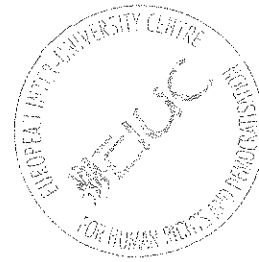


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EIUC / European Master in Human Rights and Democratisation
Venice 2003 / 2004



The Lack of Access to Healthcare of Kosovo Serbs: A Human Rights Violation?

By: Dana Cristescu

Supervised by: Dr. Hans-Joachim Heintze

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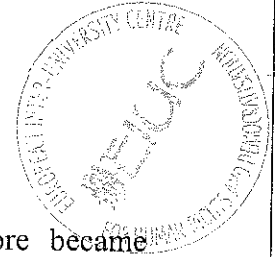
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Acronyms list

ASI	– Assembly Support Initiative
CERD	– Committee for the Elimination of Racial Discrimination
CESCR	– Committee on Economic, Social and Cultural Rights
CoE	– Council of Europe
CSCE	– Conference for Security and Cooperation in Europe
ECHR	– European Convention on Human Rights
ECMI	– European Centre for Minority Issues
ECOSOC	– United Nations Economic and Social Council
ERPKIM	– Eparhija rasko-prizrenska i kosovsko-metohijska (Diocese of Raska-Prizren and Kosovo-Metohia)
ESC	– European Social Charter
ESCR	– Economic, Social and Cultural Rights
ESI	– European Stability Initiative
FRY	– Federative Republic of Yugoslavia
ICCPR	– International Covenant on Civil and Political Rights
ICERD	– International Convention for the Elimination of All Forms of Racial Discrimination
ICESCR	– International Covenant on Economic, Social and Cultural Rights
ICG	– International Crisis Group
ICJ	– International Commission of Jurists
IDP	– Internally Displaced Persons
IIME	– Institute for International Medical Education
IPA	– International Peace Academy
IWPR	– Institute for War and Peace Reporting
LCO	– Local Community Officer
KFOR	– Kosovo Force
KSIP	– Kosovo Standards Implementation Plan
MdM	– Medecins du Monde (Doctors of the World)
NATO	– North Atlantic Treaty Alliance
NUI	– National University of Ireland
OHCHR	– Office of the High Commissioner for Human Rights
OSCE	– Organisation for Security and Co-operation in Europe
PISG	– Provisional Institutions for Self-Government
SC	– Security Council
SCR	– Security Council Resolution
SIM	– Studie- en Informatiecentrum Mensenrechten (Netherlands Institute for Human Rights)
SMH	– Serbian Ministry of Health
SMU	– Sub-Municipal Units
SRSG	– Special Representative of the Secretary General
UDHR	– Universal Declaration of Human Rights
UN	– United Nations
UNDP	– United Nations Development Program
UNHCR	– United Nations High Commissioner for Refugees
UNMIK	– United Nations Mission in Kosovo

Acronym list - continued

UN SCOR	– United Nations Security Council Official Record
UNTAET	– United Nations Transitional Administration in East Timor
WHO	– World Health Organisation



Introduction

As this paper was being researched, Kosovo once more became headline news all over the world. In March 2004, violence erupted again in the troubled province, and this time victims were not Kosovo Albanians, like in 1998 and beginning of 1999, but Kosovo Serbs. The violence erupted after three troubled years for minorities and almost two years of relative calm, in a moment when Kosovo authorities, both local and international, seemed to be preoccupied only by the fulfilment of the standards required for starting discussions about Kosovo's final status. Yet for those who knew more about the situation in the province, violence only confirmed that there are no easy solutions for an ethnically divided province, where minorities are on a "life support machine" and manage to survive only under the protection of an international force.

Kosovo has a complex history that has been politicised during the 20th century by both Albanian and Serbian sides. Albanians claim that Illyrians, who inhabited in the remote past parts of the Western Balkans, are their ancestors. However, unlike Serbs, Albanians did not have, in the Middle Ages, a tradition of statehood in the territory of the present day Kosovo. The territory of Kosovo is therefore claimed by Albanians on the basis of their uninterrupted presence since ancient times, before the arrival of Slavs, and by Serbians because the territory is considered to be the birthplace of the first Serb kingdom in medieval times¹.

Albanians and Serbs are thus the two main ethnic groups with contradicting interests in Kosovo. Data about the ethnic composition of the province have been repeatedly manipulated and misused by both sides. However, there are also other ethnic groups in the province, mainly Roma, Egyptians and Ashkaelia, and Muslim Slavs, divided into two large categories, Bosniaks and Goranis. A Turkish minority is present as well. Although despised by all other ethnic groups in Kosovo, Roma, Egyptians and Ashkaelia

¹ Noel Malcolm - *Kosovo - A Short History*, MacMillan, London, 1998, pp.5-6.

are perceived by Kosovo Albanians as being on the Serb side and treated accordingly².

Serbs were representing in 1999 about 10% from a total population of approximately 2 million, namely 200,000 people. After the transfer of Kosovo under the administration of the United Nations Mission in Kosovo (UNMIK) and the withdrawal of the Yugoslav Army from Kosovo, about 100,000 Serbs appear to have fled the province for Serbia proper. The remaining 100,000 live in enclaves scattered in the whole territory of Kosovo or in North Mitrovica.

Apart from their position of the 'traditional enemy' of Albanians, Serbs are in a special situation when compared to other ethnic minorities in Kosovo due to their capacity to organise themselves politically as well as the support they get from the Serbian government in Belgrade³. The present paper is far from stating that other minority groups are not discriminated against in regard to access to health care or other public services⁴. Due to time and space constraints, it chose to concentrate on the Serbian community. It also happens that Kosovo Serbs are in a particular position in relation to Kosovo Albanians. This situation can be easily exploited for political aims, and the underlying interests are extremely high, pointing in the direction of the final status of the province. The human rights of Kosovo Serbs are therefore under high political pressure and this does not always play in favour of their realisation.

The members of the Serbian community face serious difficulties in moving freely within Kosovo and normally use 'minority shuttles' or even armoured vehicles to move from one enclave to another.

The lack of freedom of movement of minorities in Kosovo, especially the Serbian minority, has repercussions on the rights these minorities should enjoy, whether civil and political rights or economic and social rights.

The present paper chose to concentrate on the right to health of the Serbian minority in Kosovo, and in particular on the access to healthcare. The

² OSCE Mission in Kosovo and UNHCR Branch Office in Kosovo - *Tenth Assessment of the Situation of Ethnic Minorities in Kosovo (Period covering May 2002 to December 2002)*, March 2003, p. 12-13 (further referred to as "OSCE / UNHCR Tenth Assessment").

³ Anna Matveeva and Wolf-Christian Paes, *The Kosovo Serbs: An Ethnic Minority between Collaboration and Defiance*, Bonn International Center for Conversion, Friedrich Naumann Foundation and Saferworld, June 2003, p. 21-23 (further referred to as "Matveeva and Paes - The Kosovo Serbs").

⁴ For more information, see the OSCE / UNHCR Tenth Assessment.

question it answers has multiple facets: first, is there a right to health, and what exactly the content of such a right is? In case there is a right with a clear normative content, who is entitled to it? How should discrimination be understood in the case of a social right like the right to the highest attainable standard of health? With whom lies the obligation of enforcing this right in the particular case of Kosovo? What are the means to implement the right in question?

The problems faced by ethnic minorities in Kosovo in enjoying the right to health are often comparable to those faced by those wanting to enjoy other economic and social rights like the right to work, to education or to social security. The particular choice of the right to health is due to the significance of the direct impact a violation of this right can have on the life of a person and on the possibility to enjoy any other rights. As said in the General Comment no. 14, on the right to health "[h]ealth is a fundamental human right indispensable for the exercise of other human rights⁵".

Moreover, the realisation of the right to health is viewed from the perspective of the interdependence of human rights, capturing the idea "that values seen as directly related to the full development of personhood cannot be protected and nurtured in isolation⁶". This statement involves a contribution towards the realisation of many other human rights, through the realisation of the right to health and the other way round.

The healthcare system in Kosovo faces numerous problems. There is no health insurance system in place, therefore many Kosovars of all ethnicities have no access to medical care because they cannot afford to pay for it. The existing facilities are not of the best quality. Apart from this discrimination on the basis of income, certain ethnic minorities are denied medical care because their ethnicity, even when they can afford to pay for it. The option to study the right to health in the particular case of the Serbian minority is motivated by the

⁵ United Nations Economic and Social Council (ECOSOC) - "The right to the highest attainable standard of health: 11/08/2000. E/C.12/2000/4, CESCR General Comment 14. (General Comments)", available at [www.unhcr.ch/tbs/doc.nsf/\(symbol\)/E.C.12.2000.4.En?OpenDocument](http://www.unhcr.ch/tbs/doc.nsf/(symbol)/E.C.12.2000.4.En?OpenDocument), on 7/6/2004, par.1 (further referred to as the General Comment no.14).

⁶ G. Scott - *The interdependence and Permeability of Human Rights Norms: Towards a Partial Fusion of the International Covenants on Human Rights*, in "Osgode Hall Law Journal", vol. 27, 1989, p.786, cited in Fons Coomans - *Economic, Social and Cultural Rights*, in SIM Special no. 16, Utrecht, 1995, p. 12.

particular situation in which this minority finds itself as noted above. More than Roma, Egyptians and Ashkaelia, and certainly much more than the Turkish⁶ minority, Serbs in Kosovo are a target for ethnically based discrimination in all fields, including healthcare.

It should be noted that, ironically, the situation that Serbs have to face nowadays is not new in the region, reminiscent of the situation Kosovo Albanians faced before 1999, when they were systematically denied medical care in politically controversial cases, or when they were afraid to use the official Serbian system by fear of maltreatment. In striking similarity with today's situation, a parallel Kosovo Albanian health care system was thus in place during the 1990s⁷.

The paper has four chapters. Chapter one is analysing who the holders of the right to health are and what the right to health and non-discrimination are from the point of view of international and regional treaties like the International Covenant for Economic, Social and Cultural Rights, the International Convention for the elimination of All Forms of Racial Discrimination, the European Convention for Human Rights or the European Social Charter. It anticipates a few aspects forming the body of the third chapter and establishes a connection between the latter and the international standards contained in the treaties mentioned above.

Further on, the second chapter establishes to what extent one can speak about international human rights instruments applicable in Kosovo and see whether there are any remedies or accountability mechanisms that Kosovo Serbs could use internationally, in case their right to health being violated.

The third chapter is a detailed analysis of the current situation in the field of health care in Kosovo in regard to minorities. The central issue are the origins and reasons of existence of parallel structures in the minority areas in Kosovo, as well as attempting to understand whether the right to the highest attainable standard of health is or not violated in the case of Serbs living in

⁷ OSCE – *Kosovo / Kosova - As Seen, As Told – An Analysis of Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999*, available at <http://www.osce.org/kosovo/documents/reports/hr/part1/>, on 28/06/04, chapter 11 (further referred to as "Kosovo As Seen, As Told").

Kosovo. It also raises the issue of the unresolved final status of Kosovo and its implications for international human rights standards.

Finally, the fourth chapter is a short and non-exhaustive description of the means used by Kosovar authorities to tackle the problem: governmental policies, legislation, unfortunately still in a draft form; judicial remedies and project of non-governmental organisations trying to fill in the gap between what the public institutions offer and what the needs are.

The fact that the central source of the paper are reports of international and Kosovar organisations may be seen as a limitation; but the collection of relevant information directly from the affected communities is time consuming, and requires a complex sociological apparatus. It is therefore not feasible in the given timeframe, and based on the interviews that were conducted, one can conclude that directly collected information most probably would only add details and confirm the pattern described in the reports used as source.

The terms "Albanian" and "Serb" used occasionally in this paper refer to members of Kosovo Albanian and Kosovo Serb communities respectively, unless otherwise stated. "Serbia proper" refers to the territory of the state of Serbia without the Autonomous Province of Kosovo. "Serbian government" refers to the government in Belgrade.

"Primary health care" means "essential health care made accessible at a cost the country and community can afford ..." and that is provided by a health care professional in the first contact a patient has with the health care system, to which everyone in the community should have access. "Secondary health care" means medical services provided by physicians who do not have first contact with patients, delivered by certain specialists like urologists or cardiologists, usually requiring more sophisticated and complicated diagnostic procedures and treatment than provided by the facilities at the primary care level. Similarly, "tertiary care" means specialised care, usually involving special investigation and treatment⁸.

In the specific case of Kosovo, "ambulantas" are small clinics located in villages and "health houses" are more complex facilities of the type of a polyclinic located usually in bigger villages or small towns. These facilities

⁸ Definitions of terms available on the site of the Institute for International Medical Education (IIME), at www.iime.org/glossary.htm, at 02/07/04.

belong both, by and large, to the primary health care level. Secondary care is mainly represented in Kosovo by hospitals.

CHAPTER I - The Right to Health in International Human Rights Instruments

The present chapter identifies the holders of the right to health in international law, explains the normative content of the right in discussion, clarifies the state obligations that are created by the main international human rights instruments, establishes the minimum core content components relevant for the present paper and identifies, in this light, specific violations of the right in the context of the multi-ethnic society of post-conflict Kosovo. It also briefly presents the main accountability mechanisms, whether charter or treaty based.

The issue of the Serbian minority in Kosovo and its access to health care can be best addressed from the double perspective of non-discrimination and of the right to health as a social right. While non-discrimination of ethnic minorities has been widely addressed in a variety of international, regional and national legal instruments, the right to health as such has had, until recently, the status of a "second-class right", and its content has been clarified only during the last few years.

1.1. Who has the right to the highest attainable standard of health?

The right to health appears first in the Universal Declaration of Human Rights (UDHR). Of course the UDHR is not a treaty, but in time it has tended to become part of customary law and to set a standard in regard to the human rights that are to be respected universally. This is particularly important in the case of territories with no clear status, like Kosovo. Article 25.1 of the UDHR says:

"Everyone has the right to a standard of living adequate for the health of himself and of his family, including food, clothing, housing and medical care and necessary social services".

This statement is developed in article 12 of the International Covenant for Economic, Social and Cultural Rights (ICESCR) of 1966:

"1. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.

2. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for:

[...]

(c) The prevention, treatment and control of epidemic, endemic, occupational and other diseases;

(d) The creation of conditions which would assure to all medical service and medical attention in the event of sickness."

It becomes clear therefore that "everyone" has the right to the highest attainable standard of health. No specific mention to non-discrimination is made. Because in the present paper the right to health of the Serbian minority is viewed in the light of non-discrimination in access to medical care, it is worthwhile reading art.12 of ICESCR in the light of art. 2(2) of the same covenant:

"2. The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised *without discrimination* of any kind as to race, colour, sex, *language*, religion, political or other opinion, *national* or social *origin*, property, birth or other status" (emphasis added).

Also from the perspective of non-discrimination and for the purpose of further clarifying the concept, art.5 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) of 1969 provides for "equality before the law, notably in the enjoyment of [...] (e) [e]conomic, social and cultural rights, in particular [...] (iv) [t]he right to public health, medical care, social security and social services". This right is aimed at "everyone, without distinction as to [...] ethnic origin". As noted in the General Recommendation 14 regarding the definition of discrimination, non-discrimination is a basic principle in the protection of human rights. General Recommendation 20 on the implementation of the above quoted article of ICERD, mentions that the article in discussion only requires a guarantee that the exercise of human rights shall be free from ethnic discrimination, but does

not create, for example, a right to health. The existence and recognition of such a right by the state in discussion is assumed by ICERD⁹.

