private property in Kosovo, whether these dwell inside or outside Kosovo. In particular, adequate leases should be paid for buildings and land used, just as damage done has to give rise to adequate and swift reparation.

n. Access to employment and services

127. Many reports have reached me of alleged discrimination of local⁷⁹ minorities, especially as regards access to employment, health and other social services, schools, etc. Also, I have witnessed that public utilities are sometimes not supplied or insufficiently supplied to the minority populations, especially to ethnic Roma, Egyptian or Ashkalie.

128. Anti-discrimination legislation is currently being drafted by OMIK. In order to effect to such rights, recruitment procedures could be monitored (and adjusted where necessary), adequate mechanisms for receiving complaints set up, sufficiently frequent and efficient enquiries undertaken and deterrent sanctions be imposed in case of violation. Administrations on all levels could be asked to see to it that all communities benefit of the same public utilities (especially water, electricity, sewage system and roads) and services (especially schools, health and social services, transportation, garbage collection) as the ethnic majority.

o. Monitoring the respect of human rights

129. There have been complaints by both OMIK and the Ombudsperson, that UNMIK regulations entrusting them with the monitoring of UNMIK's abidance by human rights standards are not always respected by UNMIK. In particular, the Ombudsperson of Kosovo has complained about the refusal to permit him to enter the prison of Dubrava to meet with detainees on hunger strike, while OMIK states that its human rights Officers "*are regularly refused to access to court*" for monitoring purposes. OMIK's remark that its Department of Rule of Law/Human Rights "*continues to encounter problems with implementing its mandate within UNMIK Pillars*", that "*despite these practical challenges, there are a number of encouraging signs*", that "*recommendations put forth in OMIK's reports are now generally welcomed by those who are subjected to constructive criticism*" and that "*some of these recommendations have, indeed, been implemented*"⁸⁰ give rise to concern over UNMIK's general attitude towards criticism over the last three years.

130. In line with my observations on the accountability for actions and omissions by KFOR, I consider it inappropriate that the Ombudsperson for Kosovo "*does not have the authority to address KFOR*" regarding the detention of persons⁸¹. Although KFOR was not directly

⁷⁹ The notion of minority changes depending on the place. While in most parts of Kosovo, ethnic Serbs and Roma form the minority, ethnic Albanians are the minority population in North Mitrovica and in some mixed localities. Roma, unfortunately, share the fate of the minority populations everywhere.

⁸⁰ OMIK Quarterly Trends Reports No.2 : 1 April - 30 June 2002, p. 8 (emphasis added).

⁸¹ Presentation to the Rapporteur Group for Democratic Stability (GR-EDS) of the Committee of Ministers of the Council of Europe, 10 June 2002. This lacuna of the Ombudsperson's mandate has been criticised from the outset by, inter alia, Mr. Jiri Dienstbier (see below), the IHF (Human Rights in the OSCE Region: The Balkans, the Caucasus, Europe, Central Asia and North America, Report 2002, Yugoslavia, Kosovo), etc.. - I also take note that the NGO report on prisons in Kosovo did not cover the KFOR facility at Bondsteel (Finnish Human Rights Project, *op.cit.*, p. 4).

included⁸² under the Ombudsperson's jurisdiction I feel, like Jiri Dienstbier, the Special Rapporteur of the UN Commission on Human Rights⁸³, that COMKFOR should agree to provide full cooperation to the Ombudsperson.

131. It would be desirable that UNMIK (including KFOR) and the PISG make sure that they are always open to constructive criticism, including in sensitive areas, coming both from both mandated and non-mandated observers. Mandates of human rights monitors need to be respected at all times. Issues criticised need to be seriously examined and shortcomings addressed within a reasonable time. In this context, I commend OMIK for the objectivity and clarity of their reports on human rights problems of the UNMIK administration, of which they are a constituent element. I also warmly welcome and place much hope in the setting up, by the SRSG, of the Human Rights Oversight Committee that, inter alia, opens the possibility for OMIK and others to comment on the human rights aspects of draft regulations. I was also glad to see that the Ombudsperson's latest report was displayed at the entrances of many UNMIK facilities in Pristina, notwithstanding the criticism it contains of UNMIK. It grieved me, though, to read that many of the Ombudsperson's reports and recommendations to UNMIK have elicited no response whatsoever⁸⁴.

p. Places of worship and cemeteries

132. The fury of destruction has not halted before places of worship and cemeteries in Kosovo⁸⁵. While some mosques are being repaired and quite a number of new ones have been and are being built, mostly with the help of Islamic countries, orthodox churches and cemeteries of ethnic Serbs are either totally destroyed or severely damaged and I have not seen reconstruction work underway. In addition, many of the orthodox churches that could be used, are simply closed in order to protect them. It seems to me highly desirable to set signals by starting reconstruction and repair of orthodox churches and cemeteries and by trying to protect those that have not been destroyed in a manner which allows worshippers to enter them, especially in the very centres of the cities.

133. I noted that, for the CCK, the "protection of cultural heritage" (which, in CCK publications, comprises most of all churches and cemeteries) is listed as the second criterion for returns, after security, but before property rights⁸⁶.

⁸² UNMIK Regulation 2000/38 on the Office of the Ombudsperson reads: "In order to deal with cases involving the international security presence, the Ombudsperson may enter into any agreement with [COMKFOR]" (Article 3.4)

⁸³ Cf. Situation of human rights in Bosnia and Herzegovina, the Republic of Croatia and FRY, UN doc. A/55/282-S/2000/788 of 9 August 2000, at pages 17 and 20.

⁸⁴ Ombudsperson Institution in Kosovo, Second Annual Report 2001-2002, 10 July 2002, pages 22-53.

⁸⁵ "[S]ince the deployment of KFOR and UNMIK in Kosovo and Metohija a large number of cultural monuments were mined and destroyed adding more pressure on the Serbs to give up on return" (Government of the Republic of Serbia, National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, p. 9). For a detailed stock taking of the damage done, see: Report on the Destructions of Cultural Heritage in Kosovo and Metohija, CCK, Belgrade, April 2002.

⁸⁶ Principles of Program of Returns of IDPs from Kosovo and Metohia, CCK, Belgrade, April 2002, p. 29.

IV. The fate of persons displaced from their homes in Kosovo

134. A number of reports have been presented on the problems posed by the persons displaced from Kosovo, on the difficulties they face and the options open to them, as well as on the issue of the return of those of them who still live out of Kosovo. I do not wish to repeat their content, but prefer rather to concentrate on the salient features of the situation. I might add that my Office and I have extensively investigated into the situation ourselves. What follows is based, therefore, not only on existing documents but also very much on direct recent contact with politicians, officials, agencies, as well as numerous IDPs and refugees themselves (see Appendix C).

1. Displacements of populations from Kosovo: a short overview

135. This report relates to the following movements of persons from (i.e. out of and within) Kosovo:

136. Until the arrival of KFOR in mid-June 1999, some 850,000 mostly Albanian Kosovans were pushed out of Kosovo, terrorised by Serb and Yugoslav military, paramilitary and police forces⁸⁷. Their flight became significant as of 1998, when the intensification of KLA armed activities triggered increased repression by Serbian forces. It turned into a mass exodus during the NATO air campaign from March to June 1999. Between 350 and 400,000 ethnic Albanian Kosovans fled to Albania, some 120,000 to Montenegro and approximately 360,000 to "the Former Yugoslav Republic of Macedonia". When the Macedonian Government closed down the border to Kosovo, Western European countries (mainly Switzerland, Germany and the Scandinavian countries) and the USA agreed to fly some 90,000 displaced persons out of Skopje⁸⁸.

137. Virtually all these people returned to Kosovo in the months that followed the arrival of KFOR and the departure of the Serbian forces, except those who had gone to Western Europe and the USA. The latter are now being invited by financial incentives of their host countries to return to Kosovo, or are simply being sent back (see below Chapter IV, 9 of this report). However, an estimated 70-80,000 of them still remain abroad.

138. When the Albanian Kosovans returned, they found that most of their houses and properties had been looted, heavily damaged or completely destroyed⁸⁹ in their absence, and that some 200,000-280,000 Kosovans, mostly ethnic Serbs and Roma, Egyptian and Ashkalie, had left the country at the same time as the Yugoslav and Serb forces (approximately 170,000

⁸⁷ UNHCR figures referred to in ICG, Balkans Report N° 134, *op. cit.*, p. 16. Altogether, "[f]rom March to June 1999, ninety percent of Kosovo Albanians were displaced from their homes [...]" (*ibid*).

⁸⁸ This move was brokered by the government of "the Former Yugoslav Republic of Macedonia", which had closed its border with Kosovo on several occasions.

⁸⁹ "Approximately forty percent of civilian houses were heavily damaged or completely destroyed." (ICG, Balkans Report N° 134, *op. cit.*, p. 17 – these forty percent seem to relate to all houses, Albanian Serbian or other). In vast parts of Kosovo, the wave of destruction hit 75-100 % of Albanian property (see Kosovo Atlas, published by the Humanitarian Community Information Centre, UNHCR and OCHA, Pristina, February 2000, p. V).

Serbian and Roma Kosovans as well as other members of non-Albanian communities stayed⁹⁰); several thousand went to "the Former Yugoslav Republic of Macedonia", some 200,000 to Serbia, and another approximately 30,000 to Montenegro⁹¹. In fact, on the roads between Kosovo and Montenegro, the columns of returning Albanians literally crossed those of fleeing Serbs, Roma, Egyptians and Ashkalies apparently without incident. Only very few of the persons displaced in that second wave have since returned to Kosovo.

139. The returnees and/or radical KLA elements, in turn, looted and destroyed the property of their former Serb and Roma neighbours⁹² and resorted to violence (including killings and abductions) against remaining Serbs and Roma, in spite of KFOR's presence (see also Chapter III, 3, c of this report). This is why Serb, Roma, Egyptian and Ashkalie Kosovans have continued to leave Kosovo since the arrival of KFOR and UNMIK. It seems that until recently they even outnumbered returnees⁹³.

140. There is also still an important number (22,500 persons according to UNHCR⁹⁴) of Albanian, Serb or Roma Kosovans, who have found shelter in other places within Kosovo and cannot, as of yet, return to their homes (the so-called "internally internally displaced persons", or "IIDPs").

141. This report does not deal with IDPs and refugees of the ethnic Albanian minorities of South-East Serbia and "the Former Yugoslav Republic of Macedonia" who have fled recent armed conflicts there and quite a number of whom are still in Kosovo today.⁹⁵

142. With respect to the notion of "minority", it has to be borne in mind that in Kosovo all communities form the majority populations in some places, whilst constituting the minority in

⁹⁰ Government of the Republic of Serbia, National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, p. 9. HPD says there are still 45,000 Serbs and 80,000 members of other minorities in Kosovo, totalling 125,000 persons (Periodic Report April-June 2002, HPD, p. 7).

⁹¹ The UNHCR figure of 231,100 IDPs in the FRY as of February 2002 (UNHCR, UNHCR Position on the Continued Protection Needs of Individuals from Kosovo, April 2002, para. 27) may underestimate the reality. The Serbian Government figures for registered IDPs put the number at 212,700 IDPs in Serbia proper and 29,500 in Montenegro (CCK, Principles of Program of Returns of IDPs from Kosovo and Metohia, p. 3). The difficulty in arriving at precise figures results from the fact that a number IDPs have entered the FRY, without ever having asked for IDP cards or registered with the authorities or the international agencies in any way. The Serbian Government states that "it has been estimated that there are nearly 50,000 IDPs living in Serbia and Montenegro, who have not been officially registered" and who would thus have to be added to the above numbers (CCK, Principles of Program of Returns of IDPs from Kosovo and Metohia, p. 3). Indeed, UNHCR emphasises that in the absence of a complete registration process upon departure from Kosovo, numbers remain estimates. The same applies to the numbers of returnees. Only those who are assisted are properly counted, while many spontaneous returns go unregistered. This is particularly the case for Roma, who move quite easily and can count on the solidarity of their community to quietly shelter them upon return.