In regional context, it should be noted the statement made by the current states members of OSCE in the "Report on the CSCE Meeting of Experts on National Minorities": "The participating States reconfirm the importance of adopting, where necessary, special measures for the purpose of ensuring to persons belonging to national minorities full equality with the other citizens in the exercise and enjoyment of human rights and fundamental freedoms¹⁰."

Keeping in mind the focus of the paper on the right to the highest attainable standard of health of the Serbian minority in Kosovo, and the above mentioned provisions that the right in discussion belongs to "everyone", one can conclude as a first step that the right holders in the given case are each and every Kosovo Serb, similarly to each and every other person in Kosovo. On the other hand, a discussion about a possible collective right of the Kosovo Serbian community as a whole may seem hazardous, but worthwhile.

To begin with, "collective rights are rights pertaining to collectivities as such in order to protect some collective interests¹¹". One can argue that the collective interest of Kosovo Serbs is to survive as a collectivity, and a mean of achieving this end is to enjoy the right to receive adequate medical assistance, from the perspective of the systematic *de facto* discrimination of Kosovo Serbs in regard to health care provision, as it will be shown in Chapter III. Current international law contains in general very few provisions that confer rights to a collectivity as such. Many question marks exist concerning the nature and justifiability of such rights, their compatibility with individual human rights and even the fact whether they can be viewed as genuine human rights. On one hand, it is argued that, "the granting of rights to collectivities seems to be obligatory in order to ensure such a life of dignity and respect for the individual members of some groups". The opposite approach is to take a very reserved

⁹ OHCHR – *General Recommendation No. 20: Non-discriminatory implementation of rights and freedoms (Art.5)*: 15/03/96, 48th session of CESCR, par.

¹⁰ CSCE – *Report on the CSCE Meeting of Experts on National Minorities*, Geneva, 1991, available at <http://www.htmh.hu/dokumentumok/oscegeneva.htm>, on 02/07/04.

¹¹ Marlies Galenkamp – *Collective Rights*, in "SIM Special 16", Utrecht, 1995, p. 53 (further referred to as "Galenkamp – Collective Rights").

position and argue *inter alia* that is extremely unclear who is entitled to exercise such collective rights or who is to represent the collectivity, while there is a great chance that the proclamation of such rights may be politically abused for various purposes¹².

The present paper takes the view that, because of dangers of manipulation¹³ and because of the above-mentioned divided opinions among human rights specialists, it is safer to speak about individual rights to the highest attainable standard of health of Kosovo Serbs.



1.2. Normative Content of the Right to Health

Although recognized in an international legal instrument of the importance of ICESCR, the content of the right to health was unclear for both states and legal experts. This matter started to be clarified only during the last fifteen years, after the Office of the High Commissioner for Human Rights (OHCHR) drafted the General Comments 3 and 14¹⁴.

Going back to the "right to the highest attainable standard of health" as stated in art. 12 of ICESCR, it should be noted that it is not limited to right to healthcare. However, the present paper is focused on this latter aspect, understood as the right to the enjoyment of a variety of facilities, goods and services. The Committee on Economic Social and Cultural Rights identifies one aspect of the right to the highest attainable standard of health in the form of the provision of "timely and appropriate health care¹⁵".

Further on, the Committee identifies four essential components of the right to health. The first one is the availability of public health and health care facilities. While this aspect is of great importance and Kosovo faces significant problems in providing adequate sanitation facilities, hospitals, clinics, trained

¹² *Ibid*, pp.65-68.

¹³ For concrete examples of political use of human rights, see Sava Janjic - *Parallel Institutions in Focus Again*, in "ERPKIM Info-Service", 30 October 2003, available at <http://www.kosovo.com/erpkim30oct03.html>, on 11/05/04.

¹⁴ OHCHR - *The Nature of States Parties Obligations* (art. 2, par. 1): 14/12/90. CESCR General Comment 3 (further referred to as "General Comment 3") and OHCHR - *The Right to the Highest Attainable Standard of Health*: 11/08/2000. E/C.12/2000/4, CESCR General Comment 14 (further referred to as "General Comment 14").

¹⁵ General Comment 14, par.17.

and competitively remunerated medical personnel for the whole of its population¹⁶, the present paper chose not to analyse it, focusing instead on the more political issue of discrimination on ethnic basis when providing medical care.

The second component relates to the accessibility of health facilities, goods and services, seen as having four overlapping dimensions: non-discrimination, physical accessibility, affordability and information accessibility. Again, although affordability, information accessibility and partly physical accessibility are problematic for large segments of Kosovo population¹⁷, the aspects of interest remain the accessibility in law and fact without any discrimination and partly physical accessibility. Certainly discrimination itself can have multiple facets, for example on grounds of gender or social status, but, as stated above, ethnic-based discrimination of Serbian minority remains the central point of interest. In this context, physical accessibility should be seen as a consequence of ethnic-based discrimination in accessing the nearest medical facilities.

The third element contributing to the fulfilment of the right to health is the acceptability of health facilities. In relation to the focus of the paper, the main element is the cultural appropriateness of the health facilities provided, in particular in respect to the language used in healthcare establishments in relations to the patients, as well as the language to be used by the staff of medical facilities in minority areas in their relations with the central "majority" authorities.

Finally, the quality of health facilities, goods and services forms a fourth component of the right to health, with implications on the skills of medical personnel, drugs, hospital equipments or sanitation¹⁸. Again, these

¹⁶ For more information on this aspect, see World Health Organisation (WHO) – *Interim Health Policy Guidelines for Kosovo – Prepared for the UN Civil Administration Health and Social Services*, Prishtina, August 2000, p. 2-6.

¹⁷ For more information, see Camille Montreux and Graham Holliday – *Training Workshop – Reconstruction of Health Systems in a War-torn Society – John Knox Centre, WHO, Geneva, 26 August – 1 September 2001*, European Centre for Minority Issues (ECMI) Report no.19, December 2001 and World Bank – *Kosovo, Federal Republic of Yugoslavia (Serbia and Montenegro) – Economic and Social Reforms for Peace and Reconciliation*, February 2000, vol. 2, chapter 6: Health, p. 1-3.

¹⁸ *Idem*.

aspects represent rather a general problem of Kosovo rather than a specific problem of the Serbian minority.

Although only some aspects of the four components of the right to health as identified in the General Comment 14 by the Committee on Economic, Social and Cultural Rights are of relevance for the problems faced specifically by the Serbian minority in Kosovo, all of them were briefly overviewed in order to provide a complete picture of the situation. The Serbs of Kosovo are not the only ones not enjoying the right to the highest attainable standard of health, but the specific violations of their right to health could be more easily addressed from the point of view of legal remedies, being interlinked with ethnic discrimination.

In the light of art.12.2 (c) of the ICESCR, the promotion by authorities of social determinants of good health could be relevant. The General Comment 14 enumerates social determinants "such as environmental safety, education, economic development and gender equity¹⁹". The enumeration is not exhaustive, and one could easily include safety in general, or better said personal security. As it can be seen in Chapter I, of particular interest is the creation of a system of urgent medical care in case of accidents. It is the sector where the vulnerabilities of the Serbian minority in Kosovo are most easily noticeable, especially in situations of ethnic tension, of which the most recent was the one in March 2004.

Consequences deriving from art.12.2 (d) of ICESCR include the provision of "equal and *timely* access to basic preventive, curative, rehabilitative health services²⁰" (emphasis added). Again, the importance of timeliness in offering medical assistance is striking in conflict situations like the one mentioned above. Also deriving from art.12.2 (d) are the provision of essential drugs and the participation of everybody in political decisions relating to the right to health.

¹⁹ *Idem.*

²⁰ *Idem.*

1.3. International Obligations under ICESCR; Core Content and Violations Approach to the Right to Health

State obligations regarding economic, social and cultural rights are the subject of an ongoing discussion. For the time being, the prevailing opinion is that the rights in discussion create obligations to respect, protect and fulfil, consisting simultaneously of dimensions of obligations of conduct and result, all subject to violations under human rights law²¹.

In the light of Maastricht Guidelines, “[v]iolations of the Covenant (i.e. ICESCR) occur when a State fails to satisfy what the Committee on Economic, Social and Cultural Rights has referred to as ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights...’²²”. It is important therefore in this context to establish the core content of the right to the highest attainable standard of health. General Comment 14 takes the view that part of the core obligations a state has in order to fulfil the right to health is “[t]o ensure the right of access to health facilities, goods and services on a non-discriminatory basis”, as well as “[t]o adopt and implement a national public health strategy and plan of action [...] addressing the health concerns of the whole population”, while ensuring that “the process [...] shall give particular attention to all vulnerable and marginalised groups” and “[t]o ensure equitable distribution of all health facilities, goods and services²³”.

According to the same General Comment 14, core obligations are non-derogable and states cannot justify non-compliance under any circumstances. Violations of these obligations can occur through acts of commission and omission²⁴. Having in mind all relevant reports of international and non-governmental organisations²⁵, it is not accurate to speak in the case of Kosovo

²¹ Scott Leckie – *Violations of Economic, Social and Cultural Rights*, in SIM Special no. 20, Utrecht, 1998, chapter 3, pp.14-16 (further referred to as “Leckie – Violations of ESCR”).

²² The Maastricht Guidelines, par.9.

²³ General Comment 14, par.43.

²⁴ *Ibid.*, par. 46-49.

²⁵ See the OSCE “*Tenth Assessment of the Situation of Ethnic Minorities in Kosovo*” from March 2003, the OSCE report on “*Parallel Structures in Kosovo*” from October 2003, the Amnesty International “*Prisoners in Our Own Homes*” report from April 2003 or the Council of Europe report “*Kosovo: The Human Rights Situation and the Fate of Persons Displaced from Their Homes*” from October 2003, as well as the International Crisis Group’s reports on Kosovo from 2000 to 2004.

about acts of commission, like the repeal or suspension of legislation implementing the right to health or the adoption of discriminatory legislation. The interest of the present paper is in acts of omission, like the failure to enforce relevant laws or the failure to take other appropriate steps towards the fulfilment of the right to the highest attainable standard of health of Kosovo Serbs.

The obligation to respect requires the state not to interfere with the realisation of a right²⁶. In the case of the right to health, this could mean for example that a violation occurs when the state interferes with the provision of health services as a punitive political measure, for example by detaining physicians because they treated injured individuals suspected to be "subversive"²⁷. This was actually the case, during the last years of control of the Milosevic regime in Kosovo, the measure being directed at that time to Serbian physicians attempting to treat wounded Kosovo Albanians²⁸. Denial of access to health care can take a great variety of forms and the General Comment 14 makes clear that it can be a *de jure* or a *de facto* discrimination²⁹. Violations of the obligation to respect can also occur when a state suspends or adopts laws and policies that interfere with the enjoyment of the right in discussion; when a state fails to take into account its legal obligations regarding the right to health when entering in various agreements with other state or non-state actors or when deliberately withholds or misrepresents information vital for health protection or treatment³⁰.

The obligation to protect, in our particular case the right to health, involves the state obligation to prevent violations of a right by third parties³¹. An example is the failure of the state to limit the availability of guns³². There are aspects in this example that imply a violation of the right to life but, as death is not always the result, the right to health component is also present. The case mentioned in the source of this information was the USA. However, this

²⁶ OHCHR – *The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights*, E/C.12/2000/13, par. 6 (further referred to as "The Maastricht Guidelines").

²⁷ Audrey R. Chapman – *Violations of the Right to Health*, SIM Special no. 20, Utrecht, 1998 p. 94 (further referred to as "Chapman – Violations").

²⁸ Kosovo As Seen, As Told, chapter 11.

²⁹ General Comment 14, par.50.

³⁰ *Idem*.

³¹ The Maastricht Guidelines, par. 6.

³² Chapman – Violations, p.107.

could be a typical and wide-spread violation of the right to health in Kosovo. For the time being, there is an estimate of 330,000 to 460,000 civilian small arms in Kosovo. In 2002, it was estimated that 72% of homicides in the province were committed with small arms, compared to a maximum in the rest of Eastern Europe of about 13%³³. In this context, inter-ethnic violence has ups and downs, yet in the context of the uncertain status of Kosovo it can virtually erupt any time. The "Small Arms Survey" study shows that nowadays most homicides happen between Kosovo Albanian men³⁴, but the riots of March 2004 show that Kosovo Serbs are potentially extremely vulnerable. Failure to limit the sale and distribution of small arms, or to regulate or ban their availability should be considered violations of the obligation to protect the right to health³⁵.

Apart from the above mentioned case, violations of the right to health occur *inter alia* when consumers and workers are not protected from practices detrimental to health, when the production and consumption of harmful substances is not discouraged, when harmful traditional practices are not discouraged or women are not protected from violence³⁶.

The obligation to fulfil implies the adoption by the state concerned of appropriate legislative, administrative, budgetary, judicial and other measures towards the full realisation of a certain right³⁷. Most of the obligations further treated in this paper will belong to this last category, encompassing the obligation to adopt in due time legislative measures addressing discrimination in the provision of health care, or the obligation to take adequate administrative measures for the same purpose. As it will be seen in the next chapter on the question of duty holders in Kosovo in the human rights realm, the international community finds itself in a peculiar position: its position as duty holder is unclear under international law, but the ultimate power to decide about the root causes of the present situation, i.e. the unresolved status of Kosovo, is entirely in its hands.

³³ UNDP / Small Arms Survey– *Kosovo and the Gun: A Baseline Assessment of Small Arms and Light Weapons in Kosovo*, Prishtina, June 2003, pp.viii – ix.

³⁴ *Ibid.*, p.7.

³⁵ Chapman – Violations, p.107.

³⁶ General Comment 14, par.51.

³⁷ The Maastricht Guidelines, par.6.

In respect of this last category of obligations, the failure to monitor the realisation of the right to health at country level, the failure to take measures to reduce the inequitable distribution of health facilities or the insufficient expenditure of resources for the purpose of implementing the right to health, resulting in the non-enjoyment of the respective right by certain categories of population or by the whole of it, are considered to be violations³⁸.

If viewed from the angle of obligations of conduct and of result, the responsible authorities in Kosovo would be expected to adopt and implement a plan of action to eliminate ethnic-based discriminatory practices in health care and respectively achieve satisfactory results as a consequence of the measures taken³⁹.

As for the margin of appreciation states have in respect to the implementation of obligations regarding the right to health, it is not possible to "justify derogations or limitations [...] because of different social, religious and cultural backgrounds"⁴⁰. As it will be seen in Chapter II, although far from directly imposing limitations on the right to health of the Kosovo Serbs through legislative measures, the authorities administering Kosovo and ultimately the Security Council are responsible for the legal status of Kosovo, with the respective implications concerning the right to health of Serbs. Moreover, they are using, to a certain extent, the ambiguities involved by the administration of Serbian enclaves as an excuse for the non-fulfilment of certain rights, including the right to health.

Given the political connotations of the present and future status of Kosovo, it is hard to discern whether the above mentioned failure to fulfil the right to health of Kosovo Serbs is due to the inability or to the unwillingness of the responsible entities to address the final status of the province and thus presumably end discrimination.

As any other social right, the right to health is to be fulfilled "progressively" and states are required to "take steps" towards its realisation. General Comment 3 sees such steps as "deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the

³⁸ General Comment 14, par.52.

³⁹ *Ibid.*, par.7.

⁴⁰ *Ibid.*, par.8.

Covenant". Among measures to be taken, legislation is considered to be an indispensable but not exhaustive mean of fulfilling obligations deriving from ICESCR in the field of health. Noting that it is difficult to assess the "appropriateness" of measures taken, it is judged that providing effective remedies should also be part of the solution⁴¹. Such remedies include but are not restricted to judicial remedies. In fact, it is considered sensible that administrative remedies precede any other possible solution, under the condition that they were "accessible, affordable, timely and effective"⁴².

In this respect, the provision of judicial remedies is seen indispensable for the realization of the rights enumerated in the Covenant. Distinction is made between justiciability and the quality of the norms to be self-executing. However, it is argued that regardless of specific characteristics of different legal systems, all the rights mentioned in the ICESCR "posses at least some significant justiciable dimensions"⁴³.

In the view of the Committee for Economic, Social and Cultural Rights, non-discrimination in the provision of health care services could be achieved with minimal means, like the adoption, modification or abrogation of legislation or the dissemination of information. However, in the case of Kosovo, the situation seems to be more complex, as it can be seen in Chapter I. Part of the solution should be a genuine resolution of the conflict through a dialogue between Prishtina and Belgrade including all aspects that remained unresolved after 1999, not only those of immediate political interest.

The progressive fulfilment of economic, social and cultural rights in the limits of available means has been often used by states as an excuse for the non-realisation of the rights in discussion. It can be argued though that while not all the states have at their disposal satisfactory means, a minimum should be achieved. The incapacity of a state to provide a minimum suggests a certain degree of state failure, in the light of the definition of this phenomenon. Besides flaws in providing services in the security and military sphere and in the political and legal sphere, the incapacity of a state to provide basic public

⁴¹ General Comment 3, par.4-5.

⁴² OHCHR - *The Domestic Application of the Covenant*: .03/12/98. E/C.12/1998/24, CESCR General Comment 9., par. 9(further referred to as "General Comment 9").

⁴³ General Comment 9, par.11.

services, *inter alia* health services, is considered to be an indicator of failure, making questionable the *raison d'être* of the respective state⁴⁴.

1.4 State Accountability Mechanisms

The human rights norms that appeared after the Second World War within the framework of the UN system are the basis and source of inspiration for most of the national legal instruments in the field and usually provide also a last instance remedy. One can distinguish treaty and Charter-based human rights protection mechanisms within the UN system. Treaty based mechanisms can be used only in relation to countries that are parties to the treaties of interest. In the rest of the cases, it is possible to use only the Charter-based mechanisms.

In the light of the coming chapter, the above mentioned mechanisms risk not being of great relevance, but they are nevertheless analysed in order to offer an insight in the opportunities that for the time being are refused to all Kosovars, including Kosovo Serbs, under international law.

Relevant regional mechanisms would also be of interest, in case Kosovo could effectively take part in organisations like the Council of Europe. The road would then be opened for persons living in Kosovo to use the remedies provided by the European Convention on Human Rights or the European Social Charter.

Treaty based mechanisms

Such mechanisms include, most significantly, individual complaints procedures, the possibility to make inquiries into grave and systematic violations and a reporting mechanism. Not all the treaties provide for all of the above-mentioned mechanisms.

⁴⁴ See Jack Straw – *Failed and Failing States*, speech given at the European Research Institute of the University of Birmingham, 6 September 2002, available at <http://www.eri.bham.ac.uk/seminars/jstraw060902.pdf>, on 12/07/04.

The state reporting system usually requires each state party to submit a report every five years about how the government of the respective state is fulfilling its treaty obligations, with references to areas where progress has been made and problems and obstacles encountered. The reports submitted are examined by the states and treaty-bodies concerned in public sessions. It is a system meant to encourage constructive dialogue, although in practice this is not always the case. In some cases, governments allow participation of minority individuals or organisations in the elaboration of such reports. Nevertheless, it can happen that the interested human rights organisations prepare a so-called shadow or parallel report and present it in the public meetings of the states and treaty-bodies concerned, thus raising awareness and “mobilising shame”⁴⁵.

Apart from the state reporting system, certain human rights treaties offer the possibility to individuals to send formal complaints to the committee concerned. Unfortunately, the “views” and “opinions” the concerned committee issues are not legally binding. It is, however, a last option for minorities that have exhausted all other possibilities and have no other hope left. The use of the procedure is also subject to certain conditions: the complaint can be filed only by a victim of a human rights violation, all domestic remedies in the state concerned must have been exhausted unless the domestic system lacks in totality laws in the field concerned, and a given situation can only be investigated under one international procedure at a time⁴⁶.

The ICECSR is monitored by the Committee on Economic, Social and Cultural Rights (CESCR), a treaty body exceptionally established by the Economic and Social Council (ECOSOC), as a special measure in response to the poor performance of the previous bodies entrusted with the monitoring of the Covenant⁴⁷. ICESCR provides only for a state reporting procedure on the basis of which the CESCR can make recommendations, while the International Covenant on Civil and Political Rights (ICCPR) provides also for an individual

⁴⁵ OHCHR - *Minorities and the United Nations: Human Rights Treaty Bodies and Complaint Mechanisms* - Pamphlet no. 4, available at <http://www.ohchr.org/english/about/publications/docs/pam4.doc>, on 05/06/04, pp.9-11.

⁴⁶ *Idem*.

⁴⁷ Joshua Castellino, *The Treaty-Based Regime of International Human Rights Law*, Irish Centre for Human Rights, NUI Galway, available at http://www.minority-rights.org/docs/tr_regm.htm, on 02/07/04.

complaints procedure under its first optional protocol. The International Commission of Jurists expressed the view that "if human rights are indeed indivisible, interrelated and interdependent, there is no substantive reason why the monitoring procedures under ICESCR and the ICCPR should be different⁴⁸". As an answer, a working group was created with the task of elaborating an optional protocol to the ICESCR to address the matter of complaints mechanisms.

The ICERD is monitored by the Committee for the Elimination of Racial Discrimination (CERD), the oldest committee created for the purpose of treaty monitoring within the UN. It provides for a state reporting mechanism, this time, together with an inter-state complaint mechanism and with an individual complaints system in the case of states that accepted it under art.14 of ICERD.

Charter-based Procedures

Again from the perspective of the ambiguous status under international law that Kosovo has, it is questionable whether even charter based procedures can be used. Such procedures derive their authority from the constitutional authority of the United Nations itself. They make possible addressing human rights issues by any member state of the UN⁴⁹. It is at this point that the problem in connection with Kosovo occurs, since the question of who has jurisdiction over the province is difficult to answer.

The main UN human rights bodies from this category are the Sub-Commission on the Promotion and Protection of Human Rights, the Commission on Human Rights, the rapporteurs and working groups on various countries and themes. The Office of the High Commissioner for Human Rights

⁴⁸ International Commission of Jurists (ICJ) – *Responses to States Concerns with Regard to the International Covenant on Economic, Social and Cultural Rights and the Proposed Optional Protocol*, available at http://www.icj.org/news.php3?id_article=2753&lang=en, on 02/07/04 pp. 2-3.

⁴⁹ OHCHR – *Minorities and the United Nations: The Charter-Based System of the UN and How to Use It* – Pamphlet no.3, available at <http://www.ohchr.org/english/about/publications/docs/pam3.doc>, on 05/06/04, p.1.

(OHCHR) is the branch of the UN Secretariat mainly responsible for human rights.

The Sub-Commission and the Commission can be used by NGOs from the countries concerned as a forum to debate their main concerns regarding human rights, including those of the minorities. For this purpose, NGOs need to have a formal status within these bodies⁵⁰. As with treaty-based mechanisms, all the above-mentioned organs fulfil especially a role of awareness-raising.

In respect to the thematic mechanisms, since 2000 a special rapporteur on the right to health has been appointed. Finally, the so-called “1503 procedure” offers to practically anyone the possibility to complain about a “consistent pattern of gross and reliably attested violations of human rights”.

There is therefore a wide spectrum of mechanisms capable of addressing, to a certain extent, a variety of human rights violations. Although not highly efficient when it comes to offering remedies, they do raise certain problems to the attention of international and regional organisations and of the public opinion. The following chapter will address the question of applicability of such legal instruments and of their monitoring in Kosovo.



⁵⁰ *Idem.*

Chapter II - Applicability of international human rights instruments in Kosovo; duty holders

Taking into account the importance state accountability has presently in the international human rights law, in a world composed in overwhelming proportion of sovereign states, the present chapter is an analysis the present status of Kosovo and of the consequences this situation has on the accountability of ruling entities in respect to human rights. In the contemporary context, the situation Kosovo faces from the angle of sovereignty and consequent accountability is quite unique. Among other state-building missions, UNMIK administration in Kosovo is one of the two transitional administrations with extended powers the UN undertook during their whole existence⁵¹. The analysis undertaken points to the general question of accountability of ruling entities and to the general applicability of international human rights standards (including those regarding health and non-discrimination standards), due specifically to the unique situation Kosovo finds itself from legal point of view.

2.1. Implications of the Present Status of Kosovo on the Applicability of International Human Rights Treaties in the Province

The situation in which the province of Kosovo finds itself now is a consequence of the provisions of the UN SCR 1244 from 10 June 1999 and of the preceding so-called Rambouillet Accords⁵². While “reaffirming the commitment” to “the sovereignty and territorial integrity of the Federal Republic of Yugoslavia” and at the same time “[r]eaffirming the call in

⁵¹ The second one is the United Nations Transitional Administration in East Timor (UNTAET), from 1999 to 2002. See International Peace Academy (IPA)– *You, the People – The United Nations, Transitional Administration and State-Building*, Conference report, New York, October 2002, p. 3 (further referred to as “IPA – You, the People – Conference Report”).

⁵² Otherwise called the *Interim Agreement for Peace and Self-Government in Kosovo* from 23 February 1999 (available at <http://www.monde-diplomatique.fr/cahier/kosovo/rambouillet-en>, on 11/05/04), which the government from Belgrade of the FRY never actually signed. For more information on this last point, see ICG – *A Kosovo Roadmap (I) – Addressing the Final Status*, Balkans Report no. 124, Prishtina / Brussels, 1 March 2002, p.4 (further referred to as “ICG – A Kosovo Roadmap I”).

previous resolutions for substantial autonomy and meaningful self-administration of Kosovo”, the SCR 1244 “[a]uthorises the Secretary-General [...] to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo, under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration...⁵³”. Annex 2 of the same SCR stresses once more that the people of Kosovo are to enjoy “substantial autonomy *within* the Federal Republic of Yugoslavia” (emphasis added), although nobody in UNMIK seems to know what exactly it means in practice⁵⁴.

Meanwhile, the Federal Republic of Yugoslavia had transformed into the more loose confederation of Serbia and Montenegro, but according to the Constitutional Charter of the State Union of Serbia and Montenegro⁵⁵, the state of Serbia “includes the Autonomous Province of Kosovo and Metohia, [...] currently under international administration”, recognising thus the status of successor that Serbia and Montenegro has in relation with FRY. Regarding this latter aspect, art.63 of the Constitutional Charter stipulates that “all the rights and duties of the Federal Republic of Yugoslavia shall be transferred to Serbia and Montenegro”.

According to art.3 of the same Constitutional Charter, among the aims of Serbia and Montenegro are included, “the respect for human rights of all persons under its jurisdiction” and harmonisation of regulations and practices with European and international standards. Art.10 provides for the direct implementation in the confederation of all human rights treaties that Serbia and Montenegro ratified. It should be noted at this point that Serbia and Montenegro has ratified all the international human rights treaties of interest for the present paper, namely the ICESCR and ICERD, and as a member of Council of Europe since 2002 has also ratified the ECHR. Serbia and Montenegro has not signed the European Social Charter (ESC). All these

⁵³ UN SC – *Resolution 1244 (1999)*, Adopted by the Security Council at its 4011th meeting, on 10 June 1999, available at <http://www.unmikonline.org/press/reports/N9917289.pdf>, on 02/06/04.

⁵⁴ Kosovo in Limbo, p.4.

⁵⁵ Constitutional Charter of the State Union of Serbia and Montenegro, Preamble, available at http://www.mfa.gov.yu/Facts/const_scg.pdf, on 02/06/04.

provisions are not, however, free of ambiguities, since it is arguable up to what point the jurisdiction of Serbia and Montenegro can actually be exercised in respect to the persons living in the province of Kosovo and Metohia. Serbia and Montenegro as such has no institutions on the territory of Kosovo that could allow the efficient enforcement of human rights standards for all inhabitants of the province and actually no jurisdiction.

However, once more, the existence of parallel institutions in Kosovo cannot be ignored. Apart from a system of parallel courts running on the territory of Kosovo itself, there seem to be courts in Serbia proper that claim jurisdiction over the territory of the province currently under international administration⁵⁶. Again, it is questionable how such courts can provide efficient remedies and enforce court decisions in cases of the sensitivity of those related to discrimination on ethnic basis. In the case of parallel courts and of parallel health structures as well, Belgrade authorities have no *de facto* control and therefore cannot impose any standards. Moreover, the majority of cases in which parallel courts are involved are of administrative nature, with few criminal proceedings. There are also many question marks regarding the legal validity of the decisions issued by these parallel courts, since UNMIK has so far avoided a decision on this matter⁵⁷.

In such conditions, it may be concluded that, by exercising "power and authority" in parts of Kosovo, the authorities from Belgrade retain also a share of responsibility for the human rights situation in the province⁵⁸.

It remains therefore to analyse the whole matter from the opposite point of view, and see to what extent the authority that actually administers the province, namely UNMIK, can be held responsible for respecting human rights standards under international law.

As said in the beginning of this chapter, the nature of UNMIK mission is of somewhat unprecedented nature. Up to date, the only similar UN mission was UNTAET in East Timor. Questions about the obligations of the

⁵⁶ OSCE – Parallel Structures, pp. 17-23.

⁵⁷ *Idem*.

⁵⁸ Council of Europe, Alvaro Gil-Robles, Commissioner for Human Rights – *Kosovo: the Human Rights Situation and the Fate of Persons Displaced from Their Homes*, Strassbourg, 16 October 2003, par. 33, available at [http://www.coe.int/T/E/Commissioner_H.R.Communication_Unit/Documents/CommDH\(2002\)11_E...](http://www.coe.int/T/E/Commissioner_H.R.Communication_Unit/Documents/CommDH(2002)11_E...), on 28/06/04 (further referred to as "CoE – Kosovo: the Human Rights Situation").

international community towards the inhabitants of a territory over which it assumes political control for an undetermined period, or about the extent to which an international administration should be accountable to the local population, are particularly difficult to answer, if only because of the novelty the situation presents. By assuming sovereign powers, the UN is reminiscent in a way of the League of Nations and their mandate of exercising various forms of trusteeship over territories⁵⁹.