⁹² Curiously, I have not found data on these destructions.

⁹³ According to information provided by UNHCR (OCM Pristina), there were 1462 returns in the first 6 months of 2002, as opposed to 313 departures. The total figure of returns from 2000 to 2002 given in this document is 4793, whereas more than 10,000 newly displaced non-Albanians have registered with the authorities in Serbia between 2000 and March 2002 (UNHCR's Activities in Kosovo, Humanitarian Issues Working Group, Geneva, HIWG/02/2, 1 June 2002, note 1 on p. 3).

⁹⁴ See: Estimate of Refugees and Displaced Persons Still Seeking Solutions in South-Eastern Europe, Update to reflect the situation as of 30 April 2002. Among these, more than 12,000 Albanians left North Mitrovica, while 2000 Serbs there had to leave the southern part (Agron Shala, Koexistenz im Kosovo: der Versuch, Öl und Wasser zu vermischen (translation: Co-existence in Kosovo: The Attempt to Blend Oil and Water), SOE-Monitor, Task Force Südosteuropa, Centre for European Integration Studies, University of Bonn, Juli 2002, p. 5).

⁹⁵ 81,000 ethnic Albanians fled from armed conflict in "the Former Yugoslav Republic of Macedonia" in 2001, 5000 of them still benefit of temporary protection in Kosovo. Also, some 10,000 ethnic Albanians from southern Serbia still seem to be there (Humanitarian Issues Working Group, HIWG/02/2, 1 June 2002, para. 7).

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others. On a Kosovo-wide scale, the ethnic Albanians are the majority and ethnic Serbs, Roma, Ashkalies, Egyptians, Bosniaks, Gorani, Turks, etc. constitute minorities. Unless otherwise specified, the term "minority" means non-ethnic Albanian in this report.

2. The need for realism

143. The issue regarding the fate of persons displaced from their homes in Kosovo is inextricable. It involves, among others, questions of rights, obligations and values but also of human, political, financial and military feasibility. No single solution is capable of satisfying all these imperatives. Any solutions found, indeed, any action taken, will bear elements of hardship and injustice. A realistic attitude is required from all sides, as well as the acceptance of compromise.⁹⁶

144. I observe that the various actors operate under various constraints and with various interests.

145. There are, first of all, the IDPs themselves. A significant number of them are desperate to return to Kosovo, most of all those who have not been able to secure decent living conditions in Montenegro or Serbia (for the assessment of their numbers, see below Chapter IV, 4 "(Measuring) the wish to return"). They exercise political pressure on their authorities to insist on appropriate conditions for return to be created in Kosovo. On several occasions this year, there have been attempts to organise a mass march to the Kosovan border.

146. The FRY, Serbian and Montenegrin authorities find themselves in a very difficult economic situation, following the wars in the former republics and in Kosovo, and due to the effects of international sanctions. There is high unemployment, not enough sustainable economic activity, little investment etc. The 230,000 IDPs from Kosovo, added to the 377,000 "registered refugees" and the 75,000 "war affected persons"⁹⁷ who live in Serbia today⁹⁸, constitute a particular burden for the economy, as these individual have most of the time come with no or very little belongings. Very many of them are in need of assistance. In such a situation it would seem understandable that the FRY, Serbia and Montenegro are interested in the rapid return to Kosovo of as many IDPs as possible⁹⁹.

147. In addition, there are parts of the population who still do not accept the withdrawal of Serbian power from Kosovo. These people expect that the FRY and Serbian Governments insist upon the rapid return of all or most of those who had to leave the province.

148. The international community at first envisaged the return of all IDPs to Kosovo, as is evident from the wording of UNSCR 1244¹⁰⁰. Indeed, having intervened in Kosovo in order to prevent the Serbs from conducting an "ethnic cleansing" of ethnic Albanians, the international community felt and still feels that it must be equally firm with those Albanian Kosovans who,

⁹⁶ For an original and frank discussion of the issues at hand, see the paper written by "an anonymous high-ranking international official in South-East Europe" in *Southeast European Politics*, May 2001, Vol. 2, No. 1, pp. 59-67.

⁹⁷ Former members of the Yugoslav National Army and government employees deployed in the former Yugoslav republics who fled these territories in 1991, all citizens of the FRY.

⁹⁸ Government of the Republic of Serbia, *National Strategy for Resolving the Problems of refugees and IDPs*, 30 May 2002, p. 4. See also: UNHCR/Commissioner for Refugees of the Republic of Serbia/ECHO, *Refugee Registration in Serbia 2001*, p. 6.

⁹⁹ "It is necessary to ensure a mass return of Serbs and other non-Albanians" (Statement by Dr. Covic before the UN Security Council, New York, 17 September 2001, p. 10).

¹⁰⁰ UNSCR 1244 : Preamble, Paragraph 11 (k), Annex 1, Annex 2 items 4 and 7.

in turn, might wish to keep ethnic Serbs out of Kosovo today. Emphasis is placed, therefore, on the creation of a multi-ethnic society and respect for the human rights of the other: *"returns and integration are key mid-term priorities for UNMIK", "at the heart of the Kosovo political agenda"*¹⁰¹.

149. A realistic approach to this agenda will nonetheless show that, although *"all refugees and displaced persons from Kosovo shall have the right to return"*¹⁰², some of them – perhaps many of them – may not wish to return (see Chapter IV, 3: "(Measuring) the wish to return", and Chapter IV, 7: "Conditions for return").

150. Realism is also needed with respect to the pace and, thus, the time frame of returns, as will be further explained in Chapter IV, 7 ("Conditions for return"). It cannot be ignored that the recent experiences of all communities are still very much fresh in the minds of those that endured them. Regardless of the efforts of the international community, it will necessarily take time for Kosovans to be able to meet again, without hatred, fear and suspicion.

151. For the time being, most returns have been spontaneous, and the very small number of organised returns (300 individuals¹⁰³), which started only in August 2001, was organised by UNHCR *"through a painstaking and resource-intensive process to ensure a least the minimum conditions of safety and sustainability"*¹⁰⁴, with sometimes disappointing results¹⁰⁵.

152. Having regard to the many interests and factors at stake, it is, however, important to recall that the problem of the persons displaced out of Kosovo must be treated first and foremost as an issue affecting a quarter of million individuals. Human beings who have lost everything, who require assistance and whose rights and choices must be respected.

3. The right to return and the overriding principle of free choice

153. Indeed, the right of IDPs and refugees to return is grounded in international law instruments, such as in Article 13 (2) of the Universal Declaration of Human Rights, Article 12 (2) and (4) of the International Covenant on Civil and Political Rights, and Article 5 (d)(ii) of the International Convention on the Elimination of all Forms of Racial Discrimination, Articles 8 of the ECHR and 1 of Protocol No 1 to the ECHR (see Eur.Court HR, judgment in the case of *Loizidou v. Turkey*). Protocol 4 Article 2 of ECHR guarantees the right to liberty of movement and the freedom to choose one's residence within one's state territory.

154. With respect to Kosovo, the right of IDPs and refugees to return to a safe and secure environment is explicitly dealt with in Paragraph 11 (k) of UNSCR 1244, which entrusts UNMIK with the responsibility of *"assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo"*. KFOR is mandated under Paragraph 9(c) with establishing *"a secure environment in which refugees and displaced persons can return home in safety"*, while UNHCR is designated as the entity responsible for the *"supervision"* of the

¹⁰¹ The Right to Sustainable Return, Concept Paper, UNMIK, Office of the SRSG, Office of Returns & Communities, 17 May 2002 (hereafter: UNMIK Concept Paper), p. 1.

¹⁰² Constitutional Framework, Chapter 3, Section 3.4.

¹⁰³ Humanitarian Risk Analysis No. 18, 26 April 2002, OCHA Office in Belgrade, p. 29.

¹⁰⁴ UNHCR's Activities in Kosovo, Humanitarian Issues Working Group, Geneva, HIWG/02/2, 1 June 2002, para. 12.

¹⁰⁵ For example, the very first resettlement project at Osojane (Istok municipality), which concerned 80 individuals, has been severely judged by many.

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"safe and free return of all refugees and displaced persons" (Annex 2, item 7; see also the Constitutional Framework, Chapter 3, Section 3.4). The Constitutional Framework requires the *"competent institutions and organs in Kosovo [to] take all measures necessary to facilitate the safe return of refugees and displaced persons to Kosovo"* (Chapter 3, Section 3.4).

155. As the Constitutional Framework sets out, other rights are linked to the individuals' right to return, such as their *"right to recover their property and personal possessions"* (Chapter 3, item 3.4). The UNHCR adds: *"The right to return is intrinsically linked with the right to equal protection before the law, the right to liberty of movement, the freedom to choose one's own residence, and the right to property. The realisation of these rights cannot take place without minimum guarantees of returnees' most basic right to life and physical security"*. Also linked to the right to return *"is the entitlement of returnees to enjoy civil, political, economic, social and cultural rights on a non-discriminatory basis, such as the right to use one's own language, the right to work, and the right to housing, education, health care, and social benefits. It's only when these rights are guaranteed that IDPs and refugees have the possibility of a free and informed choice on whether to return or not"*.¹⁰⁶

156. Its free exercise requires, on the one hand, adequate information on the conditions that potential returnees can expect to find on their return; hence the importance of go-and-see visits and UNHCR information campaigns. The decision to return must, on the other hand, be made without direct or indirect pressure from the various authorities involved.

157. It is of course possible that the IDPs will exercise their choice to remain in their current locations or settle in other places within FRY. Just as the right to return places an obligation on the administration of Kosovo to create the said conditions for the return of IDPs, so their right to remain requires that the FRY and the governments of Serbia and Montenegro offer IDPs living conditions and prospects commensurate with their rights as Yugoslav citizens.

4. (Measuring) the wish to return

158. A person's decision to return or not (yet) to return to the place he or she was forced to leave, may change, and this must be taken into account and respected by all the actors involved.

159. Indeed, both push factors (the living conditions and the future prospects in the place where the IDP currently resides) and pull factors (the living conditions and future prospects which the person expects to enjoy on return) as well as the degree of information the individual possesses, influence the choice all the time. Hence the difficulty in assessing the number of IDPs who *"want to return"*, and the danger of employing any such figures. Figures relating to the number of persons wishing to return can only be valid for the moment at which they are made. Moreover, they may reflect despair over present living conditions rather than the positive wish to return to a place left in fear, or be based on false information on the conditions to be found upon return, etc.

160. However, logistical considerations (like the need to determine the sums of money to be earmarked for return projects) may render some estimation necessary of the number of IDPs from Kosovo who can be expected to wish to return in the coming years.

¹⁰⁶ UNHCR, Ninth Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering September 2001 to April 2002), para 159.

161. Clearly, not all the IDPs from Kosovo will eventually decide to return. Taking into account the socio-professional composition of the persons displaced out of Kosovo¹⁰⁷, their rural or urban origins in Kosovo, the length of time they or their families lived there, their age, the fact that a number of them have sold their property in Kosovo as well as the time already elapsed since their departure, a rough estimate might be: roughly one third of the 230,000 IDPs from Kosovo prefer to integrate fully in Serbia or Montenegro (or have already succeeded to do so), another third is desperate to return (mostly the elderly, rural population who cannot not sell their property in Kosovo, who do not have professions that allow them much flexibility and whose attachment to their land is generally strongest), while the last third remains undecided¹⁰⁸.

162. I should like to finish this chapter with a word about the time factor. With respect to the return of IDPs and refugees to Kosovo, time works both ways. On the one hand, as time goes on, the emotional and other links to Kosovo wither, while the links to the new place of residence become tighter, especially for the young. Here, time plays against return. On the other hand, time is needed for the wounds to heal and for reconciliation with individuals of the other communities to become possible. Here, the passage of time improves the possibilities of sustainable return.

5. The definition of return

163. UNMIK has explained the objectives, the principles and the process for the return of persons displaced out of Kosovo¹⁰⁹. The main idea is to "[emphasize] the individual in the process", to promote "a rights-based approach" and, ultimately, to enforce the individual's "right to sustainable return". This approach can only be welcomed from a human rights perspective.

164. In order to cater for the sustainable, well-prepared return of informed candidates rather than massive, unprepared or ill-prepared return, which exposes returnees to hardship and subsequent risks, UNMIK and its partners (UNHCR being the lead agency) propose a "two-pronged approach". This approach is composed of "[reaching] out to the IDPs and refugees with appropriate and realistic information about the conditions in Kosovo while improving these conditions in order to enable the IDPs to come back" and "[working] to ensure that the conditions on the ground for returnees are sustainable, including by promoting their integration into Kosovo society". While the above mentioned "conditions on the ground" is examined below (Chapter IV, 7), this chapter deals with a particular aspect of the definition of return which, it is submitted, may pose a problem in terms of individuals' rights.

165. In both UNSCR 1244 and the Constitutional Framework, the word "return" is almost invariably followed by the word "to their homes"¹¹⁰.

166. Based on the above, UNMIK has concluded in its Concept Paper: "Therefore, organised return will be to the place of origin constituting the optimal durable solution to the current displacement. Resources are to be focused on the conditions at the location of

¹⁰⁷ See International Council of Voluntary Agencies (Belgrade) and the Norwegian Refugee Council, The Right to Choose: IDPs in the FRY, March 2002.

¹⁰⁸ The Government of Serbia thinks that "the majority of the 230,000 IDPs who have been living in Serbia and Montenegro for three years now wish to return to their homes" (National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, p. 8).

¹⁰⁹ UNMIK Concept Paper.

¹¹⁰ UNSCR 1244: Preamble, Paragraphs 9 (c), 11 (k), Annex 2 item 4. Constitutional Framework: Preamble, Chapter 3, Section 3.4

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origin."¹¹¹ This, apparently, does not mean that return to other places in Kosovo than the very location of origin, will be prohibited¹¹². It will just not be sponsored by the international presences in Kosovo. As put in the Concept Paper: "*The priority is to support returns to the places of origin*"¹¹³.

167. It would appear, however, that the line between not favouring return to another place than the very place of origin, and opposing such return, has been somewhat blurred. Thus, the Concept Paper itself underlines that "[the] principles contained herein apply equally to all returns whether spontaneous or assisted"¹¹⁴. The fact that UNMIK indeed clearly opposes return of minority Kosovans to other places in Kosovo than their precise place of origin is documented in a recent letter from SRSJ Steiner to the President of the CCK, Mr. Covic, in which the former opposes Serbian aid for return to locations that are less than a few kilometres away from the precise place of origin: "*Regional Working Groups and Municipal Working Groups in Kosovo are the established local coordination mechanisms to ensure that returns take place according to UNMIK's policy. [...] all assistance to returnees must be cleared and authorized by these Working Groups on Returns. [...] Clearly, this approach that consists of aiding the returns of IDPs to locations other than their places of origin goes against UNMIK's policy and responsibilities. It is detrimental to the returns process.*"¹¹⁵

168. One can question whether such an attitude is fully in line with a rights-based approach that emphasizes the individual in the process (see quotation above). After all, if a Serbian Kosovan can find funding, from whatever source, enabling him to freely return to a place in Kosovo, why not let that individual seize that opportunity? Indeed, UNMIK appears to ignore the possibility that Kosovans might themselves prefer to return to a different place in Kosovo to the precise one which they were compelled to leave and to which return may not (yet) be possible, because of the situation on the ground.

169. The main reason for UNMIK's attitude seems to be distrust of Belgrade and the fear of demographic engineering in an attempt to reclaim or partition Kosovo by "colonisation"¹¹⁶. It is not for me to comment on such political considerations.

170. Be this as it may, impediments to the return to places other than the original residence raise serious problems in the light of the freedom to choose one's residence within one's state's territory.

¹¹¹ UNMIK Concept Paper, Annex A : Statement of Principles, item 3 (emphasis added).

¹¹² "The role of UNMIK or any governmental authority is neither to mandate return locations nor to dictate to IDPs and refugees how and when they may return, but to facilitate the improvement of conditions so that IDPs and refugees have the opportunity to exercise their individual decision to return"; Returns are not a politically driven process but depend primarily upon the choice of the individual to come back"; "[the] selection of return locations must be based on the expressed wishes of IDPs to return to their places of origin, rather than on political considerations" (UNMIK Concept Paper, respectively pages 4, 1, 2 ; bold in text).

¹¹³ p.2 (emphasis added).

¹¹⁴ UNMIK Concept Paper, p. 1.

¹¹⁵ Letter dated 18 July 2002.

¹¹⁶ Statements made to us, as well as a number of passages in the relevant papers indicate the said distrust and fear : « UNMIK will continue to welcome Belgrade's general involvement in the returns process, being the host area authority of the majority of Kosovan IDPs. It must be stressed, however, that any involvement will be guided by the principles announced [in the Concept Paper] to avoid politicising the returns process [...] ». « In general the concept of relocation, including proposals for clusters of new settlements, is not conducive to the long-term goal of promoting a multi-ethnic society in Kosovo, and will not be endorsed by UNMIK. » « Strategically or state motivated returns are not in the best interest of returnees as they are likely to backfire on them by increasing their isolation and undermining their freedom of movement » (Concept Paper, p. 2).

171. The principle of equality might also be invoked here. Indeed, the sudden immense growth of cities like Pristina shows that Albanian Kosovans have widely used the possibility to settle down elsewhere in Kosovo than were they used to live in or before June 1999. It is somewhat incongruous, therefore, that the return of IDPs from ethnic minorities should be confined to the precise houses which they left in or after 1999. Care must be taken to ensure that UNMIK's narrow definition of return does not result in the discrimination of minority returnees.

172. Moreover, the insistence on return to the very house/village where someone came from greatly reduces the scope of immediate return. Also, groupings of people allow for economies of scale as regards the (re)construction of houses, the (re)construction and the running costs of infrastructure, public services and public utilities as well as the efforts necessary for maintaining their safety. Groupings are also likely to reduce fear among returnees.¹¹⁷

173. The above is a critical analysis of the narrow definition of return that is currently employed. The conclusion is not, however, that return to any place in Kosovo - be it the very place of origin or another place - can as a rule happen without the involvement of the current administration in Kosovo. KFOR (and/or police) clearance regarding the security situation in the area of return is a necessary prerequisite for organised return programmes, and UNMIK and its partners will have a word to say about constraints regarding infrastructure, the social services available etc. before any project can be envisaged.

6. Conditions for return

174. The right of all IDPs and refugees to choose return to Kosovo (see above Chapter IV, 3), puts an obligation on the administration in Kosovo to offer returnees a normal, safe life without legal, political, social, economic or other discrimination.

175. This is where the two topics covered by this report - the human rights situation in Kosovo and the fate of persons displaced from their homes in Kosovo - converge. Indeed, the respect of the human rights of ethnic minorities in Kosovo is one of the most important factors that determine the chances of return of minority members who have left Kosovo. In order to assess the situation they can expect to find upon return, potential returnees observe the situation of minority members who have stayed, and of the very few who have returned.

176. UNMIK, UNHCR and KFOR are aware that strong action is necessary, especially in the fields of security, with a view to granting everybody in Kosovo (the possibility to enjoy) freedom of movement, but also as regards the repair or reconstruction of houses and the provision of basic infrastructure, access to public utilities and services, as well as a chance to earn a living.

177. As set out above in this report (see Chapter III, 3, b: "Security and policing"), although the security situation has much improved, lack of safety is still a primary concern in Kosovo, not only, but especially, for members of ethnic minorities. The security situation is still such, in short, as to significantly limit the scope of possible return in certain areas. Indeed a recent

¹¹⁷ The CCK shares this view of "groups of settlements" and considers that such an approach is in line with the FRY-UNMIK Common Document signed on November 5, 2001 (Principles of Program of Returns of IDPs from Kosovo and Metohia, CCK, Belgrade, April 2002, p. 21).

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return program witnessed¹¹⁸ involved round the clock KFOR protection for 15 heads of families who told us that they could not even walk the 50 meters from their houses to cultivate their fields. The enjoyment by ethnic minority Kosovans of freedom of movement outside their enclaves or North Mitrovica is still severely restricted. KFOR, which is mandated under UNSCR 1244 to establish a secure environment in which refugees and displaced persons can return home in safety, is, however, reconsidering its approach to minorities' safety.

178. In the light of the improved security situation in certain areas, and the political imperative to stimulate return, KFOR has considered that the correct approach should be flexible and decentralised and follow on a case by case basis, whilst avoiding the creation of new isolated enclaves¹¹⁹. This means that KFOR moves away from "*impos[ing] conditions on visits and returns, which were in many instances overly restrictive*"¹²⁰. Rather, it is acknowledged that "*[s]ecurity measures need to facilitate and make inter-ethnic interaction possible instead of creating barriers that entrench separation and impact on the chances of realising other rights [...]. Efforts will be undertaken to scale down the level and visibility of area-specific security measures in order to avoid perceptions of continued separation between minority and majority communities.*"¹²¹ In the same vein, KFOR considers that "*[a]s soon as the situation allows [it] should play a less prominent role in Kosovo security matters handing over as many tasks as possible to UNMIK Police and the KPS*"¹²². In other words, KFOR is ready to take some risks, and the ongoing process of removal of escorts and checkpoints is conducive to the idea of removing barriers between the different communities.

179. Restrictions on free movement may still have to be imposed "*if the failure to do so could destabilise the security situation and impact negatively on future [...] returns. Also, even when the fundamental right of return is beyond questions, [IDPs and refugees] should accept that this aspiration cannot be satisfied in all cases in the short term. Therefore, [...] returns in some areas may be limited, or in some cases prohibited, until the necessary conditions are suitable for return*"¹²³. KFOR is "*currently ready to support the return to some selected locations Kosovo-wide and, if required, to create the circumstances for some others to happen*"¹²⁴.

180. It is, however, evident that the single largest obstacle for return is the lack of financial means for preparing and sustaining returns, whether individual or to pre-identified organised return locations. Over the last three years, public and private donors have made considerable efforts to repair or rebuild, as a matter of priority, the houses of the returning Albanian Kosovans¹²⁵. This part of the reconstruction is by and large completed. However, rather little

¹¹⁸ To Bica, near Klina.

¹¹⁹ HQ KFOR, Policy Paper on the Feasibility to Accommodate Returns in Kosovo, 21 May 2002 (hereafter: KFOR Policy Paper), p. 1.