SCR 1244 lists “protecting and promoting human rights” in Section 11(j) under the main responsibilities of the international civil presence in Kosovo. This provision was interpreted by the Ombudsperson of Kosovo as establishing clearly the jurisdiction of UNMIK over the human rights situation in the province and that SCR 1244 created in this way a “surrogate state, with all ensuing obligations, including affirmative obligations to secure human rights to everyone within UNMIK jurisdiction⁶⁰”. This situation leads to an obligation of UNMIK to implement, not only to observe human rights⁶¹, in other words an obligation to fulfil, not only to respect and protect.

In this context, the institution of the Ombudsperson is the only body in Kosovo that has jurisdiction to oversee the activities of UNMIK and the PISG, although there are still many obstacles preventing the smooth functioning of this institution⁶².

A similar interpretation in respect to the human rights obligations that UNMIK has to protect and fulfil in Kosovo is given by the 2002 Report of the Secretary – General on the United Nations Interim Administration Mission in Kosovo, which finds that such obligations should form the basis itself of the exercise of mission’s authority⁶³.

⁵⁹Simon Chesterman – *Kosovo in Limbo: State Building and Substantial Autonomy*, New York, August 2001, p. 3 (further referred to as “Kosovo in Limbo”).

⁶⁰ Ombudsperson Institution in Kosovo – *Special Report No. 2 on Certain Aspects of UNMIK Regulation No. 2000 / 59, Amending UNMIK Regulation No. 1999 / 24 on the Law Applicable in Kosovo*, Prishtina, 27 October 2000, p.3 (further referred to as “Ombudsperson - Special Report No. 2”).

⁶¹ *Idem*.

⁶² Ombudsperson Institution in Kosovo – *The Human Rights Situation in Kosovo – Remarks by Mr. Marek Antoni Nowicki, Ombudsperson in Kosovo on “Human Rights Protection Mechanisms in Kosovo”*, Paris, 16 March 2004, p.2, available at <http://www.ombudspersonkosovo.org/doc/others/Speech%20for%20Paris%20Hearing%20on%20Human%20Rights%20in%20Kosovo.doc>, on 28/06/04.

⁶³UN - *Report of the Secretary-General on the United Nations Interim Administration in Kosovo*, U.N. SCOR, 57th Sess., par.26, U.N. Doc. S/2002/1126 (2002), quoted in David

In the particular case of Kosovo, the elections of October 2000 and November 2001 led to the transfer to provisional Kosovar structures of self-government of certain prerogatives, including health care. However, the Special Representative of the UN Secretary General (SRSG) retains authority when it comes to matters of decisions conflicting with the SCR 1244, of applicable law or rights and interests of minority communities⁶⁴. The consent of Kosovo's population is vital for the continuation of the international protectorate in Kosovo⁶⁵.

It is thus generally agreed that in cases like Kosovo, UN is exercising quasi-sovereign powers. The source of these powers is based on legitimacy stemming from a Security Council mandate, but also from the performance on the ground of the respective mission and its respect for certain principles. Such principles include foremost respect for internationally recognised human rights and require certain accountability mechanisms of the UN institutions themselves. From this particular angle, UNMIK has a not-too-bright record, being "very reluctant" when it came to accepting the jurisdiction of the OSCE Ombudsperson in Kosovo. Some even argued that "stricter rules for accountability would only make sense if accompanied by an actual delegation of responsibility, which UN was 'terribly reluctant' to do"⁶⁶.

In the general framework of UN accountability and the rule of law that UN missions should emphasise, there are certain values that are considered to form a hard core: the independence of the judiciary, fair trial procedures and the right of access to independent lawyers, which should never be compromised⁶⁷.

Enforcing human rights is thus largely at the latitude of UNMIK, and opinions are divided. Some argue that as long as Kosovo is an "internationally-recognised emergency", UNMIK can derogate from particular human rights norms⁶⁸. The opinion that a Security Council resolution regarding Chapter VII of the UN Charter absolves the peacekeeping operation from certain human

Marshall and Shelley Inglis – *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, in "Harvard Human Rights Journal", vol. 16, p.103 (further referred to as "Marshall, Shelley – Disempowerment in Kosovo").

⁶⁴ ICG – *A Kosovo Roadmap (II) – Internal Benchmarks*, Balkans Report No. 125, Prishtina / Brussels, 1 March 2002, p.4 (further referred to as "ICG – A Kosovo Roadmap II").

⁶⁵ ICG – *A Kosovo Roadmap I*, p. 6.

⁶⁶ IPA – *You, the People – Conference Report*, p. 9.

⁶⁷ *Ibid.*, p. 11.

⁶⁸ *Kosovo in Limbo*, pp. 10-11.

rights obligations was expressed⁶⁹. On the other hand, it is accepted that the justification of intervention in its broad sense is based on the need to protect human rights.

The present paper takes the view that UNMIK is the entity responsible in Kosovo for implementing human rights and for ensuring compliance with internationally standards as recognised in human rights treaties, rather than Serbia and Montenegro, which has no *de facto* control over the whole province. The argument is that UNMIK has in its hands all the necessary instruments: the primary responsibility for policing belongs to UNMIK, as the executive, legislative and judicial powers, all stemming from SCR 1244. Moreover, as the Commissioner for Human Rights of the Council of Europe was saying, "it would be hard to justify the international administration of Kosovo according to lower human rights standards than the other parts of the FRY⁷⁰". Consequently, by virtue of the powers conferred to him by the SCR 1244, the SRSG is "legally and politically" accountable for the human rights situation in Kosovo, including for acts of commission and omission of the PISG⁷¹. Another argument in favour of this option is the view of various human rights groups that the UN should uphold in Kosovo "the same standards that it had itself created to ensure the rights of the people vis-à-vis their governments⁷²".

On the other hand, UNMIK does not have treaty making powers⁷³, a characteristic easy to understand given the specific political conditions in which the mission operates, i.e. the strong opposition of Serbian governmental circles to Kosovo's independence. This fact leads to a situation in which responsible authorities cannot be held "classically" accountable for human rights violations. Instead, as noted above, UNMIK is in an unclear position in this respect, but the reasons themselves of the interventions should point to a high concern vis-à-vis human rights.

The discussion ultimately points to the question whether the Security Council is entitled under the Chapter VII of the UN Charter to suspend in certain circumstances the sovereignty of states over parts of their territory, in

⁶⁹ *Idem.*

⁷⁰ CoE – Kosovo: the Human Rights Situation, V. Main findings and conclusions, par.1.

⁷¹ *Idem.*

⁷² Marshall, Shelley – Disempowerment in Kosovo, p. 104.

⁷³ IPA – You, the People – Conference Report, p. 4.

this case of FRY over Kosovo, when exercising its peace enforcement powers. There is no clear answer given so far by international law. One advantage would be that suspension of sovereignty would allow the clear answer that in such cases, sovereignty was revived only after the final settlement of the conflict, i.e. a decision on the final status of Kosovo⁷⁴.

An option for suspended sovereignty at doctrine level should be used by transitional authorities to develop a model of good governance and to ensure their accountability, rather than allowing them to reflect traditional power politics⁷⁵.

In an effort of finding accountability mechanisms for territories under transitional administration, one International Peace Academy staff mentioned the obligation of UNMIK to report at about every three months to the Security Council. The drawback of such a procedure was seen to be the fact that "[r]eports to the Council are generally taken at face value⁷⁶". The re-activation of the Trusteeship Council was suggested, alternatively with the creation of a transitional administration committee, under the Security Council⁷⁷.

While the present status of Kosovo poses, as it could be seen, numerous dilemmas, the final and so far undecided status of the province has a number of notable negative consequences, including, for example, an extremely slow economic development, determining a lack of available resources for essential services and an undefined postponement of the moment when parallel structures will be dismantled.

2.2. Applicability of International Human Rights Instruments in Kosovo

Given the special status of Kosovo under international law and in the light of controversies mentioned above, the applicability of international

⁷⁴ Alexandros Yannis, *The Concept of Suspended Sovereignty in International Law and Its Implications in International Politics*, in EJIL 13 (2002), pp. 1037 – 1052.

⁷⁵ *Idem*.

⁷⁶ Simon Chesterman– *Building Democracy through Benevolent Autocracy – Consultation and Accountability in UN Transitional Administrations*, available at www.icsf-2003.mn/abstracts/SS3-Simon%20Chesterman-Building%20Democracy%20Through%20Benevolent%20Autocracy-Paper.doc, on 28/06/04.

⁷⁷ *Idem*.

human rights treaties caused year-long discussions and dilemmas within the international presence in the province.

In a first stage, section 1 of the UNMIK Regulation No. 1999 / 24 on the Law Applicable in Kosovo from 12 December 1999, as amended by UNMIK Regulation 2000 / 59 from 27 October 2000 stipulated that:

“1.3 In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards, as reflected in particular in:

- The Universal Declaration on Human Rights of 10 December 1948;
- The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;
- The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto;
- The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
- The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965; ...”

Apart creating confusion among international staff, the above mentioned law was strongly criticised by the Kosovo Ombudsperson, who expressed the view that such a formulation is inconsistent with the principle of state responsibility in the international human rights legal regime. He noted that: “[t]hese obligations, therefore, do not attach only to public officials in their official capacities, but to the institutions on behalf of whom they exercise their public functions⁷⁸”. A further concern raised by the Ombudsperson was that no legal instrument in May 2001 had made relevant international human rights treaties directly applicable in Kosovo, and “[i]n the event that the drafters of UNMIK Regulation 2000 / 59 intended for Section 1.3 to incorporate or apply international human rights instruments directly in Kosovo, this purpose has not been achieved by the actual wording of that Section⁷⁹”. In this way UNMIK institution had failed to comply with art.11 (j) of SCR 1244

⁷⁸ Ombudsperson – Special Report No. 2, p.4.

⁷⁹ *Idem.*

regarding the responsibility of the international community to protect and promote human rights in Kosovo⁸⁰.

Provisions regarding the applicability of international human rights instruments have been later enshrined in the provisions of the Constitutional Framework for Self-Government from 15 May 2001. Nevertheless, it should be noted that the above-mentioned provisions refer only to the Provisional Institutions of Government and not to the UNMIK, which remains subject to the stipulations of SCR 1244.

The preamble of the Constitutional Framework makes the first mention of a number of "internationally recognised legal instruments" that should be "taken into account" in Kosovo and of the "need to fully protect and uphold the rights of all Communities of Kosovo and their members". With chapter 2 of the same document stressing that "[t]he Provisional Institutions of Self-Government and their officials shall [...] (b) [p]romote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation", the way is open to the more detailed provisions of chapter 3, entirely dedicated to human rights, which reads:

"3.1 All persons in Kosovo shall enjoy, without discrimination on any ground and in full equality, human rights and fundamental freedoms.

3.2 The Provisional Institutions for Self-Government shall observe and ensure internationally recognised human rights and fundamental freedoms, including those rights and freedoms set forth in:

- (a) The Universal Declaration on Human Rights;
- (b) The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
- (c) The International Covenant on Civil and Political Rights and the Protocols thereto;
- (d) The Convention on the Elimination of All forms of Racial Discrimination;
- (e) The Convention on the Elimination of All Forms of Racial Discrimination against Women;
- (f) The Convention on the Rights of the Child;
- (g) The European Charter for Regional or minority languages; and
- (h) The Council of Europe's Framework Convention for the Protection of National Minorities.

3.3 The provisions on rights and freedoms set forth in these instruments shall be directly applicable in Kosovo as part of this Constitutional Framework".

⁸⁰ *Idem.*



While all relevant international and European instruments regarding non-discrimination are included, it is easy to see that, for no obvious reason, the International Covenant on Economic, Social and Cultural Rights is not made directly applicable in Kosovo by the Constitutional Framework of 2001. This omission is even more difficult to explain in the light of the recommendations made by the former High Commissioner for Human Rights, Mary Robinson, that such norms “should be part of any legal framework established by a UN administration⁸¹”.

The inclusion of relevant international human rights instruments in the Constitutional Framework of Kosovo creates an obligation of the PISG vis-à-vis the “citizens” of Kosovo. However, given the ambiguity of the province’s status and lack of treaty making powers on UNMIK side, it is clear that one cannot speak about any international obligations whatever for Kosovar or international authorities in the field of human rights. It should also be noted that the Constitutional Framework does not create any obligations for the international component of the administration in place. Those remain as formulated by the SCR 1244 and analysed above, in Chapter 2.1, and are supplemented by the provisions of Section 4.6 of the Constitutional Framework, which says:

“Based on his direct responsibilities under UNSCR 1244 (1999) to protect and promote human rights and to support peace building activities, the SRSB will retain the authority to intervene as necessary in the exercise of self-government for the purpose of protecting the rights of Communities and their members”.

Once again, the final decision on the enjoyment of fundamental rights is practically concentrated in the hands of a single person, and no mechanism of checks and balances is in place.

Although the ICESCR is not incorporated in the Constitutional Framework and therefore not directly applicable in Kosovo, the formulation that the PISG “should observe and ensure internationally recognised human rights and fundamental freedoms, *including* those set forth in...” (emphasis

⁸¹ *Letter of Mary Robinson to SRSB Michael Steiner*, dated 14 March 2002, cited in CoE – Kosovo: the Human Rights Situation, par. 27.

added) leaves place for interpretation in favour of the inclusion of the economic, social and cultural rights protected by the second covenant within the standards that should be observed by PISG. International staff of both UN and OSCE agrees on this matter, and monitor the respective rights accordingly. Yet the focus is on matters regarding non-discrimination on ethnic basis in the enjoyment of economic, social and cultural rights, of interest for the present paper, rather than on the pure economic or social component of the right⁸². Sometimes inclusion went that far as to include the European Social Charter among the regional human rights instruments providing guiding principles in matters regarding economic and social rights, although not even Serbia and Montenegro is party to this treaty⁸³.

The non-inclusion of ICESCR in the Constitutional Framework together with ICCPR is inconsistent with the principle of indivisibility of human rights, as reflected in the Vienna Declaration and Programme of Action of 1993, which says: “[a]ll human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis...”. It can be argued though that by generously interpreting the general non-discrimination clause of article 26 of the ICCPR, as suggested by the Human Rights Committee, one can come to the conclusion that it also covers economic, social and cultural rights, and consequently the right to medical assistance⁸⁴.

Regarding this last point, Section 4.4 of the Constitutional Framework stresses that “[c]ommunities and their members shall have right to: [...] (m) [r]eceive and provide public health and social services, on a non-discriminatory basis, in accordance with applicable standards”. It is not clear though, what the applicable standards are. This last provision of the Constitutional Framework seems only to mirror art.5 of the ICERD⁸⁵. Further on in Chapter 5, health,

⁸² Author's interview with OSCE Human Rights Officer in Gjilan, June 2004.

⁸³ *Idem*.

⁸⁴ Ida Elisabeth Koch, *The Justiciability of Indivisible Rights*, in “Nordic Journal of International Law”, no. 72, 2003, Kluwer Law International, p. 7 (further referred to as “Koch – The Justiciability of Indivisible Rights”).

⁸⁵ See OHCHR – *The Convention for the Elimination of All Forms of Racial Discrimination*, art.5, available at <http://www.ohchr.org/english/law/cerd.htm>, on 28/06/04.

together with good governance, human rights and equal opportunity are included among the responsibilities PISG have.