¹²⁰ *Ibid.*, p. 3.

¹²¹ *Ibid.*, p. 3.

¹²² *Ibid.*, p. 3.

¹²³ *Ibid.*, p. 4.

¹²⁴ *Ibid.*, p. 5.

¹²⁵ Donors and agencies have made efforts to ensure that the beneficiaries of their respective aid programmes are by and large treated equally. Thus, no matter who provides aid to whom, the average value of repair or reconstruction works offered to a family of up to 6, is approximately 11,000 Euros (there are discrepancies, however, as to the amount of work which beneficiaries have to provide themselves, under the various aid programmes). In addition, around 30-40 % of the sums used for reconstruction or repair of destroyed houses are spent on the neighbours' houses, so that they "accept" the repairs for the benefit of the other community ...

has been done until now for the reconstruction of the properties of ethnic Serbs¹²⁶ and still less for the houses of the Roma who left¹²⁷. Donor fatigue is being signalled. But, as the Serbian Government insists: *"The funds for reconstruction need to be ensured on the same principles as those applied in the case of [the] Albanian population"*¹²⁸. (See also above, Chaptes III, 3, l ("Establishing and securing property rights") and III, 3, m ("Respect of property rights by the international presences")).

181. In addition to security and reconstruction aid, the preconditions for sustainable return include access to public and social services, mainly education (in each community's own language whenever possible), health care and medical services, social security and social assistance, garbage collection, etc. Adequate budgetary allowances and work planning will be needed to ensure adequate public utilities (water, electricity, sewage system, roads, etc.) to minority communities, including returnees¹²⁹.

182. The President of the CCK asserted in July 2002 before the UN Security Council that *"returnees came back to Central Serbia and Montenegro, after they were unable to get their previously held jobs. There are no Serbs left in public services, industry, agriculture farms or the system of electric power supply"*¹³⁰. Fair and equal employment opportunities in the public and private sector (to the extent that those exist¹³¹) have to be granted to minorities. UNMIK and the governmental authorities have a responsibility to ensure equitable representation of all communities in the public sector and provide effective remedies for discrimination in the hiring process and in the workplace. A draft anti-discrimination law is currently being prepared. It is to be hoped that it will, if introduced, succeed in addressing these issues.

183. The respect for property rights is also of considerable importance for return. As many minority members have their homes illegally occupied, often by members of the majority community, UNMIK will have to ensure the effective functioning of the HPD mechanisms for filing claims, resolving property disputes and ensuring the expeditious return of properties to their rightful owners (see above, Chapter III, 3, l: "Establishing and securing property rights").

184. Last but not at all least, there is the essential question of individual attitudes. This is, ultimately, the critical element. Albanians, Serbs, Roma and other minorities will have to live together, side by side, peacefully, in a democratic, multi-ethnic Kosovo, in which human rights and the rule of law prevail. Ethnic Albanians will have to distinguish between criminals and innocent members of the Serbian and Roma communities. Ethnic Serbs will have to accept that there is a new Kosovo in which, with due respect for the safeguards of democracy and the rule of law, and regardless of the ultimate degree of autonomy, ethnic Albanians will hold and use

¹²⁶ "[T]he European Agency for Reconstruction has an annual quota of 4,000 houses, 10% of which were reserved for minorities. Even this quota was only partially implemented. It is, therefore, not logical that this year's plan is the reconstruction of 1,000 houses only, of which only 10 houses will be reconstructed for minority communities! The reduction of the total number of houses cannot be justified at this moment when the issue of returns is being worked on and when conditions for returns should be created." (Principles of Program of Returns of IDPs from Kosovo and Metohia, CCK, Belgrade, April 2002, p. 29).

¹²⁷ The fact that less financial efforts are being made for the benefit of the Roma, Egyptian and Ashkalie returnees than of Serbian ones can only be due to political considerations. It would appear to be the case, however, that generally speaking, the former are currently likely to be better received in Kosovo than the latter.

¹²⁸ Government of the Republic of Serbia, National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, pp. 10/11.

¹²⁹ Comp. UNMIK Concept Paper, p. 3, and see above Chapter III, especially c, d, e and l - q.

¹³⁰ Statement by Dr. Covic before the UN Security Council, New York, 30 July 2002.

¹³¹ Unemployment is currently estimated at some 50% (Mr. Steiner's address to the 4518th Meeting of the United Nations Security Council, Wednesday 24th April 2002).

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the vast majority of voting rights. Both communities, and many of the individuals who compose them, are still quite far away from such attitude¹³², without which sustainable return and integration will remain difficult.

185. To this end, contributions will have to be made by political leaders and influential persons on all sides, including religious authorities. Among the very encouraging examples one finds a number of initiatives of Prime Minister Rexhepi, who visits Orthodox places of worship¹³³, makes speeches in Serbian and makes moderate, conciliatory statements that underline the need for all communities to gradually overcome hatred and mistrust. On the Serbian side, I heard realistic, moderate and positive views¹³⁴ expressed by the President of the Coordination Centre for Kosovo (CCK), Mr. Covic. Such views are not necessarily representative, however, of the declarations of public figures both inside and outside Kosovo.

186. UNMIK's aim was, in May 2002, to "*achieve breakthroughs in minority returns during the summer and autumn 2002 to effect a change in climate and to build momentum for more significant numbers of returns during 2003 and 2004*"¹³⁵. The sober assessment for the current year made by our hosts at COMKFOR in August 2002 speaks for itself: "[A] maximum of 2400 people from various minorities would return if enough funding [were made] available"¹³⁶.

7. The question of the final status of Kosovo

187. Under Paragraph 11 (c) of UNSCR 1244, one of the responsibilities assigned to UNMIK is "[f]acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords". No indication on the final status is given, other than the reference to Rambouillet. However, repeatedly stress is laid on continued sovereignty of the FRY over the province, pending the determination of the final status¹³⁷.

188. The Rambouillet accords, that were signed in February 1999 by Kosovo Albanian representatives, but not by Yugoslavia, state: "*Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act [...]*"¹³⁸. It is noteworthy that the three-year time frame of the Rambouillet accords is not mentioned in UNSCR 1244.

189. Likewise, the Constitutional Framework of May 2001, gives no indication on what Kosovo's final status will be. As to the time frame for its determination, the Preamble indicates that such "*determination [will be done] through a process at an appropriate future stage*".

¹³² See the various periodic OSCE, UNMIK and UNHCR reports on incidents and provocations. See also: Agron Shala, *op.cit.*, pp. 4-5, and Aleksandra Tekijaski (Kosovo Law Center, Pristina), *Das serbische Leben in Kosovo* (translation: Serbian Life in Kosovo), *ibid*, pp. 6-7.

¹³³ Aleksandra Tekijaski, *op. cit.*, p. 7.

¹³⁴ As an example for an ambiguous attitude, see the written submission made by the President of the Serbian National (sic) Council of Northern Kosovo and Metohija to the UNSC on 23 April 2002.

¹³⁵ UNMIK Concept Paper, p. 1.

¹³⁶ COMKFOR slides of 3 August 2002.

¹³⁷ "*The stress on continued FRY sovereignty in the interim phase, while leaving the future status of the province open, introduced a deliberate ambiguity that was necessary in order to ensure a consensus in the UN Security Council*"; for explanations of the political background, see ICG Balkans Report N° 124, *op.cit.*, p. 4.

¹³⁸ Interim Agreement for Peace and Self-Government in Kosovo, Rambouillet, 23 February 1999, Chapter 8.3.

190. In April this year, that is almost three years after the beginning of the international administration of Kosovo, the new SRSG formulated his so-called "benchmarks" approach to the question of the final status: A certain number of conditions must be fulfilled in Kosovo, before discussions about the final status will start. The benchmarks approach has been summarized in the slogan "standards before status": standards of democracy, rule of law and human rights will have to be respected on the territory, by its inhabitants and the PISG, before political negotiations on the final status of the territory will take place¹³⁹.

191. The advocates of "standards before status" recall that Kosovo is not yet ready to administer itself, in whatever form. It is therefore suggested to concentrate on improving democracy, the rule of law and the respect of human rights, because, regardless of its final status, Kosovo will have to function according to these values.¹⁴⁰

192. It is not for the Council of Europe Commissioner for Human Rights to discuss the merits of the various possibilities of final status. However, the fact that there is still uncertainty over that question, does have a bearing on the issues addressed in this report.

193. Firstly, the uncertainty over the final status hampers the readiness of the Serbian and Albanian communities to reconcile and to respect each other's human rights. Leaving the final status question open keeps everybody's hopes and frustrations alive: Albanian Kosovans still fear a return of the Serbs in one way or another, while extremist Serbs keep on fueling the hope for return to a position close to the *status quo ante*. These attitudes are detrimental to the readiness to respect the (human) rights of the other.¹⁴¹

194. Secondly, uncertainty over the final status of Kosovo cannot but have a negative impact on potential investor's willingness to invest in the territory¹⁴². This, in turn, is obviously not helpful for the enjoyment of economic and social rights by all inhabitants of Kosovo.

195. Lastly, such uncertainty does not put potential returnees in a position to make an informed, definitive choice over their future.

8. Living conditions in Serbia, Montenegro and "the Former Yugoslav Republic of Macedonia"

196. The right of all IDPs to choose to stay or settle down in other parts of the FRY than Kosovo, puts an obligation on the governments of FRY, Serbia and Montenegro to offer these persons full integration without legal, political, social, economic or other discrimination. In order to live up to that obligation, some affirmative action seems still necessary.

¹³⁹ See Rafael Biermann, SOE-Monitor, Task Force Südosteuropa, Centre for European Integration Studies, University of Bonn, Juli 2002, p. 1.

¹⁴⁰ Some, like the International Crisis Group for example, object to that attitude and suggest "conditional independence under a form of international trusteeship", arguing that "while the achievement of such benchmarks must influence the timing of the implementation of an agreed final status, it should not determine what that status should be" (ICG Balkans Report N° 124, *op. cit.*, respectively pages. ii and i). Also: Agron Shala, *op.cit.*, p. 5. Against: Statements by Dr. Covic before the UN Security Council, New York, 24 April 2002, p. 7 and on 19 June 2002, p. 5.

¹⁴¹ This view is also taken by the International Crisis Group (ICG Balkans Report N° 124, *op.cit.*).

¹⁴² « In such a scenario – that is without knowing who owns the place – it is to be feared that the legitimate economy will never invest a single dollar or Euro in the province. Of course, the illegitimate one will only be too pleased to replace the legitimate one (and already has a serious head start) » (The Balkans 2001: Where Do We Go Now?, Southeast European Politics, Vol. 2, No. 1, May 2001, p. 63).

197. There are state institutions in Serbia (the Commissariat for Refugees) and in Montenegro (the Commissariat for Displaced Persons) who take care of IDPs (from Kosovo) and refugees (from the former republics of the SFRY). In addition, there is – grouping the Republic of Serbia and the federal (FRY) level, but not the Republic of Montenegro level – the already mentioned Coordination Centre of Federal Republic of Yugoslavia and Republic of Serbia for Kosovo and Metohia. The latter is mostly concerned with the return of IDPs to Kosovo.

198. In Serbia, the Government has formulated and published a National Strategy For Resolving the Problems of Refugees and IDPs (hereafter: National Strategy). The National Strategy addresses the options of both “repatriation” and “local integration”, by identifying difficulties and proposing ways forward. Although, on various occasions, the text underlines that both options are equally open to IDPs, there is a clear tendency to consider local integration to be the likely solution for refugees from the former republics, and return the solution for IDPs from Kosovo (and Metohija)¹⁴³.

199. The Implementation Programme that goes with the National Strategy, follows the same line and its title worryingly makes no mention of IDPs¹⁴⁴. Indeed, in the substantive parts in which the various programmes for “Ensuring Conditions for Local Integration” are set out, only refugees are mentioned as the beneficiaries, not IDPs. As the IDPs from Kosovo, from what I have seen, live in a comparably difficult situation in Serbia, I strongly hope that IDPs will be able to benefit just like refugees from these programmes¹⁴⁵ which are aimed at addressing such vital issues as housing, the gradual closing down of collective centres and employment.

200. The living conditions of many Kosovan Serbs and Roma, which my office and I have seen in various locations in Serbia and Montenegro, whether in official or unofficial collective centres or in private accommodation¹⁴⁶, are at best difficult and often dire.

¹⁴³ « The main strategic orientation of Serbia in respect of 230,000 IDPs from Kosovo and Metohija is provision of assistance and necessary guarantees for return and life in safety. This situation clearly suggests two main, parallel directions of implementation of the National Strategy, giving the possibility to refugees and the IDPs to choose the most favourable durable solution freely. The first group of activities is aimed at ensuring conditions for repatriation of refugees and IDPs [...] This refers especially to voluntary and safe return of IDPs to Kosovo and Metohija to the places of their habitual residence. The second direction of activities relates to the provision of conditions for local integration, meaning the durable resolution of the essential existential problems of refugees and IDPs as well as their families. The basic aim of local integration is helping refugees achieve self-sufficiency, a financially and socially equal positions as that of the other citizens of the country.” (National Strategy For Resolving the Problems of Refugees and IDPs, Government of Serbia, Belgrade, 30 May 2002, p. 4.)

¹⁴⁴ Government of the Republic of Serbia, National Strategy For Resolving the Problems of Refugees [!]: Implementation Programme, Belgrade, 30 May 2002, (Basic Objectives and Plan of Action): “The Strategy primarily refers to refugees and other war-affected persons. As regards the nearly 230,000 displaced persons from Kosovo and Metohija, the basic strategic commitment of Serbia and the FRY, supported by encouraging arrangements and the Plan of Returns endorsed by the Republican and Federal Assembly, by the UNMIK-FRY Common Document, as well as by the Serbs’ participation in the elections for the Assembly of Kosovo and Metohija, is to provide each returnee the assistance and necessary guarantees for a safe life in Kosovo. At the same time, IDPs can also benefit the integration programs formulated in the National Strategy, as a way for building their self-sustenance and reducing their dependence on humanitarian aid.”

¹⁴⁵ If I understood well the Deputy Prime Minister of Serbia, Dr. Covic, then this will be the case.

¹⁴⁶ Of the approximately 200,000 registered IDPs in Serbia, some 8 % secure their own accommodation, 40 % live with family and friends, 41 % rent the apartment they live in, and 7 % have been accommodated in collective centres (National Strategy, p. 12). Others dwell in specialised institutions and student dormitories (UNHCR, Belgrade, Refugees in FR Yugoslavia, Collective Accommodation of Refugees and IDPs in FRY as at 1 July 2002). Official collective centres are places for which leases with the owner have been established and where the

201. Indeed, my own observations are well reflected in what an NGO survey, funded by the Norwegian Refugee Council, concluded in March this year, states: *"IDPs reside on the very margin of society. Since they became displaced in Serbia [...] living conditions for most of them have greatly deteriorated. A general impression [...] is utter disinterest of subjects, fatigue and exhaustion [and] the evident difficulties of IDPs to integrate into the micro-environment due to the lack of prospects in their present situation, but also to the lack of possibilities for day-to-day survival. For most IDPs the basics required for minimum existence are provided by local and international humanitarian organisations. [...] They face worries about their future and dilemmas where to go or where to stay?"*¹⁴⁷.

202. In spite of the above, the situation of most IDPs and refugees in Serbia and Montenegro is no longer qualified as an "emergency situation" according to their criteria, by the specialised international agencies and NGOs¹⁴⁸. This explains why these donors are presently rapidly downscaling their operations in Serbia and Montenegro¹⁴⁹, leaving the respective governments with an additional burden, which they have difficulties shouldering. The ICRC has, however, identified some 50,000 individuals in Serbia and a further 9000 in Montenegro, who will continue to need emergency humanitarian assistance. For these individuals at least, the international community should continue helping the authorities.

203. The planned gradual closing down of official collective centres, plus court ordered evictions of IDPs from unofficial ones (especially in Montenegro¹⁵⁰), will particularly affect the most vulnerable people, like the elderly, single parents, orphans and individuals who need specific health care. Given the great economic difficulties which Serbia and Montenegro face, it seems necessary that donors and international agencies – including the Development Bank of the Council of Europe – assist the governments in providing alternative, durable housing solutions to at least these people.

204. Talks with the mayor of Belgrade, Mrs. Hrustanovic, whose municipality hosts 80,000 IDPs from Kosovo, have convinced me that it would be wise to see to it that not only IDPs (and refugees) benefit from international assistance, but also the most vulnerable individuals of the

state pays for water, electricity, some heating, etc.. Unofficial collective centres are by and large squats, some tolerated by the owners, some not or no longer.

¹⁴⁷ International Council of Voluntary Agencies, Belgrade, and Norwegian Refugee Council, *The Right to Choose: IDPs in the FRY* (hereafter: *IDPs in the FRY*), p. 4. See also the eloquent observations on the state of these IDPs a year and a half ago, in: ICRC, *A Study of the Internally Displaced People of Kosovo Living in Serbia and Montenegro*, November 2000-January 2001, by Kerry-Jane Lowery and Dusan Radojicic, February 2001.

¹⁴⁸ *"The threat of new conflicts has now subsided and the process of healing has begun. The focus of attention is no longer on emergency assistance, but rather on identification of durable solutions after many years of displacement."* The Government of Montenegro and the international community must now *"identify and promote long term durable solutions for refugees and IDPs and [...] implement programmes which will resolve their status permanently either in Montenegro or in their country of origin."* (Government of the Republic of Montenegro, Commissariat for Displaced Persons and UNHCR Podgorica, *Census of Refugees and IDPs in Montenegro*, p. v.).

¹⁴⁹ *"A decline in UNHCR and non-UNHCR funding along with the withdrawal of several agencies during the past year has resulted in a sharp decrease of assistance distributed to IDPs in Montenegro. Most significantly, the end of ECHO funding (previously funding several agencies to cover supplementary food, shelter and heating fuel) and the closure of World Vision (offering shelter construction, community services, food and non-food distribution and income generating activities) [...]"* (Briefing Note, UNHCR Podgorica, 18 July 2002, p. 2)

¹⁵⁰ *"Unofficial collective centres are locations occupied illegally by IDPs on arrival in Montenegro and are neither recognized nor financially supported by UNHCR or the government. Many of these locations are currently under court-ordered eviction which has serious political implications for the Government of Montenegro and highlights the shelter problem faced by all displaced persons"* (Briefing Note, UNHCR Podgorica, 18 July 2002, p. 1)

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local population, whose situation is not better. This is essentially a question of the equal treatment of individuals living in comparable conditions.

205. In Montenegro there is no national strategy as of yet, but the Commissioner has explained to us that it is in the making. Representatives of the international community there feel that the absence of a clearly formulated national strategy is a major handicap with respect to donors' readiness to continue supporting the government with respect to assistance for IDPs and refugees. This is particularly worrying because, as both the Government and the UNHCR recognize, "[l]ocal integration is perceived as the most likely solution for the majority of the displaced population of Montenegro"¹⁵¹.

206. The Serb and the Montenegrin authorities are to be commended for the efforts they have deployed over the years to help IDPs benefit from social services including health services and from schools more or less in the same way as other citizens. One of the encouraging results is that according to the statements of parents, in Serbia *"most children of IDPs established a new circle of friends and got used to the new environment"*¹⁵² (for which much credit be given to the local citizens). Notwithstanding these efforts, I was worried to hear and read that IDPs feel that their chances to find a job in Serbia are much worse than of the local population¹⁵³ and that they face lack of understanding and numerous obstacles in their relationships with local authorities¹⁵⁴.

207. In Montenegro, the Government, through the Office of the Montenegro Commissioner for Displaced Persons, manages the collective accommodation, maintains an IDP population database and a direct contact point for IDPs, provides medical care in accordance with the Republic's health insurance policy and provides education to IDPs on a basis of equality with the local population.

208. However, IDPs from Kosovo, who retain certain legal rights as citizens of the FRY, have only limited access to important political rights conferred by the Republic of Montenegro¹⁵⁵. Here, the IDPs are the victims of the difficulties between the Serbian and Montenegrin governments, concerning the question of the relations between the two entities. Perceived by the present Government, which is in favour of independence of Montenegro, as being potentially in favour of Montenegro remaining linked to Serbia, IDPs from Kosovo are not offered the possibility to fully integrate in this part of their country (the FRY). The concern would appear to be to prevent them from formally establishing residence in municipalities in Montenegro and applying for Montenegrin citizenship, and the voting rights that go with it. This is certainly regrettable from a human rights point of view.

209. I should like to stress the fact that the living conditions and respect for the human of Roma IDPs are generally lower than other IDPs in Montenegro and Serbia. In this context, my

¹⁵¹ Government of the Republic of Montenegro, Commissariat for Displaced Persons and UNHCR Podgorica, Census of Refugees and IDPs in Montenegro, p. 4. It has to be noted that 33% of the 29,000 IDPs from Kosovo who are in Montenegro identify as Montenegrins (Briefing Note, UNHCR, 18 July 2002, p. 1).

¹⁵² International Council of Voluntary Agencies, Belgrade, and Norwegian Refugee Council, The Right to Choose: IDPs in the FRY, March 2002, p. 26.

¹⁵³ More than 65 percent of IDPs, and over 70 percent of those aged 18-35, made that statement in the beginning of 2002 (IDPs in the FRY, p. 19).

¹⁵⁴ Almost 70 percent of those interviewed in the beginning of 2002 (IDPs in the FRY, p. 27).

¹⁵⁵ While IDPs are being accorded social rights and limited benefits in Montenegro, there is no willingness to extend political rights out of concern for the ethnic balance and political stability of Montenegro. Although it is recognised by nearly all the authorities in Montenegro that the majority of IDPs will likely not return to Kosovo, it is still [felt to be] too early to consider local integration." Briefing Note, UNHCR, 18 July 2002, p. 2.

attention was drawn to the fact that Roma in several countries of the former Yugoslavia face significant difficulties in obtaining basic documents, such as birth certificates, personal identity documents, local residence permits, documents related to (in most cases, state-provided) health insurance, marriage certificates, work booklets, death certificates, passports, IDP and refugee registration documents. *"Exclusionary obstacles created by a lack of documents can be daunting and in many instances, the lack of one document can lead to a 'chain reaction', in which the individual at issue is unable to secure a number of such documents. In the extreme case, a Romani child without a birth certificate may wind up in a situation of complete paralysis with respect to the exercise of basic rights: precluded access to basic health care, effectively hindered freedom of movement (including the right to leave one's own country), denial of the right to vote, exclusion from state housing provided to persons from socially weak groups, as well as the inability to have real access to other rights and services crucial for basic human dignity."*¹⁵⁶

210. Documentation problems are not restricted to Roma IDPs. Registration and documentation difficulties have resulted from the transfer of official state documents in the final days of the conflict from Kosovo to a number of locations in Southern Serbia. In order to register somewhere in Serbia, and thereby enjoy the right to vote in local elections and enjoy local social benefits, it is necessary first to deregister from one's previous place of residence. This is, inevitably, a rather difficult procedure if one's previous residence was in Kosovo and the relevant papers, if they exist at all, are currently to be found somewhere in Southern Serbia. Such bureaucratic obstacles to local integration ought not, however, with the necessary will of the FRY authorities, to be insurmountable.