One can conclude therefore that in the "surrogate state" of Kosovo, two layers of responsible authorities can be identified: the first one is represented by PISG and the second by the UNMIK itself, with a significant degree of control concentrated in the hands of SRSG. At an attentive reading of the Constitutional Framework, the demarcation line is blurred, and it is not clear when it is appropriate for the SRSG to intervene. Moreover, the extent to which UNMIK itself should go in supporting human rights is not clear for all the actors involved and the UN Security Council is the only body that can ultimately exercise control and ensure the accountability of UNMIK. In such conditions, human rights become an almost hundred percent internal matter of the PISG and UNMIK together, with a feeble chance of control from the part of the Security Council.

The major international human rights instruments are directly applicable in Kosovo, being incorporated in the Constitutional framework. One notable exception is the ICESCR, whose provisions are, however, to be "observed" and "ensured" by the responsible authorities. Kosovo being only a "surrogate state", without proper attributes of sovereignty, the main human rights treaties remain only a part of the domestic legislation and no advantage can be taken of the mechanisms available under such treaties for addressing human rights violations.

CHAPTER III - Health care in Kosovo after 1999 and the specific situation of Kosovo Serbs

The present chapter aims to cast light on the security situation of the Serbian minority in Kosovo, as a more general determinant of their possibility to access various public services, and in this context on the health care facilities that are accessible for them, in the general framework of the presently unresolved status of the province. It presents the accountability dilemmas that are raised by a situation full of incertitude in terms of status and the consequences regarding parallel structures this situation had. The purpose is to identify the elements that made questionable the enjoyment of the right to health by Kosovo Serbs during the last five years.

3.1. Serbs in Kosovo after 1999

After a decade of increasing abuses by the Milosevic regime over the Albanian minority of the Province of Kosovo and Metohia of the Federal Republic of Yugoslavia (FRY)⁸⁶, the international community intervened in 1999 in order to stop the gross human rights violations the government of Belgrade was perpetrating. The intervention was to be highly controversial, with the defensive alliance of NATO bombing, for the first time in its existence, a European state. The primary purpose of the intervention at that time was to protect the Kosovo Albanians from the abuses of the Belgrade government⁸⁷. After the withdrawal of Serbian troops from Kosovo at the end of July 1999, the United Nations Mission in Kosovo (UNMIK) took over, with NATO forces (KFOR) in charge of the security. Ethnic incidents continued to involve victims on both sides, but the balance tipped this time in favour of the Albanians, turning little-by-little the former Serbian perpetrators into victims and determining them to isolate themselves in enclaves and in pockets, or to

⁸⁶ Until February 2003, the present confederation of Serbia and Montenegro was called the Federal Republic of Yugoslavia. "Kosovo and Metohia" is the name the Serbian authorities from Belgrade use until nowadays to designate the province of Kosovo / Kosova under UN administration.

⁸⁷ Mateeva and Paes - The Kosovo Serbs, p. 21.

leave for Serbia ("Serbia proper")⁸⁸. KFOR was slow in understanding this shift of situation and in taking adequate measures to protect the Serbian minority⁸⁹.

On the other hand, during the last five years UNMIK experimented with various policies aimed at making different ethnic groups live together again. After the failure of the "Agenda for Coexistence" during the first years of the international administration, a more ambitious goal of creating a 'multi-ethnic society' started to be promoted. The Special Representative of the Secretary General (SRSG) Michael Steiner was telling the General Assembly of the UN in 2002: "Albanians as the majority community have to practice what their leaders preach (i.e. multi-ethnicity). [...] On the other hand, the smaller communities have to participate in the institutions that we set up under Resolution 1244. They must integrate and abandon parallel structures"⁹⁰.

While Albanian leaders continue "preaching" multi-ethnicity and at the same time see such an approach as a way of getting the favours of the international community rather than an inherent right of the Serbs, ordinary Albanians react negatively to measures aimed at protecting Serbs. The latter have difficulties in accepting their minority status and still believe their government is in Belgrade. Each side blames the other that it does not make sufficient efforts to integrate⁹¹.

From the 100,000 Serbs estimated to be left in Kosovo after 1999, one third of them live in the predominantly Serbian municipalities of Zvečan / Zvecan, Leposavić / Leposaviq and Zubin Potok, or in the towns of Štrpce / Shterpce and Mitrovica / Mitrovicë North. Another significant concentration of ethnic Serbs in Kosovo can be found in the village of Gračanica / Graçanicë, near Prishtina⁹². Some estimates go as far as 130,000 Serbs⁹³, but it is

⁸⁸ Amnesty International - *Serbia and Montenegro (Kosovo / Kosova)* "Prisoners in our own homes": *Amnesty International's concerns for the human rights of minorities in Kosovo / Kosova*, 29 April 2003, accessed at <http://web.amnesty.org/library/print/ENGEUR700102003>, on 11.05.04 (further referred to as "The Amnesty International Report 2003").

⁸⁹ Mateeva and Paes - *The Kosovo Serbs*, p. 22.

⁹⁰ International Crisis Group (ICG) - *Kosovo's Ethnic Dilemma: The Need for a Civic Contract*; Balkans Report No. 143, Prishtina / Brussels, 28 May 2003, p. 16 (further referred to as "ICG - Kosovo's Ethnic Dilemma").

⁹¹ ICG - *Kosovo's Ethnic Dilemma*, p. 16-22.

⁹² The Amnesty International Report 2003, *Minority Communities in Kosovo, Kosovo Serbs*.

extremely difficult to find out the real number since no census was conducted after 1999.

For the purpose of the present paper, it is important to understand that except living in the above mentioned concentration areas, Serbs in Kosovo can be found scattered across the whole province, in mono-ethnic or mixed villages, with smaller size concentrations in Obilic, Kosovo Polje, Lipljan, Gjilan and Orahovac⁹⁴. This fact leads to a specific security situation, with consequences in regard to access to health care, education, justice. While Kosovo Serbs living in larger communities have at least access to primary health care and more chances to get help in accessing secondary health care facilities, the ones living in more isolated locations face great difficulties and are more exposed to all kind of risks.

The security situation of Serbs in Kosovo presented slight variations during the last five years. After 1999 and until 2002, the situation was particularly tense and KFOR ran check points and provided escorts. Afterwards, the number of reported incidents decreased and as a consequence security measure diminished. The unfortunate results of such a relaxed security policy could be seen in March 2004, when serious inter-ethnic violent incidents occurred throughout Kosovo, restricting again the freedom of movement of Serbs in the province⁹⁵. Again, many Kosovo Serbs are unwilling to travel without KFOR escorts and according to the SRSG Harri Holkeri they are "more isolated than at any time in the past three years⁹⁶".

The perception of the security situation was different among Kosovo Serbs and Albanians even before the March events. While the latter were not viewing security as a major problem of Kosovo, about 40% of the former ranked this issue as the greatest problem⁹⁷. Similarly, in a survey conducted in November 2003, 76% of Serbs declared that interethnic relations between

⁹³ European Stability Initiative (ESI) - *The Lausanne Principle – Multiethnicity, Territory and the Future of Kosovo's Serbs*, Berlin / Prishtina, 7 June 2004, p. 2 (further referred to as "ESI – The Lausanne Principle").

⁹⁴ Mateeva and Paes - *The Kosovo Serbs*, p.20.

⁹⁵ International Crisis Group (ICG), *Collapse in Kosovo*, Prishtina / Belgrade / Brussels, 22 April 2004, p. i (further referred to as "ICG – Collapse in Kosovo").

⁹⁶ UN Security Council – *In Briefing to the Security Council, Special Representative Describes March Violence a 'Most Serious Setback' in Last Five Years*, Press Release, SC/8090, 11 May 2004.

⁹⁷ UNDP – *Early Warning Report Kosovo, Report No.5*, September – December 2003, p. 2 (further referred to as "UNDP – Early Warning Report 5").

Serbs and Albanian in Kosovo would remain tense, while only about 35% of Albanians held the same opinion⁹⁸.

From the particular angle of the health situation, Serbian enclaves are considered to be especially vulnerable: their population is ageing and it suffers of various chronic diseases. Isolation and precarious security created anxiety, depression and addiction among the inhabitants of Serbian areas. Moreover, a significant share of the inhabitants of these areas is represented by internally displaced persons (IDPs) from towns and villages that were taken over lately by the majority Albanian population⁹⁹.

3.2. Parallel Structures in Health Care

From the point of view of the Constitutional Charter of Serbia and Montenegro, but also of the Security Council Resolution 1244 (SCR 1244), the province of Kosovo (or Kosovo and Metohija, as it is called by the Belgrade government) is still part of the Serbia and Montenegro confederation. However, according to the same SCR 1244, Kosovo has been administered since 1999 by the United Nations Mission in Kosovo (UNMIK). As a consequence, after the withdrawal of the Serbian administration from the province, UNMIK created its own structures, including naturally those in the field of health. In minority areas, notably in Serbian inhabited enclaves, the former structures remained in place. This situation is considered to be a consequence of the desire Belgrade has to show its continuous implication in Kosovo, but also of inertia to perpetuate a reality that existed for decades¹⁰⁰.

It should be noted that in the field of health care, parallel structures take most often the form of primary health care facilities, with the only secondary health care facilities located in North Mitrovica, Gracanica and Laplje Selo¹⁰¹. Sometimes these structures can be considered 'half parallel', with some of their

⁹⁸ *Idem*.

⁹⁹ World Health Organisation (WHO), *Access to Health Care in Kosovo's Minority Areas*, Prishtina, May 2001, pp. 3-4 (further referred to as "WHO – Access to Health Care Report").

¹⁰⁰ Mateeva and Paes - *The Kosovo Serbs*, p. 35.

¹⁰¹ Organisation for Security and Cooperation in Europe (OSCE) - *Human Rights Challenges Following the March Riots*, p. 22 (further referred to as "OSCE – Human Rights Challenges").

employees paid both by the Serbian Ministry of Health (SMH) and by the Ministry of Health from Pristina.

Parallel structures in health care are the illustration of how the right to health of the minority population can be addressed, although not in a satisfactory way. A successful attempt to dismantle these structures would therefore represent a step forward in fulfilling the right to health of all communities in Kosovo.

Specifically in the field of health care, the persistence of parallel structures has mainly the following causes: mistrust among Kosovo Serbs in the skills and ethics of Kosovo Albanian doctors; better salaries offered by the Serbian Ministry of Health; pensions paid by Belgrade; lower numbers of posts envisaged by the UN payrolls in the field of health and a certain mentality among Kosovo Serbs of not collaborating with the UN¹⁰².

During many years before the 1999 conflict and also after, Kosovo Serbs have held the belief that Kosovo Albanian doctors are not so well trained like the Serbian doctors. Apart that, many Serbs now are afraid of going to see an Albanian doctors because they fear maltreatment¹⁰³. In some cases problems of communication due to different languages spoken can occur. In many cases Serbs expect also a refusal from the part of Albanian doctors, so they prefer to refer directly to a Serbian doctor, even if this means to go to more remote locations facing security risks¹⁰⁴.

While Serbian patients are afraid to be treated by allegedly incompetent or revengeful Albanian doctors, the Albanian doctors themselves are sometimes afraid to treat Serbian patients, fearing Albanian extremists could threaten them if they have normal working relations with 'the enemy'.

A second aspect that leads to the perpetuation of parallel structures in health care is represented by the much better salaries paid by SMH, compared to those paid by Prishtina. Base salaries by Belgrade are approximately equal to those paid by Prishtina, but additionally the Serbian government pays staff

¹⁰² OSCE - *Parallel Structures in Kosovo*, October 2003, p. 36 (further referred to as "OSCE – Parallel Structures") and author's interview with UNMIK municipal representative in Strpce municipality.

¹⁰³ OSCE – *Parallel Structures*, p. 37.

¹⁰⁴ The Amnesty International Report 2003, Part 4, Access to Social and Economic Rights, Health.

in parallel structures an additional sum that equals the actual salary in order to stimulate them to continue working in Kosovo¹⁰⁵. Moreover, most of the health care facilities of the parallel system are overstaffed. The reason is that being employed by the Belgrade government is one of the few jobs a Serb can find in Kosovo. Belgrade is aware of this issue and it is also willing to support Kosovo Serbs in this manner, creating an informal 'well-fare system'. The Provisional Institutions of Self-Government (PISG) of Kosovo, including the Ministry of Health from Prishtina have on the other hand different, more market-oriented standards for staffing the ambulancias and health houses of Kosovo. The health house in the Serbian inhabited town of Strpce for example has about 140 employees paid by the SMH, while the PISG standards show that the number of personnel needed should be no bigger than 43. In the past, the number of staff in the health house in Strpce was as big as 294¹⁰⁶. Yet another example, the project of the Ministry of Health from Prishtina to create a health house in Lipjan which would serve both Kosovo Albanian and Kosovo Serbs failed, and one of the reasons was that too few positions were proposed to Serbian doctors and nurses. Currently the ambulancia serving the Kosovo Serbs in Lipjan is run in a private house¹⁰⁷.

From the point of view of a rights based approach this situation leads only to poorer services offered to Kosovo Serbs. The Belgrade government cannot control these parallel facilities and therefore the quality of services offered diminished drastically in the last five years. Corruption is present and the staff of SMH-run establishments in Kosovo cannot or is not interested to attend continuing medical education, causing in this way a further deterioration of the quality of the services offered¹⁰⁸.

A further obstacle for the elimination of parallel structures is represented by the pensions paid by the SMH to the staff that has been on its payrolls. This is particularly true for the staff that has accumulated a significant number of years in the service of SMH. No agreement was negotiated between Belgrade and Prishtina on this matter and consequently no Serbian doctors are

¹⁰⁵ OSCE – Parallel Structures, p. 36.

¹⁰⁶ Author's interview with the UNMIK municipal representative in Strpce, June 2004.

¹⁰⁷ OSCE – Parallel Structures, p. 36.

¹⁰⁸ OSCE – Parallel Structures, p. 37.

willing to risk their pensions from Belgrade for the insecure arrangements in place in Kosovo, in a period when the final status of the province is still unclear and Kosovo Serbs still hope that the province will stay part of Serbia and Montenegro¹⁰⁹.

Sometimes, attempts of health houses from Serbian enclaves to collaborate with the Ministry of Health from Prishtina are hindered by an inadequate response of responsible Kosovar authorities. For example, parallel health care ambulancias and health houses usually order the drugs they need from Belgrade. When attempts to order drugs from Prishtina are made, often at the suggestion of UNMIK authorities, Serbian doctors faced the difficult test of filling in a form only in Albanian and often gave up¹¹⁰. Unfortunately, use of minority languages by PISG central authorities is not clearly regulated, with the UNMIK Regulation 2000/45 applying only at municipal level.

Moreover, collaboration with UNMIK and the PISG is perceived negatively and Kosovo Serbs who worked together with these entities are increasingly seen as traitors by their communities¹¹¹.

Meanwhile, the existence of parallel structures is used for political purposes by Serbian politicians from Serbia proper and Kosovo. It is said that parallel structures are a "full moral right" of Kosovo Serbs, as long as UNMIK fails to create a safe environment for all the residents of the administered province. It is feared that the absence of basic services for Kosovo Serbs would lead to their departure from the province, leading thus to the creation of an 'ethnically cleansed' region¹¹².