211. There are currently 3306 persons displaced from Kosovo currently residing in "the Former Yugoslav Republic of Macedonia", the majority of which are Roma, Egyptian or Ashkalie and the remainder Gorani¹⁵⁷. These individuals, who have crossed an international border are potential refugee applicants. Some 1500 of them are currently living in two camps, Katlanovo (438 individuals) and Suto Orizari (1,108). The rest are privately accommodated. My team has visited both these camps. Katlanovo offers good living conditions in a nice setting, but is totally isolated the countryside; as a result it is impossible for the Roma living there to have any occupation that brings in some money. Suto Orizari was built only three years ago, on a former municipal rubbish site, in a very poor locality, mostly inhabited by local Roma. The camp is in a lamentable state, due to the underground waste that resurfaces in the case of rain, improperly executed construction work, and the lack of respect shown by its inhabitants.

212. The main difficulty that they face is that they are currently enjoying only a temporary humanitarian status, which allows them to reside in "the Former Yugoslav Republic of Macedonia", but prevents them from being able to work there. The right to demand refugee status is provided by the Macedonian constitution – the difficulty resides in the fact that there is no further legislation establishing a mechanism for obtaining such a status and the right to seek

¹⁵⁶ See the information on a workshop that was organised by European Roma Rights Center (ERRC) in Igalo, Montenegro, in September 2002, on the theme of Personal Documents and Threats to the Exercise of Fundamental Rights among Roma in the FRY (<http://www.errc.org>). The MARGO Group reckons that almost half of the Roma in Montenegro do not possess a complete set of the personal documents necessary to live and work in the country. "Conflicting Federal and Republican laws and administrative procedures", "bureaucratic and unclear policies" are cited as reasons. MARGO also states that "the Montenegro authorities have refused to register new settlers who came from different towns within FRY" (A Survey of the Issues Affecting Roma Documentation and a Call to Action, UNHCR, Belgrade, 1 July 2002, p. 6).

¹⁵⁷ UNHCR Statistics for Macedonia from 1 to 30 June 2002.

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employment that goes with it. This explains why in the "the Former Yugoslav Republic of Macedonia" only 40 individuals have applied for refugee status (18 of whom are Bosnians), and 27 have obtained it. It seems urgent that the "the Former Yugoslav Republic of Macedonia" adopt adequate legislation or asylum procedures.

213. In the meantime, the Roma IDP community is greatly distracted by the prospect of finding a third country – a possibility they have been encouraged to believe in by the delayed processing of some 300 successful candidates for residence permits in the United States. Indeed, at the time of my team's visit, demonstrations were frequently being staged outside the UNHCR's office in Skopje. The Roma community would appear to be encouraged to pursue this avenue by authorities that are reluctant to see them demanding greater rights and competing for the few jobs available. It was revealing, therefore, that Roma representatives from the worse of the two camps insisted that no more money should be spent on renovating their camp, but ought to be spent instead on relocating them.

214. The unlikelihood of securing access to third countries and the foreseen reduction of international emergency aid will ultimately result in the need for alternative solutions to be found for the majority of persons displaced from Kosovo who continue to be unable to return. The establishment of mechanisms for securing permanent refugee status combined with international development aid aimed at Kosovan refugees and their wider host communities would contribute to the resolution of this problem.

9. Forced return

215. My Office does not have precise figures on how many Kosovans are still in Western Europe and the USA. As mentioned above, some 70,000 Albanian Kosovans of the approximately 90,000 who were flown out of Skopje in 1999, seem to be still abroad. Some Roma and Albanian Kosovans must have also been able to go abroad by their own channels. As to Serbian and other minority Kosovans, we are not aware of the figures.

216. Presently, there is a tendency in the host states to make Kosovans return to Kosovo or to other places in the FRY. Some countries, like Switzerland for example, offer financial incentives to returnees. Others return forcibly. From January to June this year, Germany has forcibly returned 1,785 individuals, the UK 648, Switzerland 425, Norway 266, Slovenia 247, Belgium 103, etc.; the total of "forced returns to Pristina" registered by UNMIK Border Police for that period of time is 3737 persons¹⁵⁸. The Norwegian Refugee Council returnee monitoring team has stated that "79 individual cases of minority returns were recorded of which 11 were reported as having been forcibly repatriated to Kosovo" from January to August 2002¹⁵⁹.

217. The UNHCR has issued a position paper on the question of returns¹⁶⁰. Its starting point is to recognize that the vast majority of Kosovo Albanians who fled during the Kosovo crisis have returned home and "only few of them have experienced individual protection problems."

¹⁶¹ However, UNHCR recalls that there are certain categories of Kosovo Albanians who may face serious problems, like those who come from areas where they constitute an ethnic minority, those in ethnically mixed marriages and of mixed ethnicity, as well as those who are

¹⁵⁸ Forced Returns to Pristina, Protection Unit, UNHCR Pristina (leaflet).

¹⁵⁹ Forced Returns from Western Europe (leaflet).

¹⁶⁰ UNHCR Position on the Continued Protection Needs of Individuals from Kosovo, April 2002.

¹⁶¹ *Ibid*, p. 1.

perceived to have been associated with the Serbian regime after 1990. Claims from persons who fall under these categories should be carefully considered, while *"claims not falling in these categories may be considered in accelerated procedures."*¹⁶² There are also vulnerable individuals, like chronically ill or handicapped persons, unaccompanied elderly people or children, etc. whose cases should be carefully studied.

218. With respect to minorities, UNHCR states: *"Minorities [in Kosovo] continue to experience varying degrees of threat to their life and personal integrity [...] Improvements in the general situation are having a gradual impact on some minority communities in specific locations, and some have managed to secure a limited degree of tolerance within certain areas. This does not imply that the risk of serious human rights violations has disappeared. [...] It is important to note that, even during such 'quiet' periods, minorities continue to endure less visible forms of mistreatment that erode the community's will to remain and hence continue to cause displacement or impede sustainable returns."*¹⁶³ UNHCR concludes that *"minority return should take place on a strictly voluntary basis and based on fully informed decisions [...] Minorities should not be forced, compelled or induced to return to Kosovo."* UNHCR's position remains that *members of minority groups in Kosovo [...] should continue to benefit from international protection in countries of asylum."*¹⁶⁴

219. In considering applications for asylum from persons originating from Kosovo, some asylum countries assess whether an internal relocation alternative is available for them in other parts of the FRY. The UNHCR position on that question is that *"[t]he circumstances faced in Serbia and Montenegro by IDPs from Kosovo lead UNHCR to the general conclusion that internal displacement in such conditions does not offer an adequate or reasonable alternative to international protection."*¹⁶⁵ UNHCR offers detailed information on present conditions for IDPs from Kosovo in various areas of the FRY and invites refugee status determining authorities to proceed to a *"cautious assessment of any internal relocation alternative"*¹⁶⁶, in the light of such information.

220. Having examined in some detail the human rights situation that awaits returnees in Kosovo and the situation of IDPs in Montenegro and Serbia, I must say that I agree with the analysis and the arguments set forth by UNHCR. In order to avoid that forced return exposes individuals to danger or inhumane living conditions upon return, it should only take place after examination of the individual cases against the criteria set up by UNHCR.

¹⁶² *Ibid.*, p. 2.

¹⁶³ *Ibid.*, p. 3.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*, p. 1.

¹⁶⁶ *Ibid.*

V. Main Findings and Conclusions

1. The human rights standards applicable in Kosovo and accountability for their respect :

1. The international interim administration of Kosovo should be carried out in full respect not only of those norms of universal human rights law and of Council of Europe human rights law which UNSCR 1244 and the Constitutional Framework of May 2001 refer to, but also of those instruments that (will) have been accepted as binding by the FRY. Indeed, it would be hard to justify the international administration of Kosovo according to lower human rights standards than the other parts of the FRY.

2. For the time being, and to the extent that he retains the ultimate authority for the implementation of UNSCR 1244(1999), the SRSG is legally and politically accountable for abidance by human rights standards in Kosovo, including for acts and omissions by the newly installed Provisional Institutions of Self-Government (PISG).

3. This ought also to be the case with respect to KFOR. It is to be noted that in every democracy that is governed by the rule of law and the respect for human rights, the armed forces fall under the control of the civil authorities (this has, for instance, been laid down as one of the conditions for the FRY to join the Council of Europe).

4. However, in so far as they exercise power and influence in Kosovo, the PISG, the FRY and Serbia retain a measure of political responsibility for the situation in Kosovo. National KFOR contingents engage, to the extent that they act autonomously, the direct responsibility of their governments.

5. The international administration and all its members enjoy immunity from jurisdiction in virtue of UNMIK Regulation 2000/47. Whilst the immunity of internationals would appear to be lifted in most cases where a well-founded request is made (and a number of individuals have been prosecuted by their national authorities), the very existence of such an exception is increasingly difficult to justify. Kosovo is administered by an international administration, not by an independent local administration. Its judiciary has been created and shaped by the international administration and remains under its control; international judges are available. Such disregard for the rule of law and the right of access to court must, inevitably, undermine the credibility of international attempts to promote precisely such values. Indeed, it is difficult to expect local Kosovans to place their faith in a judicial system that has been built up by the international community, but in which that community itself has little confidence.

6. The international administration would appear, moreover, with the important exception of the Ombudsperson's Office, to offer only limited possibilities for appealing against its decisions. There are (as a logical corollary to the general immunity of the international administration) no administrative tribunals in Kosovo. The inhabitants of Kosovo are, as a result, denied the possibility of administrative and judicial appeal against the majority of decisions taken by an administration, which, furthermore, frequently regulates through administrative decisions questions that would, under normal circumstances, require either legislative action or a judicial decision.

7. There is, under such circumstances, an evident need for UNMIK (including KFOR) and the PISG to remain open to constructive criticism, including in sensitive areas, from both mandated and non-mandated observers. The mandates of human rights monitors must, therefore, be respected at all times. The creation by the SRSG of a Human Rights Oversight Committee, which will, inter alia, open the possibility for OSCE and others to comment on the human rights aspects of draft regulations, is consequently to be welcomed.

2. Specific human rights issues

8. The effective enjoyment of several human rights is conditional on an adequate level of security. Such security is still not guaranteed to all inhabitants in Kosovo. It is important that the committed and efficient combating of ethnically or politically motivated crimes and offences, as well as of other serious and organised crime, especially the trafficking of human beings, be given a clear priority in policing. Special attention must continue to be paid to the protection of vulnerable groups or individuals (victims of trafficking in human beings, witnesses, juveniles and minorities).

9. Even after NATO's arrival in Kosovo, serious crimes continued to be committed in retaliation against Serbs and Roma, as well as against Albanian Kosovans suspected of collaborating with the former regime. The reports of victims or their families were frequently heard but rarely acted on. This has gravely undermined the ethnic minorities' trust in the protection offered by KFOR and UNMIK, as well as in their impartiality. It is urgent, therefore, that serious investigations into crimes committed against minorities since the beginning of the international presence in Kosovo in June 1999, including abductions and disappearances, be given a higher priority by the police and the judiciary, than it has to date.