3.3. Kosovo Serbs' Access to Health Care

Throughout the last five years, the situation in the health system was closely monitored by UNMIK and other international organisations. Special

¹⁰⁹ Author's interview with UNMIK Local Community Officer (LCO) from Novo Brdo, June 2004.

¹¹⁰ Author's interview with UNMIK municipal representative in Strpce, June 2004.

¹¹¹ UN Security Council – *In Briefing to the Security Council, Special Representative Describes March Violence a 'Most Serious Setback' in Last Five Years*, Press Release, SC/8090, 11 May 2004.

¹¹² Sava Janjic -*Parallel Institutions in Focus Again*, in "ERPKIM Info-Service", 30 October 2003, available at <http://www.kosovo.com/erpkim30oct03.html>, on 11/05/04.

attention was given to the situation of minorities and especially of ethnic Serbs in regard to access to health care. Reports like the 2001 World Health Organisation (WHO) "Access to Health Care in Kosovo's Minority Areas", the 2003 OSCE "Tenth Assessment of the Situation of Ethnic Minorities in Kosovo", the 2003 Amnesty International "Prisoners in Our Own Homes" report or the most recent but less detailed in the field of health care OSCE "Human Rights Challenges Following the March Riots" report from 2004 show the same reality.

In their own villages, Kosovo Serbs have usually access to primary health care. In the light of recent March events, even such a situation can be considered lucky, since in certain locations ambulancias or health houses were burnt down¹¹³. In mixed villages like the one of Svinjare / Svinjarë in Southern Mitrovica, KFOR used to escort a Serbian doctor from North Mitrovica for weekly visits. Greek KFOR also offered the services of one of its own doctors, on a monthly basis¹¹⁴. However, such solutions can be hardly seen as sustainable.

In such a situation, Serbian patients in Kosovo rely almost entirely on facilities in North Mitrovica or Serbia proper. As a consequence, it is crucial for them to have access to adequate transport. This is however not the case: a Serbian doctor was complaining in 2000 that in an interval of only 2 – 3 weeks, three pregnant women almost died because nobody wanted to transport them to the hospital in North Mitrovica. The same Serbian doctor said, referring to two other patients: "I myself had two urgent cases, cases of life or death. The Norwegian KFOR wanted to take them to Prishtina. The patients were afraid, they said, 'for us it's the same thing, to die a natural death or to go to the Prishtina hospital'¹¹⁵."

This situation is further explained by the words of a Serbian woman from Prizren: "Even the doctors are afraid to treat you. The best way I to go to the hospital is with a member of the international community, and it's best to

¹¹³ OSCE – Human Rights Challenges, p. 22.

¹¹⁴ OSCE / UNHCR Tenth Assessment, p. 41.

¹¹⁵ Medecins du Monde - *Kosovo: Minorities in Danger*, 20 December 2000, accessed at <http://www.medecinsdumonde.co.uk/downloads/minorities%20in%20danger-%20Kosovo.doc> on 11/05/04, p.9 (further referred to as "MdM – Minorities in Danger").

speak Albanian, even though they can all understand Serbian¹¹⁶”, as quoted in the Amnesty International report from 2003 on the situation of minorities in Kosovo. The same Amnesty International report signals cases of Albanian doctors who have refused to see minority patients or made them wait for hours without ‘reasonable cause’. There were also cases of patients that were treated only after KFOR soldiers intervened in their favour.

Recently, a Serbian old woman from the Strpce municipality returned home from Serbia and Montenegro, where she was an IDP. As she was suffering from kidneys she needed access to dialysis three times a week. This meant she needed to go three times a week to the Serbian run hospital in North Mitrovica for treatment. However, KFOR could provide escort only two times a week, according to the established schedule. After long negotiations, KFOR arranged that the woman was to be treated in the municipal hospital in Gjilan. This case shows how precarious and unsustainable the present situation is¹¹⁷. Without support from an international force, the woman in discussion would not have access to a treatment she needs in order to survive, be it because of a refusal of the Albanians doctors to treat her or of her own fear to ask for their assistance.

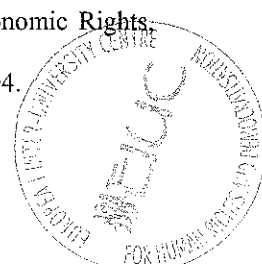
Fears and hopes of the Serbian minority are perhaps best expressed in the following words: “We hope that one day it’ll be possible (i.e. go and see an Albanian doctor), but it isn’t at present. We have no trust in the doctors. It’s politics which is like that, we don’t trust it. I think everybody’s like that. I’m sure there are doctors who respect the Hippocratic oath, but they would be afraid of their colleagues. We wouldn’t want to go and see them because we would create problems for them¹¹⁸.”

The situation of access to health care facilities has its ups and downs according to the general security situation. In critical moments, like the one of the 17-18 March 2004 violence, the flaws of the system, if it can be called a system at all, were more obvious. Ambulancias and health houses in Serbian enclaves do not have the capacity to deal with life threatening emergencies. A

¹¹⁶ The Amnesty International Report 2003, Part 4, Access to Social and Economic Rights, Health.

¹¹⁷ Author’s interview with UNMIK municipal representative in Strpce, June 2004.

¹¹⁸ MdM – Minorities in Danger, p.13.



Serbian boy heavily hurt during the March 2004 riots in the village of Traikovski from Strpce municipality could not be transported to the nearest hospital in Ferizaj due to fear of refusal, quite justified in the given context. An attempt was made to take the boy to the nearby American KFOR camp. Because of slow procedures of accepting him in the camp and despite a prior acceptance on radio of the case, the wounded boy died after thirty minutes of waiting at the gates of the camp. KFOR is not obliged to treat anybody except their own soldiers, therefore they could not be held responsible for the death of the boy¹¹⁹.

In such conditions, the "normal" procedures in case access to a doctor is needed is to telephone KFOR, or go to a KFOR check-point and then wait for either KFOR or UNMIK Police to come and provide transport to the nearest "friendly" hospital. In some cases transport with private vehicles is used as well¹²⁰.

Despite all these problems mentioned above, the level of satisfaction with the functioning of ambulances, hospitals and public health services was very high, according to a poll conducted by UNDP together with Index Kosova. However, there were significant variations at level of ethnic group, with Serbians being more satisfied with the above mentioned services in North Mitrovica, where they actually have access to the local hospital and substantially less satisfied in Novo Brdo, where they do not enjoy such access¹²¹. A correlation between this generally speaking high level of satisfaction and the attribution of the responsibility for services to the Belgrade government was noticed¹²².

In the same survey, Kosovo Serbs ranked the limited freedom of movement as being their biggest problem, followed by their precarious personal security, in contrast with Kosovo Albanians, for whom unemployment and electricity supply were leading the top. Health is not perceived as a top problem by both communities, perhaps because there are more pressing issues in Kosovo today and the survey aimed to rank the difficulties faced by people,

¹¹⁹ Author's interview with the UNMIK municipal representative in Strpce, June 2004.

¹²⁰ Amnesty International Report 2003, Part 4, Access to Social and Economic Rights, Health.

¹²¹ UNDP – *The Kosovo Mosaic – Perceptions of Local Government and Public Services in Kosovo*, Prishtina, March 2003, p. 12 (further referred to as "UNDP – The Kosovo Mosaic").

¹²² *Ibid.*, p. 14.

not to appreciate their depth. However, most of the respondents, regardless of ethnicity, indicated primary health care as a top priority for the municipality where they live¹²³.

The problem of transportation to convenient health care facilities became once more acute after the last March events.

OSCE rightly observed that the tendency during the last few years was to offer mono-ethnic solutions in health care, instead of focusing on integrated facilities serving all communities. The few projects to create such health houses have been pending for years¹²⁴.

The report of the Commissioner for Human Rights of the Council of Europe rightly identifies at its turn discrimination in access to health services as one of the problems existent in Kosovo¹²⁵. Unfortunately, the space consecrated is tiny and no details are provided. It is true, however, that in the light of the many serious human rights violations Kosovo faces, access to health care is only a relatively "mild" problem, but many aspects concerning the enjoyment of this right can be encountered in the case of almost all human rights in Kosovo, to mention only the applicability of international treaties on the territory of the province or the underlying discrimination.

Several more aspects can be identified. First, a reduced access to quality health care due to security reasons can be observed. This first aspect becomes particularly important in cases of life-threatening emergencies or in the case of persons who do not have access to appropriate means to go to the nearest Serbian-run hospital or clinic. Secondly, apart from alleged cases of refuse to treat and malpractice coming from the part of Kosovo Albanian doctors, a climate of mistrust and fear survives in the minds of Kosovo Serbs, determining them to visit doctors of their ethnicity. Thirdly, the question of the language used in the relationship doctor or nurse-patient or clinic-Ministry of Health in Prishtina also constitutes a serious obstacle in providing appropriate medical services to Kosovo Serbs.

¹²³ *Ibid.*, p. 19.

¹²⁴ OSCE – Parallel Structures

¹²⁵ Council of Europe, Alvaro Gil-Robles, *Commissioner for Human Rights – Kosovo: the Human Rights Situation and the Fate of Persons Displaced from their Homes*, CommDH(2002)11, Strassbourg, 16 October 2003, par. 33, available at [http://www.coe.int/T/E/Commissioner_H.R.Communication_Unit/Documents/CommDH\(2002\)11_E...](http://www.coe.int/T/E/Commissioner_H.R.Communication_Unit/Documents/CommDH(2002)11_E...), on 28/06/04.

CHAPTER IV - Finding Solutions to Fight Non-Discrimination in Health Care in Kosovo

The present chapter briefly examines two aspects. First, the recommendations that been made by various actors aimed at improving various aspects of non-discrimination in health care will be described. Second and most importantly, the focus will be directed to the solutions that have been envisaged by PISG and UNMIK in Kosovo in order to eliminate discrimination on ethnic basis in general and in particular in the field of health care, as a mean to implement the obligations of “enforcing” and “observing” the right to health and the observance of the relevant provisions of ICERD.

4.1 Recommendations and Standards

Apart trying to point to a certain direction in which solutions and resourced should be directed, the recommendations made by various organisations involved in the field of human rights in Kosovo are a way of recognising the existence of certain problems as well. When such recommendations come from OSCE, the main component of UNMIK dealing with human rights, their weight significantly increases.

The recommendations addressed to the Ministry of Health from Prishtina and made in the beginning of the OSCE / UNHCR 10th Assessment of the Situation of Ethnic Minorities in Kosovo address health care as well as freedom of movement. The creation of a health care system able to address the needs of all communities living in Kosovo as well as the necessity of “duplicating” best practices is stressed. Dialogue and cooperation with the Belgrade government is encouraged, in order to find a sustainable solution for the elimination of parallel structures in the field of health care¹²⁶. The report was also strongly suggesting to the Ministry of Health to issue a “Charter on Patients Rights” which provides for non-discriminatory health care for all ethnic communities of Kosovo.

¹²⁶ OSCE / UNHCR Tenth Assessment, pp. 8-9.

Noticing that often security is not a real threat, but rather a question of perception, the OSCE / UNHCR Tenth Assessment was encouraging confidence-building activities within ethnic communities in Kosovo¹²⁷. The situation changed since the report was issued, showing that sometimes indeed security is a matter of misperception, while sometimes it is a very real threat.

A later report of OSCE, this time specifically on parallel structures, took in 2003 a more pro-active attitude and make recommendations on how to reduce the demand and supply for the services of the structures in discussion. Specifically for the parallel structures existent in the field of health care, on the demand side, it was suggested to "reach out to certain communities to help them overcome their fears of seeking aid from the UNMIK health care system¹²⁸". On the supply side, a formal agreement between UNMIK and PISG on one side and the government in Belgrade on the other side was advised in order to create a consolidated health care system accessible to all communities¹²⁹.

The International Crisis Group, examining the "ethnic dilemma" in which Kosovo can be found, made a number of valuable suggestions. Among others, the recommendations made to UNMIK were to establish a system of rewards and penalties for institutions and individuals, with the aim of eliminating discriminatory practices in public service, to create a committee for minority services to assess the situation in minority communities and find means to improve it or engage actively in relations with Kosovo Serb leaders in order to promote reconciliation¹³⁰. To the Kosovo Albanian leaders, it was recommended to allocate a "fair share" of resources for the needs of the minority communities and to "discipline" leaders and other individuals who do not respect the rights of the minorities. Finally, the Kosovo Serb leaders were told to use existing legal means to establish and consolidate their rights and to collaborate with the other actors in the formal attempts to solve the question of minorities in Kosovo¹³¹.

¹²⁷ *Idem.*

¹²⁸ OSCE – Parallel Structures, p. 9.

¹²⁹ *Idem.*

¹³⁰ ICG – *Kosovo's Ethnic Dilemma: The Need for a Civic Contract*, Balkans Report no. 143, Prishtina / Bruxelles, 28 May 2003, p. 5.

¹³¹ *Idem.*

As for the international community, it was suggested that aid conditionality should be used as a lever in the relationship with the Belgrade government, in the situation which presently at least 80 million Euros per year from the financial aid received by Serbia is used for financing parallel structures in Kosovo¹³².

Last but not least, the problem of the legal framework recognising, *inter alia*, internationally accepted human rights standards was touched in the "Report of the Panel on United Nations Peace Operations (Brahimi Report)" in August 2000. The general remark was that in the case of missions with extended mandate, as it was the case in Kosovo, in the initial emergency phase the international community should come with a pre-prepared, standard legal template. As it was shown in Chapter II, until nowadays it is unclear what the applicable law in Kosovo is. In the conditions proposed by the Brahimi Report, the question of the applicable law could have been addressed in a better manner, without having to work under time-pressure¹³³.

4.2 Policy-Level Measures

In an effort to ensure good governance before a final decision about the status of Kosovo, be it independence, continued autonomy within the confederation of Serbia and Montenegro or any other convenient solution, UNMIK has set a number of standards to be achieved before starting negotiations for the final status. The goals set in the standards are quite ambitious. They provide *inter alia* for an environment where all individuals can travel freely regardless of ethnic background and they can use freely their language "anywhere and in any institution of Kosovo" or for a successful dialogue between Prishtina and Belgrade¹³⁴. Among key priorities, minority

¹³² ICG – Collapse in Kosovo, p.40.

¹³³ UN – *Report of the Panel on United Nations Peace Operations (Brahimi Report)*, U.N. Doc. A/55/305/S/2000/89, 17 August 2000, cited in Scott Carlson, Wendy Betts, and Greg Givold – *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, paper presented at the World Bank conference "Empowerment, Security and Opportunity Through Law and Justice", Saint Petersburg, Russia, July 2001.

¹³⁴ UNMIK – *Kosovo Standards Implementation Plan (KSIP)*, Prishtina, 31 March 2004, p. 2 (further referred to as "UNMIK – KSIP").

rights are listed first, with the need of law-making and executive bodies of Kosovo to produce and implement policies “that fully protect the rights and respect the needs of all communities¹³⁵”. Secondly, after the rights of minorities, comes the creation of local administrative bodies that are accountable to the local communities and the integration of parallel structures into the local institutions.