10. The problem of missing persons remains one of the most salient unresolved human rights issues in Kosovo. Three years after the arrival of the international presence the fates of some 3700 persons from all communities remains unknown. In addition to the torment of the families concerned, the failure to address this issue adequately represents a significant obstacle to the reconciliation of all parties and gravely undermines their confidence in the international administration. The creation, in June this year, of a new Office on Missing Persons and Forensics is, therefore, a positive development. It is, however, urgent that this office receives the necessary human and financial resources to fulfil its objectives rapidly.

11. A multi-ethnic judiciary is not an end in itself. It is a means that is thought to create the best conditions for an impartial judiciary in which all citizens place confidence. The imminent engagement of some 40 additional Serbian judges is, consequently, to be welcomed (at present, out of 420 local judges and prosecutors only 16 are Serbian, of which only 4 are actively working). Adequate salaries for all personnel, good working conditions, and sufficient protection, should allow for recruiting and retaining the qualified personnel still lacking.

12. Comprehension of the complex legal regime currently in place in Kosovo is not facilitated by the length of time it frequently takes for important UNMIK regulations to be translated into, and published in, local languages. Enhanced efforts would appear necessary to keep the members of the judicial professions as well as the public at large informed in a timely and clear fashion of the applicable law in Kosovo. The extreme slowness of a judiciary operating under difficult conditions is also a cause for concern.

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13. The SRSG has interpreted UNSCR 1244 and the Constitutional Framework he has promulgated, as granting himself the power to override judicial decisions. Thus, the SRSG has decided, by executive order, that individuals should continue to be detained, despite formal judicial decisions authorising their release. The present SRSG is to be credited for never having resorted to detentions by executive order. The Ombudsperson has, however, documented a number of other cases, where the UNMIK administration refused to execute court decisions. Such disrespect for court decisions by the executive is in contradiction with the principle of the rule of law and, ultimately, at odds with the establishment of a fully functioning, independent judiciary. As progress is apparently being made in this area, the time has perhaps come to consider alternative mechanisms to correct decisions by prosecutors and judges taken on grounds of partiality or corruption or which gravely jeopardise the efficient administration of justice.

14. COMKFOR has interpreted UNSCR 1244 as granting him the power to arrest and detain individuals extra-judicially. This practise, for which there is no specific legal basis and which allows for the potentially indefinite detention of individuals with no judicial decision or legal remedy, is hard to reconcile with international human rights standards. It is, moreover, difficult, in the light of UNMIK's own assertions regarding the progress made in the fields of police and justice over the last three years, to see the continuing justification for this practice.

15. The security situation would appear to remain such, however, as to warrant, in exceptional circumstances, KFOR arrests and detentions. Such powers ought, though, to be clearly conferred by the competent legislative authority in a normative document specifying the conditions under which they may be used and providing for control by an independent judicial body. The actions aimed at guaranteeing a safe and secure environment, as well as the fight against criminality and terrorism, must be carried in conformity with the principles of the rule of law and in full respect of non-derogable human rights.

16. The reports of qualified observers show that detention conditions have enormously improved in the (UNMIK-run) prisons in Kosovo. A visit to Dubrava, by far the biggest prison in Kosovo, revealed the resoluteness with which shortcomings that still existed in the beginning of this year, have since been addressed. Improvements do, however, remain to be made, particularly regarding recreational activities, the availability of professional training and measures that emphasise the presumptive innocence of persons in pre-trial detention, as well as the detention conditions of juveniles and women.

17. There is, for several reasons, considerable uncertainty over property rights in Kosovo; selling real estate to ethnic Albanians was prohibited for a certain period during the 1990's but continued to take place unofficially; registers and documents were destroyed in the war or were removed from Kosovo; illegal occupancy is rife; rapid transactions are taking place without sufficient documentation, etc. The Housing and Property Directorate (HPD, run by UN HABITAT) and a Housing and Property Claims Commission were set up to clarify or establish property rights. However, the caseload of claims made to HPD and the Commission is enormous and their resources far from proportionate (several decades would, on present rates, be required to complete its current workload). Given the importance of resolving property disputes for both stable economic development and to IDPs and refugees wishing either to return or sell, it would appear imperative that these institutions be granted resources commensurate with their tasks.

18. It is equally important that UNMIK, COMKFOR and all the components of KFOR, as well as all international personnel respect the property rights of all owners of private property in Kosovo. Adequate leases should be paid for privately owned occupied buildings and land. Damage caused must be swiftly and adequately repaired. Whilst COMKFOR has established an operational Claims Commission, national KFOR contingents have been slower to offer accessible complaint mechanisms. The scale and duration of KFOR's presence would, however, suggest a need for greater sensitivity to civilian claims for compensation and, perhaps, greater uniformity in the procedures established.

19. Attention will increasingly need to be given to ensuring the equal access of all communities to public services and utilities and the employment market. The living conditions in certain Roma settlements visited were, for instance, far from satisfactory and revealed an evident lack of municipal assistance. A comprehensive anti-discrimination law currently in the pipeline can be expected to counter some of these problems. Be this as it may, if minority communities are to be encouraged to participate in new domestic structures, efforts will have to be made to ensure the latter's sensitivity to minority needs.

20. Special attention must continue to be given to the protection and preservation of places of worship, including cemeteries, whilst allowing, so far as possible, for their use by worshippers. Consideration will, sooner or later, have to be given to the reconstruction or repair of places that have been destroyed or damaged.

3. The fate of persons displaced from their homes in Kosovo

21. The issue regarding the fate of persons displaced from their homes in Kosovo is inextricable. It involves, among others, questions of rights, obligations and values but also of human, political, financial and military feasibility. No single solution is capable of satisfying all these imperatives.

22. The most important human rights notion in relation with IDPs who have lost their homes in Kosovo and who are now living in other parts of their country (the FRY) is their right to a free choice between settling down elsewhere in the FRY and returning to Kosovo. That choice must be respected at all times by all involved.

23. The 3300, predominantly Roma, Egyptian and Ashkalie Kosovans currently enjoying temporary humanitarian status in the "the former Yugoslav Republic of Macedonia" face different choices. Whilst the majority, who claim to be unable to return, would appear to be pressing hard for their transfer to third countries, the unlikely success of all applicants suggests a need for the Macedonian authorities to hasten the establishing of procedures for obtaining refugee status and the increased rights that go with it.

24. Figures concerning IDPs wanting, and likely to be able, to return to Kosovo should be handled cautiously. Political interest or dogma, or the vested interest of those making the assessment, may tend to the bias of such figures. Difficult assessments regarding the push factors (the living conditions and prospects of IDP were they are now) and pull factors (the quality of life awaiting them should they return) influence people's wishes and current choices. Realism is called for; whilst by no means all of the 230,000 or so registered IDPs in Serbia and Montenegro can be expected to wish to return, it is, at the same time, clear that the current conditions in Kosovo are unfavourable for large-scale individual return. However, it seems to

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me that an urgent effort has to be made to have the process of minority return to Kosovo at least get seriously started now.

25. Despite frequent assertions to the contrary, it seems obvious that uncertainty over the final status of Kosovo poses a major problem with respect to return. For so long as the question remains open Kosovans inside and outside Kosovo will be unable to make an informed, clear choice about their personal future. Indeed, the uncertainty keeps hopes and frustrations alive: Albanian Kosovans still fear a return of the Serbs in one way or another, whilst radicalised Serbs continue to fuel hopes for a return to a position close to the *status quo ante*. These attitudes are detrimental to the readiness to respect the (human) rights of the other. Finally, uncertainty over the final status of Kosovo cannot but have a negative impact on potential investors' willingness to invest now. This, in turn, is not helpful for the enjoyment of economic and social rights by all inhabitants of Kosovo.

26. The current UNMIK policy is to prioritise the return of minority IDPs to their original residences. Organised return projects will only be sanctioned to this end and financial assistance is likely to be scarce for individuals returning to areas other than their places of origin. Care must be taken, however, to ensure that such a policy does not lead to a de facto restriction of the freedom of movement of minority return candidates and their freedom to choose their residence. Indeed, the sudden immense growth of cities like Pristina shows that Albanian Kosovans have widely taken advantage of the possibility to settle down elsewhere in Kosovo than where they used to live before June 1999. Moreover, return to the very house or village where someone came from, greatly reduces the potential for immediate returns. Consideration must be given, therefore, to accommodating individual or organised minority returns that reflect a free choice to settle in a location other than one's previous place of residence.

27. The right of all IDPs and refugees to choose to return to Kosovo puts an obligation on the Administration to offer returnees a normal, secure life without legal, political, social, economic or other discrimination. Whilst the successful return of minority IDPs will ultimately depend on the readiness of all communities to put aside past differences, resolute action, will, in the meantime be necessary, especially in the fields of security, the (enjoyment of) freedom of movement, the reconstruction of houses and the provision of basic infrastructure. Indeed, at present, the lack of financial means for preparing and sustaining return, would appear to be as much of an obstacle for return as security concerns.

28. The right of all IDPs to choose to stay or settle down in other parts of the FRY than Kosovo, puts an obligation on the governments of FRY, Serbia and Montenegro to offer these persons full integration without legal, political, social, economic or other discrimination. Greater efforts to assist this process would appear necessary. This is especially the case with respect to bureaucratic requirements, which place a major, unnecessary burden, on IDPs living in both Serbia and Montenegro and render their full integration difficult.

29. In view of the problems and difficulties outlined above, it would appear opportune to recall to the authorities of third countries hosting Kosovans who fled the territory of the FRY, that their involuntary return should take place in accordance with the criteria established by the UNHCR.

APPENDIX I

Glossary

COMKFOR	- Supreme Commander of KFOR
DRC	- Detention Review Commission
ECHR	- European Convention of Human Rights
FRY	- Federal Republic of Yugoslavia
HPCC	- Housing and Property Claims Commission
HPD	- Housing and Property Directorate
IAC	- Interim Administrative Council
ICG	- International Crisis Group
ICTY	- International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed on the Territory of the Former Yugoslavia since 1991
IDP	- Internally displaced person
IHF	- International Helsinki Federation for Human Rights
IOM	- International Office of Migration
KFOR	- Kosovo Force
KLA	- Kosovo Liberation Army
KPC	- Kosovo Protection Corps
KPS	- Kosovo Police Service
MNB	- Multinational Brigade
Montenegro	- the Republic of Montenegro
NATO	- North Atlantic Treaty Organisation
OCHA	- UN Office for the Co-Ordination of Humanitarian Affairs
OMIK	- OSCE Mission in Kosovo
PISG	- Provisional Institutions of Self-Government
Serbia	- the Republic of Serbia, without Kosovo (ie Serbia proper)
SFRY	- Socialist Federal Republic of Yugoslavia
SRSG	- Special Representative of the Secretary General (of the UN)
UN	- United Nations
UNHCHR	- United Nations High Commissioner for Human Rights
UNMIK	- United Nations Mission in Kosovo
UNSCR	- United Nations Security Council Resolution

APPENDIX II

Acknowledgements

The organisation of two visits, to so many places, and in so short a space of time, would not have been possible but for the assistance of numerous other actors. I am, first and foremost, greatly indebted to the offices of the Council of Europe in Belgrade, Podgorica, Pristina and Skopje. Their consummate professionalism in organising everything from drivers and interpreters to ministerial and other meetings ensured that the visits passed almost entirely without incident. I was, furthermore, fortunate and glad to be able to benefit from their experience and knowledge of the local situation.