In regard to ensuring the availability of health care “without discrimination to all communities in Kosovo”, the Kosovo Standards Implementation Plan (KSIP) provides a detailed plan of action. As a first step, under the coordination of a Joint Steering Board on Public Administration, and following the development and creation of a Public Administration Strategy, PISG, the Ministry of Health and health care service providers are to “formulate and publish standards for the services they will provide to the citizens”. The timeframe set for this objective was December 2004. Performance it intended to be measured periodically through Citizen’s Report Cards¹³⁶.

A second measure to be enforced under KSIP is the adoption and implementation of a new anti-discrimination law, “in compliance with relevant European standards”. All the responsible bodies were expected that in April 2004 they would prepare and implement so-called annual sub-component plans aimed at addressing, in physical and financial terms, at local level, the needs of minority communities in the respective areas. The report regarding this last component is to be presented annually by the Ministry of Health. For the purpose of monitoring and evaluating the health care service delivery, a new administrative body is to be created. All PISG Ministries, including therefore the Ministry of Health, are expected to establish “public grievance redressal offices with adequate community representation, including a system for accepting and engaging with public utilities providers on claims of inadequate utility service provision¹³⁷”. The deadline set for implementation is September 2004. Last but not least, PISG through a specialised body are expected to address the matter of representation of minority communities in the bodies

¹³⁵ *Idem.*

¹³⁶ UNMIK – KSIP, p. 15-16.

¹³⁷ *Idem.*

providing, in the particular case discussed in this paper, health care, goods and services¹³⁸. As a particular challenge in implementing the standards comes the fact that Kosovo Serbs refused to take part in the UN standards policy from the very beginning, being afraid that it would be an action supporting Kosovo independence, to which they are opposed¹³⁹.

After five years with few results, the KSIP is setting highly ambitious goals. It remains to be seen how such goals can be fulfilled in the given timeframe, making finally possible the respect for the human rights of minorities, including the non-discriminatory access to health care.

From the different perspective of decentralisation, the so-called "Civiletti Plan" outlines various measures aimed primarily and less ambitiously at the peaceful coexistence and tolerance among minorities in Kosovo. While recommending that the responsibility for primary health care should stay with municipalities and the one for secondary health care to be shared between the Ministry of Health and municipalities, in contrast with the present situation when municipalities have no control over hospitals, the Community Committees are created at the level of municipal and sub-municipal units (SMUs) together¹⁴⁰. In regard to the Community Committees, an increase in the number of votes reserved to minorities and especially Kosovo Serbs was recommended, with the purpose of preventing boycotts in case no positive result is realistically expected. It is rightfully observed that, although the creation of SMUs is territorially rather than ethnically based, the situation in the field will lead sometimes to the creation of, for example, purely Serbian SMUs¹⁴¹.

The above mentioned suggestion occurs in a present situation when the Community Committees exist only at municipal level. Moreover, the process of selection of the members of such committee is flawed; members

¹³⁸ *Idem.*

¹³⁹ IWPR – Kosovo: *UN Lays Down Conditions*, in "Balkan Crisis Report", no. 491, Prishtina, 8 April 2004, p.3.

¹⁴⁰ CoE – *Reform of Local Self-Government and Public Administration in Kosovo, Final Recommendation*, SG/Inf(2003)40, Strasbourg, November 2003, p. 24.

¹⁴¹ *Idem.*

misunderstand their roles and competencies and lack commitment¹⁴². By proposing the creation of SMUs, the implementation of the Civiletti Plan would hopefully contribute to the elimination of flaws in the selection process and would diminish the existing tensions contributing thus to an increased will of understanding one's competencies.

An original feature of the Council of Europe's above mentioned plan is the granting of rights for the Community Committees when dealing with monitoring bodies like the OSCE, the Council of Europe, the UN, the EU, in the special case when rights of ethnic minorities have been violated. A minimum level of being allowed to communicate directly with the monitoring bodies and submit to them their demands and suggestions is mentioned, without any further details¹⁴³.

With the purpose of protecting the rights of minorities in general, the institution of the Ombudsperson is mentioned, alongside with Administrative courts. Unfortunately, the Ombudsperson has the powers to "receive complaints, monitor, investigate, offer good offices, take preventive steps, make recommendations and advise on matters relating to his or her functions¹⁴⁴" only. The chances to enforce recommendations of the ombudsperson are not very high.

Last but not least, the Serbian government from Belgrade, in a political attempt to show commitment in face of the international community for solving the problem in Kosovo, recently proposed a "Plan for the Political Solution to the Situation in Kosovo and Metohia", which makes proposals for an autonomy of Serbian inhabited territories within the province of Kosovo. Given the fact that Serbs live in a proportion of two thirds scattered in the territory of Kosovo¹⁴⁵, the solution is unrealistic and would most probably lead to new and increased tensions.

¹⁴² UNMIK / OSCE Mission in Kosovo / PISG – *Assessment of Municipal Communities Committees*, available at www.osce.org/documents/mik/2004/03/2335_en.pdf, on 28/06/04, p.2.

¹⁴³ *Idem.*

¹⁴⁴ UNMIK Regulation 2000 / 38 – *On the Establishment of the Ombudsperson Institution in Kosovo*, Section 4 – Functions and Powers.

¹⁴⁵ OSCE / UNHCR Tenth Assessment.

4.3. Present and Future Legislation

The goals envisaged by the Assembly of Kosovo in 2004 are ambitious, aiming at the approval of more laws that would improve situation in the health care field: the Law on Healthcare, the Law on the Rights and Obligations of Citizens in Healthcare and the Law on Public Healthcare Institutions in Kosovo. Unfortunately, all these laws have stayed since the beginning of the year in draft form¹⁴⁶. Regarding discrimination, an Anti-Discrimination Law is intended to be passed this year, providing for a Centre for Equal Treatment for the victims of discriminatory practices, with powers to "provide free legal assistance to victims of discrimination, bring cases to the appropriate administrative bodies or court bodies on behalf of such victims, conduct independent surveys or investigations on arbitrary discrimination"¹⁴⁷.

For the moment, there are a limited number of domestic legal remedies for discrimination on access to healthcare. They are listed in the "Remedies Catalogue" drafted by OSCE which lists a wide number of remedies, in an attempt to improve the enjoyment of the right to an effective remedy in Kosovo, on the basis of art.13 of the European Convention for Human Rights (ECHR) in Kosovo. It is however stressed that the rights in the catalogue are not restrictively only those to be found in ECHR, but cover a wider spectrum of rights, under international law standards. A proof is the inclusion of the right to health, if only in its limited aspect of access to health care¹⁴⁸.

It is noted that no particular law or UNMIK legal instrument contain a clear administrative remedy in the first instance for discrimination in access to

¹⁴⁶David Buerstedde, Office of Political Affairs, OSCE Mission in Kosovo – *Kosovo Citizens Deserve Better Healthcare Services*, in Assembly Support Initiative Newsletter (ASI), no. 10, Prishtina, February 2004, p. 4.

¹⁴⁷ Ombudsperson Institution in Kosovo, Marek Antoni Nowicki – *Letter to Nexhat Daci, President of the Assembly of Kosovo, regarding the Draft Anti-Discrimination Law*, Prishtina, 15 March 2004, p. 2, available at <http://www.ombudspersonkosovo.org/doc/Outgoing%20Letters/English/OMB%20letter%20to%20Daci%20-%20Gender%20Equality%20-%20engLH30-10-03.doc>, on 09/07/04.

¹⁴⁸ OSCE Mission in Kosovo, Human Rights and Rule of Law Division – *Remedies Catalogue*, 2003, available at http://www.osce.org/documents/mik/2003/08/983_en.pdf, on 09/07/04, p.2 (further referred to as "OSCE – Remedies Catalogue").

health care¹⁴⁹. However, a number of legal instruments are mentioned under the heading of applicable law: UNMIK Regulation 2000/45, On Self-Government^{*} of Municipalities, UNMIK Regulation 2001/9, On a Constitutional Framework for Provisional Self-Government, UNMIK Regulation 2000/10, On the Establishment of the Administrative Department of Health and Social Welfare and older Serbian laws on administrative procedures and administrative disputes, presently still applicable in Kosovo.

Section 35.1 of the UNMIK Regulation 2000/45 stipulates: “[a] person may file a complaint about an administrative decision of a municipality if he or she claims that his or her rights have been infringed by the decision”, while section 35.7 stresses that “[t]he rights set out in this section shall be additional to any rights that the person may have to refer an administrative decision to the Ombudsperson or to a court of law¹⁵⁰”. As for “any rights that a person may have”, Section 4, art. 4.2 of the Constitutional Framework for Self-Government clearly states that “[n]o person shall be obliged to declare to which Community he belongs, or to declare himself a member of any Community. No disadvantage shall result from an individual’s exercise of the right to declare or not declare himself a member of a Community”. The above mentioned article should be read in conjunction with art.4.4, ensuring that minorities have inter alia the right to “[r]eceive and provide public health and social services, on a non-discriminatory basis, in accordance with applicable standards¹⁵¹”.

As it can be seen, the bulk of the solution for combating discrimination in health care is just being researched for. During 2004, policies must be implemented and laws adopted. It remains to be seen whether the solutions found will be successful. As a second major step, when conditions are created for a decision about the final status of Kosovo, the road will be opened for ensuring also international accountability regarding, among other things, non-discrimination in health care.

¹⁴⁹ OSCE – Remedies Catalogue, Section H – Claims of discrimination on access to healthcare.

¹⁵⁰ UNMIK Regulation 2000/45, On Self-Government of Municipalities, UNMIK/REG/2000/45, available at http://www.unmikonline.org/regulations/2000/re2000_45.htm, on 02/07/04.

¹⁵¹ UNMIK Regulation 2001/9 – On a Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, available at <http://www.unmikonline.org/regulations/2001/reg09-01.htm>, on 02/07/04.

Conclusion

Kosovo is a multi-ethnic territory with a complex history, emerging after a recent conflict for which a final solution was not yet found. In this context of a provisory situation, the rights of the Serbian minority cannot be enforced properly and the case of discrimination in access to health care is but one example among many others, like the lack of freedom of movement, discrimination in education, social welfare or lack of freedom of speech. The right to health was chosen also because of its position as social right, with a content that was clarified only during the last fifteen years. While discrimination in civil and political rights is efficiently addressed by various international and regional instruments, addressing discrimination in economic and social rights is at its beginnings, meaning that it is more difficult to find in the legislation presently available the necessary mechanisms to enforce them.

The present paper takes the view that is safer to speak about an individual right to health of each and every person belonging to the Serbian minority in Kosovo, than about a collective right of the Serbian minority in Kosovo as such.

The particular aspects of interest regarding the normative content of right to the highest attainable standard of health in the case of Kosovo Serbs are the accessibility of health care facilities, especially seen from the combined point of view of non-discriminatory access and of physical accessibility and the acceptability of medical facilities, especially when considering the cultural appropriateness of the goods and services provided. A secondary aspect is represented by the quality of health care, in the present case in the light of the lack of control of Belgrade authorities over the parallel structures in Kosovo enclaves. Last but not least, one can speak about the promotion by authorities of the social determinants of good health, like safety and economic development.

Regarding state obligations in respect to the right to health, they were divided into obligations to respect, to protect and to fulfil the right to the highest attainable standard of health. Violations of such obligations occur through acts of commission and omission. In the light of the last two chapters of the present paper, it can be observed that in Kosovo, violations of the right

to health occur through acts of omission. Regarding the obligation to protect, the present authorities of Kosovo should be able to protect all the persons living in the province, including Kosovo Serbs, from the violations by third parties of their right to health. The obligation to fulfil means that the responsible authorities shall adopt appropriate legislative, administrative, budgetary, judicial and other measures aimed towards the full realisation of a certain right. Therefore, any failure to adopt the mentioned measures but also the lack of results such measures should generate, is considered a violation of the state's obligation to fulfil the right to health, also including measures aimed to combat discrimination in health care.

Although the full realisation of the right to health is considered to be extremely costly and time-consuming, in the view of General Comment 14 non-discrimination in accessing health care facilities is the easiest to enforce, and requires usually simple legislative measures. Chapter four of the present paper challenges this view and shows that at least in the case of Kosovo the real solution is to be found only in the end of the political crisis. Following such a solution and apart from adopting legislation, there is also a need to adopt appropriate administrative measures, like the so-called Civiletti plan discussed in Chapter four.

The content of the right to health as discussed in Chapter one reflects the provisions of the ICESCR. International obligations deriving from ICESCR are, however, applicable only to states that ratified the treaty in discussion. It is consequently essential to understand the status Kosovo presently has under international law and the applicability of essential international human rights instruments in the territory of Kosovo. While Serbia and Montenegro still retain formally sovereignty over Kosovo, the province is actually under UNMIK administration. The present paper takes the view that given the UNMIK control over the resources necessary for implementing human rights, the UN mission is responsible for enforcing human rights in Kosovo. Because UNMIK has transferred to PISG through the Constitutional Framework certain duties, it can be interpreted that there are two layers of responsibility, a primary one lying with PISG and a second one, fulfilling more a supervisory role with UNMIK and especially the SRSG. The matter of UN authorities accountability

is however highly problematic. The only higher body that could exercise control over UNMIK is the Security Council.

As for the applicability of international instruments, although Serbia and Montenegro is party to all essential international human rights treaties, given the lack of de facto control over Kosovo's territory of the Belgrade authority, it cannot be realistically considered that, seen from this point of view, the ICESCR and ICERD are applicable in Kosovo. As Kosovo has actually a status of protectorate, with UNMIK not able to conclude treaties, a solution was found in incorporating the provisions of internationally recognised human rights instruments in the Constitutional Framework for Self-Government. This solution is but a compromise, since although it makes provisions of main international human rights treaties directly applicable in Kosovo, as domestic law, it does not ensure the accountability of ruling bodies. For an unexplainable reason, the ICESCR is not among the treaties whose provisions were made directly applicable in Kosovo, but it can still be considered that, the rights contained being undoubtedly among "internationally recognised human rights", they have to be "enforced" and "observed" by UNMIK and PISG authorities.

Because of the situation described above, Kosovars have no access to the last instance remedies provided for by international human rights treaties. Kosovo not being a state, and not being a member of the UN, the persons living in Kosovo cannot even use the Charter-based mechanisms. The same is valid for regional instruments, like the European Convention for Human Rights or the European Social Charter. The undecided status of Kosovo creates a peculiar kind of situation, with the persons inhabiting the province not having access to a number of remedies that are accessible to many other people simply due the fact that they are the citizens of a certain state.

The examination of reports of international governmental and non-governmental organisations acting in the field of human rights in Kosovo points to a number of conclusions regarding the situation of Kosovo Serbs vis-à-vis health care, in a more general context regarding physical security.

Serbs have massively left Kosovo after the 1999 events, but still an estimate of 100,000 remains in the province, living in enclaves, often under

strict security measures, by fear of attacks coming from the part of Kosovo Albanians. There were moments when such fears were considered to be exaggerated^{*} and security measures consequently lifted, but the March 2004 riots showed that calm is fragile and violence can erupt at any time. At the political UNMIK level, the goal is to create a multi-ethnic society. Yet while all these noble ideals are preached, the Serbian minority in Kosovo is denied in practice fundamental rights. One constant issue during the five past years has been the lack of access of Kosovo Serbs to the Kosovo Albanian-run health care activities. Among the causes is the general security situation that makes Serbian minority presence in Albanian majority areas dangerous, and a climate of mistrust generated by alleged refusal and malpractice from the part of Albanian doctors. Cases of refusal and malpractice are extremely difficult to document, however the fact of finding them in the published reports of international organisations like OSCE working directly in the field makes them trustworthy. The above-mentioned situation results in Kosovo Serbs having to travel long distances when in need to emergency medical care and arriving sometimes at destination when it is too late.