The insight I was able to obtain into the situation of IDPs and refugees was due in large measure to the assistance of the UNHCR and the ICRC, both of which provided considerable logistical support and whose staff were, often at the expense of their weekends, exceedingly generous with both their time and their experience. The UNHCR office in Strasbourg deserves particular thanks for the speed and efficiency with which they addressed our rather demanding requests.

We were, throughout our visits, exceptionally well and openly received by all the authorities concerned. I am grateful, therefore, to all those who opened their doors, and, in the case of KFOR, their gates, to us, including, in respect of the latter, COMKFOR and the American KFOR contingent in Camp Bondsteel, who freely showed us their detention facilities and frankly responded to our questions. The same indeed, must be said of the directors of the UNMIK prisons in Dubrava and Pristina. Indeed, the cooperation of all the authorities, and, in particular, the logistical assistance provided by the Serbian and Montenegrin authorities, is gratefully acknowledged.

I would, lastly, like to thank all those IDPs and refugees, who, despite the tragedy of their situation and the paucity of their means, generously offered us their hospitality and patiently recounted their experiences.

APPENDIX III

Programmes of visits

**Programme of the Visit of
Mr. Markus Jaeger¹⁶⁷ and Mr. John Dalhuisen¹⁶⁸
to Serbia, Montenegro, Kosovo and the FYRoM
23rd July – 6th August 2002**

Tuesday 23 July – Friday 26 July : SERBIA.

Meetings with :

Mr. Ljajic, Minister of National and Ethnic Communities
Mrs. Radmila Hrustanovic, Mayor of Belgrade
Mrs. Sandra Raskovic-Ivic, Commissioner for Refugees
Mr. Petar Ladjovic, Advisor of the President of the FRY on Refugee Matters
Mr. Branko Radujko, Prime Minister's adviser on Refugee Matters

Mr. Peter Stocker, Head of the Delegation of the ICRC for FRY
Mr. Gert Westerveen, Assistant Representative, UNHCR, Belgrade

Representatives of Serbian Family Associations for Missing Persons

Round tables with representatives of :

Local NGO's
International Organizations
International NGO's

Site visits :

With the UNHCR - Rakovica (mixed Kosovo IDPs and Croatian/Bosnian Refugees Collective Centre)
- Jastrebac (Serb IDP Collective Centre)
- Cukaricka Padina (Roma IDP settlement)

With the ICRC - Batocina (Serb IDP Collective Centre)
- Privately accommodated internally displaced family near Knic

Saturday 27 July - Monday 29 July : MONTENEGRO

Meetings with :

Mr. Scepanovic, the Commissioner for refugees and displaced persons
Mr. Ranko Krivokapic, Chair of the Parliamentary Committee for Human Rights

Mr. Rob Breen, Head of Sub-Office, UNHCR, and field assistants.

¹⁶⁷ Deputy Director of the Office of the Commissioner for Human Rights

¹⁶⁸ Private Secretary to the Commissioner for Human Rights

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Kosmet, IDP association in Bar
Margo Group, Roma association, Kotor

Round tables with representatives of :

International NGOs
International Organizations.

Site visits :

With the UNHCR - Konik (Roma IDP Collective Centre)
- Spuz (Serb IDP Collective Centre)
- Hotel Zlatibor (Mixed IDP/refugee Collective Centre)

Tuesday 30 July – Sunday 4 August : KOSOVO

Meetings with :

Mr. Charles Brayshaw, PDSRSG (and Chairman of the HR Oversight Body)
Mr. Neithard Hoefer-Wissing, Deputy Director, Political Affairs, Office of the SRSG
Mr. Christian Lindmeier, Press Officer, Division for Public Information
Mr. Andrew MacGregor, Head of HRD, OSCE

Mr. Jean-Christian Cady, DSRSG, Head of Pillar I, Police and Justice
Mr. William Irvine, Head, Penal Management Section, Department of Justice

Mr. Stefan Feller, UNMIK Police Commissioner
Mr. Nils Bechmann, Deputy Commissioner

Mr. Saber Azam, Acting Director, Office of Returns and Communities
Mr. Nenad Radosavljevic, Senior Adviser, ORC

Ambassador Pascal Fieschi, Head of Mission, OSCE
Mr. Carsten Weber, Director, Human Rights/Rule of Law, OSCE
Mr. Gregory Fabian, Legal Adviser, Human Rights, OSCE
Mr. David Buerspedde, Office of Political Affairs, OSCE
Mr. Ramadan Berat, Romani issues, OSCE
Mr. Zurab Lomashvili, OSCE Head of Mission, OSCE
Mr. Elmars Svekis, Political Officer, OSCE

Ms. Donna Gomlen, Deputy Head, Ombudsperson's Office

Mr. Milod Todorovic, Inter-Ministerial Co-ordinator on Non-Albanian Communities
Ms. Sadete Demaj, Human Rights Adviser to the Prime Minister, Office of Good Governance
Mr. Baki Svirca, Acting Head of the Office of Returns and Communities within the PM's Office

Mr. Gottfried Koefner, Deputy Head of Mission, UNHCR
Mr. Vetton Orana, Associate Protection Officer, UNHCR
Ms. Ariana Zherka-Hoxha, Protection Assistant, UNHCR

Mr. Gregory Lyndon, Head of Kosovo Team, OHCHR,
Ms. Barbara Amstad, Head of Mission, ICRC,
Mr. Paulo Marques, Chief of Staff, IOM,
Mr. David Chillaron-Cortizo, Regional Head of Mitrovica Office, UNMIK Housing and Property Directorate

Mr. Emilio Castaneda, Municipal Administrator of Leposavic
Mr. John Rogers, MA Mitrovica,

Brigadier S. Allen and HQ staff officers, Film City
Colonel Dran, Commander of KFOR Bimeca

Representatives of Serb Family Associations for Missing Persons (ICRC office in Gracanica)
 Representatives of Albanian Family Associations for Missing Persons (ICRC office in Gjakova)

Alliance for Rights and Tolerance (grouping of international NGOs for return issues)

Site visits :

With the UNHCR - Sveti Sava School, Kosovo Polje, meeting with Serbian IDPs
 - Magura (Lipjan/Lipljan) return site: Discussion with K/Albanian representatives and Ashkalia IDP representatives
 - Vranjevac (Pristine/Pristina) - Ashkalia return site.
 - Makres (return site)
 - Stara Kolonja (return site)
 - Roma neighbourhood in Gjilan/Gnjilane
 - K/Albanian villages (Koshutovo, Bistrica, Ceranja) in Leposavic
 - Warehouses, Leposavic town (Roma IDP Collective Centre)
 - Kodra e Minatoreve/ Mikronaslj (mixed neighbourhood, North Mitrovica)
 - Branko Radicevic (Collective Centre for Serb IDPs & Croatian/Bosnian refugees, North Mitrovica)
 - Bosniak mahala and Three Towers (North Mitrovica)
 - Priluzje, Serb-Roma enclave

UNMIK detention centre, Pristina
 KFOR detention centre, Camp Bondsteel

Sunday 4 August - Tuesday 6 August : the FYRoM

Meetings with :

Mr. Heiki Estola, Head of Delegation, International Federation of Red Cross
 Ms. Suzana Tuneva-Paunovska, Senior Programme Officer, IFRC
 Mr. Owen Masters, Resident Adviser on Local Self-Government, Council of Europe
 Mr. Gjorgji Jovanovski, Assistant, Council of Europe Information Office

Mr. William Tall, Field Coordinator, UNHCR
 Mr. Francois Stamm, Head of delegation, ICRD
 Mr. Ilija Cvetanovski, Secretary General of the Macedonian Red Cross

Mr. Nezet Mustafa, Mayor of the Municipality of Suto Orizari
 Mr. Goran Mitevski, Director of the Bureau for Public Security, Ministry of Interior.
 Mr. Boge Cadinovski, adviser of the Minister, Ministry of Labour and Social Policy.

Representative of Mr. Orce Bozinovski, Mayor of the Municipality of Petrovec

Roma Refugees Committee, Suto Orizari

Site visits :

With the UNHCR - Suto Orizari (Roma refugee Collective Centre)
 - Katlanova

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Programme of the Visit of

**Mr. Alvaro Gil-Robles,
Commissioner for Human Rights of the Council of Europe,
Mr. Christos Giakoumopoulos¹⁶⁹, Mr. Markus Jaeger
and Mr. John Dalhuisen**

**to Kosovo, Montenegro and Serbia
4 – 11 September 2002**

Wednesday 04 September – Saturday 7 September : KOSOVO**Meetings with :**

Mr. Michael Steiner, SRSG

Mr. Ibrahim Rugova, President

Mr. Bajram Rexhepi, Prime Minister

General Valentin, COMKFOR

Ambassador Pascal Fieschi, HoM, OSCE

Mr. Andrew MacGregor, Head of HRD, OSCE

Mr. Gregory Fabian, A/Senior Legal Adviser, OSCE

Mr. Elmars Svekis, Political Officer, OSCE,

Mr. Marek Nowicki, Ombudsperson

Ms. Donna Gomlen, Deputy Ombudsperson

Mr. Nike Lumezi, Local Deputy, Ombudsperson Institution

Ms. Peggy Hicks, Director of Office of Returns and Communities, Office of the SRSG

Mr. Nils Bechmann, Deputy Police Commissioner

Mr. Jose-Pablo Braybar, Head of Office for Missing Persons

Mr. Walter Irvine, Chief of Mission, UNHCR

Ms. Anne-Christine Eriksson, Deputy CoM, UNHCR

Mr. Sheremet Ademi, President of Coordination Council of Kosovo Family Associations for missing persons,
hostages and war wounded

Sites visited :

With the UNHCR - Bica/Binxhe (Klina/c), K/Serb return village

- 7 Shtatori, K/RE concentration (Peje/Pec)

- Warehouses, Leposavic town (Roma IDP Collective Centre)

- Kodra e Minatoreve/ Mikronasli (mixed neighbourhood, North Mitrovica)

- Bosniak mahala and Three Towers

UNMIK Detention Centre, Dubrava

KFOR Detention Centre, Camp Bondsteel

Morgue, Office for Missing Persons, near Orahovac

¹⁶⁹ Director of the Office of the Commissioner for Human Rights

Sunday 8 September - Monday 9 September : MONTENEGRO

Meetings with:

Mr. Zeljko Sturanovic, Minister of Justice in Republic of Montenegro
Mr. Ranko Krivokapic, Chair of the Parliamentary Committee for Human Rights
Mr. Scepanovic, Commissioner for Refugees and Displaced Persons

Ms. Charlotte Bjerregaard, Deputy CoM, UNHCR
Mr. Vlado Radulovic, Assistant Liaison Officer, UNHCR

Kosmet, IDP association in Bar

Site visits:

With the UNHCR - Konik (Roma IDP Collective Centre)
- Spuz (Serbian IDP Collective Centre)

Monday 9 September - Wednesday 11 September : SERBIA

Meetings with :

Mr. Vojislav Kostunica, President of the Federal Republic of Yugoslavia

Mr. Nebojsa Covic, President of the Coordination Center for Kosovo Metohia, Deputy Prime Minister of Serbia

Mrs. Radmila Hrustanovic, Mayor of Belgrade

Mrs. Sanda Raskovic-Ivic, Commissioner for Refugees

Round tables :

with representatives of International Organizations

with representatives of Serbian Associations of the Families of the Missing from Kosovo, ICRC office.

Site visits :

With the UNHCR - Jastrebac (Serb IDP Collective Centre)
- Cukaricka Padina (Roma IDP settlement)