The parallel structures in various fields, including health care and justice, are maintained by the Belgrade authorities because of real needs of the Serbian community but also due to political reasons. Ironically, the existence of parallel structures in Kosovo is justified by the Belgrade authorities by the need of ensuring respect for the human rights of the Serbs living in enclaves in Kosovo.

Because financing parallel structures and giving from Belgrade instructions to its staff is all that the Ministry of Health from Belgrade can do, the quality of services offered in such facilities has reportedly decreased because of a lack of direct control and a lack of interest among staff to attend further training and keep updated in their profession. The particular position of Kosovo Serbs and the chief reason for the existence of parallel structures is the political support given by the Belgrade government. Without such a support, parallel structures would not have means to survive and the quality of services offered to the Serbian minority would be controllable.

The matter of the language used in the relation doctor-patient and in the attempted contacts between parallel structures and the Ministry of Health in Prishtina is a further obstacle in establishing inter-ethnic relationships in the field of health care.

Finally, the problem that needs to be addressed when looking for a solution is twofold: first, find internal means to combat discrimination in general and in particular in regard to free access to health care and second, ensure international accountability in respect to human rights of the ruling entities.

In order to address the roots of the problem, a political solution regarding the final status of Kosovo is necessary. This does not mean that such a political solution could automatically eliminate the fear Kosovo Serbs have when going to see a Kosovo Albanian doctor. It would be only the foundation on which to finally build inter-ethnic relations or at least ensure a peaceful cohabitation of different ethnicities in Kosovo, with all deriving consequences.

Numerous organisations like OSCE or the International Crisis Group (ICG) have made recommendations regarding generally the peaceful coexistence of all ethnic communities, the dismantling of parallel structures in the field of health and the creation of multi-ethnic health care facilities. Such recommendations have remained however without significant echoes and following actions.

By setting the "Standards for Kosovo" in December 2003 and by drafting the "Kosovo Standards Implementation Plan" in the beginning of 2004, UNMIK has shown its commitment to a durable solution for the ethnic conflict in Kosovo, with all its implied consequences, including the liquidation of parallel structures in health care.

Last but not least, the so-called Civiletti plan for local self-government and public administration could create, if implemented, adequate conditions for a realistically peaceful coexistence among Albanians and Serbs in Kosovo.

The policies of the Ministry in Health in Prishtina include disappointingly few provisions regarding non-discrimination on base of ethnicity in health care.

At the level of finding a solution through the adoption of legislation, the Committee for Health of the Assembly of Kosovo has drafted a number of very ambitious laws addressing discrimination in health care. Up to the moment this paper was concluded, the Law on health Care, the Law on Public Health in Kosovo and the Law on the Rights and Obligations of Citizens in Health Care stayed in draft form, as has the Charter of Patients Rights.

The laws presently applicable in Kosovo which offer a level of protection in regards to discrimination in health care are not very well known and even less used, in a context where there are more serious day-to-day problems and a lack of confidence in the judiciary.

When trying to distinguish between the inability or the unwillingness to find a solution of both UNMIK and PISG, one can conclude that there were a lot of efforts made, but the more general context in which things happened was extremely challenging and finally the parts involved could simply not find a solution. With the events in Afghanistan and Iraq during the last three years, the interests of the international community and of donors have shifted, and the crisis of Kosovo remained unresolved. The unwillingness at higher level, due to the apparition of new issues on the agenda, combined with the consequent inability at lower, local level led to the nowadays situation. A very palpable right of 100,000 Kosovo Serbs to have timely access to the same quality healthcare like their Kosovo Albanians neighbours from the next village is meanwhile violated every day.

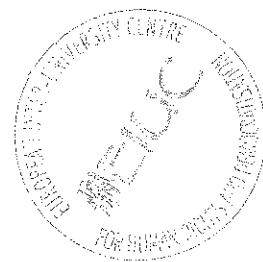
Annex 1

Serb communities in Kosovo



Source: Anna Mateeva and Wolf-Christian Paes— *The Kosovo Serbs: An Ethnic Minority between Collaboration and Defiance*, Bonn International Centre for Conversion / Friedrich Naumann Foundation and Saferworld, June 2003

Annex 2



Kosovo

Administrative divisions

Note:

All municipalities have the same name as the main town or village, except the southernmost, centred on Dragas/Drageash village, which in Serbian is known as Gora.

Names of municipalities are links to corresponding chapters of Part V of the report. Note that Pristina/Prishtina area contains two links - the Pristina/Prishtina city only and the municipality excluding the city



Source: OSCE – Kosovo / Kosova - As Seen, As Told – An Analysis of Human Rights Findings of the OSCE Kosovo Verification Mission, October 1998 to June 1999, available at <http://www.osce.org/kosovo/documents/reports/hr/part1/>, on 28/06/04

Annex 3

RESOLUTION 1244 (1999)

Adopted by the Security Council at its 4011th meeting,
on 10 June 1999

The Security Council,

Bearing in mind the purposes and principles of the Charter of the United Nations, and the primary responsibility of the Security Council for the maintenance of international peace and security,

Recalling its resolutions 1160 (1998) of 31 March 1998, 1199 (1998) of 23 September 1998, 1203 (1998) of 24 October 1998 and 1239 (1999) of 14 May 1999,

Regretting that there has not been full compliance with the requirements of these resolutions,

Determined to resolve the grave humanitarian situation in Kosovo, Federal Republic of Yugoslavia, and to provide for the safe and free return of all refugees and displaced persons to their homes,

Condemning all acts of violence against the Kosovo population as well as all terrorist acts by any party,

Recalling the statement made by the Secretary-General on 9 April 1999, expressing concern at the humanitarian tragedy taking place in Kosovo,

Reaffirming the right of all refugees and displaced persons to return to their homes in safety,

Recalling the jurisdiction and the mandate of the International Tribunal for the Former Yugoslavia,

Welcoming the general principles on a political solution to the Kosovo crisis adopted on 6 May 1999 (S/1999/516, annex 1 to this resolution) and welcoming also the acceptance by the Federal Republic of Yugoslavia of the principles set forth in points 1 to 9 of the paper presented in Belgrade on 2 June 1999 (S/1999/649, annex 2 to this resolution), and the Federal Republic of Yugoslavia's agreement to that paper,

Reaffirming the commitment of all Member States to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other States of the region, as set out in the Helsinki Final Act and annex 2,

Reaffirming the call in previous resolutions for substantial autonomy and meaningful self-administration for Kosovo,

Determining that the situation in the region continues to constitute a threat to international peace and security,

Determined to ensure the safety and security of international personnel and the implementation by all concerned of their responsibilities under the present

resolution, and acting for these purposes under Chapter VII of the Charter of the United Nations,

1. Decides that a political solution to the Kosovo crisis shall be based on the general principles in annex 1 and as further elaborated in the principles and other required elements in annex 2;
2. Welcomes the acceptance by the Federal Republic of Yugoslavia of the principles and other required elements referred to in paragraph 1 above, and demands the full cooperation of the Federal Republic of Yugoslavia in their rapid implementation;
3. Demands in particular that the Federal Republic of Yugoslavia put an immediate and verifiable end to violence and repression in Kosovo, and begin and complete verifiable phased withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable, with which the deployment of the international security presence in Kosovo will be synchronized;
4. Confirms that after the withdrawal an agreed number of Yugoslav and Serb military and police personnel will be permitted to return to Kosovo to perform the functions in accordance with annex 2;
5. Decides on the deployment in Kosovo, under United Nations auspices, of international civil and security presences, with appropriate equipment and personnel as required, and welcomes the agreement of the Federal Republic of Yugoslavia to such presences;
6. Requests the Secretary-General to appoint, in consultation with the Security Council, 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 towards the same goals and in a mutually supportive manner;
7. Authorizes Member States and relevant international organizations to establish the international security presence in Kosovo as set out in point 4 of annex 2 with all necessary means to fulfil its responsibilities under paragraph 9 below;
8. Affirms the need for the rapid early deployment of effective international civil and security presences to Kosovo, and demands that the parties cooperate fully in their deployment;
9. Decides that the responsibilities of the international security presence to be deployed and acting in Kosovo will include:
 - (a) Deterring renewed hostilities, maintaining and where necessary enforcing a ceasefire, and ensuring the withdrawal and preventing the return into Kosovo of Federal and Republic military, police and paramilitary forces, except as provided in point 6 of annex 2;
 - (b) Demilitarizing the Kosovo Liberation Army (KLA) and other armed Kosovo Albanian groups as required in paragraph 15 below;
 - (c) 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;
 - (d) Ensuring public safety and order until the international civil presence can take responsibility for this task;
 - (e) Supervising demining until the international civil presence can, as appropriate, take over responsibility for this task;
 - (f) Supporting, as appropriate, and coordinating closely with the work of the international civil presence;

(g) Conducting border monitoring duties as required;

(h) Ensuring the protection and freedom of movement of itself, the international civil presence, and other international organizations;

10. Authorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo;

11. Decides that the main responsibilities of the international civil presence will include:

(a) Promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);

(b) Performing basic civilian administrative functions where and as long as required;

(c) Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;

(d) Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;

(e) Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);

(f) In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;

(g) Supporting the reconstruction of key infrastructure and other economic reconstruction;

(h) Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;

(i) Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;

(j) Protecting and promoting human rights;

(k) Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo;

12. Emphasizes the need for coordinated humanitarian relief operations, and for the Federal Republic of Yugoslavia to allow unimpeded access to Kosovo by humanitarian aid organizations and to cooperate with such organizations so as to ensure the fast and effective delivery of international aid;

13. Encourages all Member States and international organizations to contribute to economic and social reconstruction as well as to the safe return of refugees and displaced persons, and emphasizes in this context the importance of convening an international donors' conference, particularly for the purposes set out in paragraph 11 (g) above, at the earliest possible date;

14. Demands full cooperation by all concerned, including the international security presence, with the International Tribunal for the Former Yugoslavia;

15. Demands that the KLA and other armed Kosovo Albanian groups end immediately all offensive actions and comply with the requirements for demilitarization as laid down by the head of the international security presence in consultation with the Special Representative of the Secretary-General;

16. Decides that the prohibitions imposed by paragraph 8 of resolution 1160 (1998) shall not apply to arms and related matériel for the use of the international civil and security presences;
17. Welcomes the work in hand in the European Union and other international organizations to develop a comprehensive approach to the economic development and stabilization of the region affected by the Kosovo crisis, including the implementation of a Stability Pact for South Eastern Europe with broad international participation in order to further the promotion of democracy, economic prosperity, stability and regional cooperation;
18. Demands that all States in the region cooperate fully in the implementation of all aspects of this resolution;
19. Decides that the international civil and security presences are established for an initial period of 12 months, to continue thereafter unless the Security Council decides otherwise;
20. Requests the Secretary-General to report to the Council at regular intervals on the implementation of this resolution, including reports from the leaderships of the international civil and security presences, the first reports to be submitted within 30 days of the adoption of this resolution;
21. Decides to remain actively seized of the matter.

Annex 1

Statement by the Chairman on the conclusion of the meeting of the G-8 Foreign Ministers held at the Petersberg Centre on 6 May 1999

The G-8 Foreign Ministers adopted the following general principles on the political solution to the Kosovo crisis:

- Immediate and verifiable end of violence and repression in Kosovo;
- Withdrawal from Kosovo of military, police and paramilitary forces;
- Deployment in Kosovo of effective international civil and security presences, endorsed and adopted by the United Nations, capable of guaranteeing the achievement of the common objectives;
- Establishment of an interim administration for Kosovo to be decided by the Security Council of the United Nations to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo;
- The safe and free return of all refugees and displaced persons and unimpeded access to Kosovo by humanitarian aid organizations;
- A political process towards the establishment of an interim political framework agreement providing for a substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of the KLA;
- Comprehensive approach to the economic development and stabilization of the crisis region.

Annex 2

Agreement should be reached on the following principles to move towards a resolution of the Kosovo crisis:

1. An immediate and verifiable end of violence and repression in Kosovo.
2. Verifiable withdrawal from Kosovo of all military, police and paramilitary forces according to a rapid timetable.
3. Deployment in Kosovo under United Nations auspices of effective international civil and security presences, acting as may be decided under

Chapter VII of the Charter, capable of guaranteeing the achievement of common objectives.

4. The international security presence with substantial North Atlantic Treaty Organization participation must be deployed under unified command and control and authorized to establish a safe environment for all people in Kosovo and to facilitate the safe return to their homes of all displaced persons and refugees.

5. Establishment of an interim administration for Kosovo as a part of the international civil presence under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, to be decided by the Security Council of the United Nations. The interim administration to provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants in Kosovo.

6. After withdrawal, an agreed number of Yugoslav and Serbian personnel will be permitted to return to perform the following functions:

- Liaison with the international civil mission and the international security presence;
- Marking/clearing minefields;
- Maintaining a presence at Serb patrimonial sites;
- Maintaining a presence at key border crossings.

7. Safe and free return of all refugees and displaced persons under the supervision of the Office of the United Nations High Commissioner for Refugees and unimpeded access to Kosovo by humanitarian aid organizations.

8. A political process towards the establishment of an interim political framework agreement providing for substantial self-government for Kosovo, taking full account of the Rambouillet accords and the principles of sovereignty and territorial integrity of the Federal Republic of Yugoslavia and the other countries of the region, and the demilitarization of UCK. Negotiations between the parties for a settlement should not delay or disrupt the establishment of democratic self-governing institutions.

9. A comprehensive approach to the economic development and stabilization of the crisis region. This will include the implementation of a stability pact for South-Eastern Europe with broad international participation in order to further promotion of democracy, economic prosperity, stability and regional cooperation.

10. Suspension of military activity will require acceptance of the principles set forth above in addition to agreement to other, previously identified, required elements, which are specified in the footnote below.¹ A military-technical agreement will then be rapidly concluded that would, among other things, specify additional modalities, including the roles and functions of Yugoslav/Serb personnel in Kosovo:

Withdrawal

- Procedures for withdrawals, including the phased, detailed schedule and delineation of a buffer area in Serbia beyond which forces will be withdrawn;

Returning personnel

- Equipment associated with returning personnel;
- Terms of reference for their functional responsibilities;
- Timetable for their return;
- Delineation of their geographical areas of operation;
- Rules governing their relationship to the international security presence and the international civil mission.

Notes

1 Other required elements:

- A rapid and precise timetable for withdrawals, meaning, e.g., seven days to complete withdrawal and air defence weapons withdrawn outside a 25 kilometre mutual safety zone within 48 hours;
 - Return of personnel for the four functions specified above will be under the supervision of the international security presence and will be limited to a small agreed number (hundreds, not thousands);
 - Suspension of military activity will occur after the beginning of verifiable withdrawals;
 - The discussion and achievement of a military-technical agreement shall not extend the previously determined time for completion of withdrawals.
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Source: UN Security Council – *Resolution 1244*, 10 June 1999, available at <http://www.unmikonline.org/press/reports/N9917289.pdf>, on 02/06/04

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