THE COMMISSIONER
FOR HUMAN RIGHTS

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Strasbourg, 19 June 2003

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Foreword

The presentation of this third annual report comes midway through my term of office. After a brief summary of my office's activities in 2002, I will take the opportunity to make a number of comments on the mandate of the Council of Europe Commissioner for Human Rights, based on experience to date, but looking to the future.

Over the past year, we have continued to focus on developing three key aspects of the Commissioner's mandate: promoting education in and awareness of human rights throughout Council of Europe member states, contributing to the effective observance of human rights in their legislation and practices and supporting national "human rights bodies".

My official visits to member states serve the three above-mentioned purposes. Above all, though, they enable me to identify the most serious problems concerning effective observance of human rights by examining the situation on the ground and with the relevant actors. Most of my visits are followed up by "visit reports" accompanied by "recommendations". In some cases, the urgency of the situation has led me to issue recommendations aimed at improvements in the very short term. In others, the complexity of the issues raised and of the economic, political and social conditions on the ground mean that my recommendations call for legal or political action in the medium or long term.

The institution of the Commissioner for Human Rights has also had to deal with crisis situations. These have required - and in some cases continue to require - active and repeated presence on the spot, as well as continual follow-up.

For instance, the armed conflict in the Chechen Republic in the Russian Federation has demanded several visits to the region and ongoing contacts and discussions. We have made practical recommendations to try and put an end to the criminal actions both by the Chechen fighters and by the Russian federal forces, as well as the climate of impunity in which these atrocities are committed. My thoughts and actions throughout the past year have been influenced at all times by the situation of the displaced persons in Ingushetia, the refugees outside Russia, the dead Russian soldiers, the people disappearing or dying during operations by the federal forces and the assassinated Russian and Chechen officials, as well as the many indiscriminate attacks and, lastly, the plight of so many Russian and Chechen families that have been destroyed by the savage violence. It is clear that there will be no lasting peace in that long-suffering region unless progress is made towards political solutions and justice is done in all cases without exception.

We have also followed the situation of the people displaced by the war in Nagorno-Karabakh and the conflict in Abkhazia, hundreds of thousands of whom are living in total insecurity as a result of lack of understanding on all sides. This situation, which has scarcely improved with time, which has, indeed, worsened in some areas, requires a renewed attention.

At the request of the Parliamentary Assembly, we made two visits to Kosovo and the neighbouring states to study the situation of the people who had to leave Kosovo because of the war and the violence and also to review the respect for human rights in the internationally administered territory. The conclusions are not encouraging and I would refer to the report included here, which, unfortunately, could not be presented to the Assembly, despite having been requested by it.

In the course of all the visits and our work on the ground, we have paid particular attention to the more vulnerable sections of society, whose situation demands greater vigilance with regard to respect for their fundamental rights, for instance, the elderly, children, people with disabilities and all those who, for one reason or another, find themselves deprived of their freedom and confined in special centres.

In addition, the situation of the Roma has been an ongoing concern for some considerable time and, especially, this year. I hope that we will very shortly be able to put forward some practical conclusions and suggestions in a general report that is currently under preparation. Moreover, each visit reveals with increasingly clarity the benefits to be had from an international forum in which Roma citizens could evaluate and make recommendations on common problems.

In a similar vein, the situation of foreigners and immigrants, including those who have entered individual countries illegally, is of particular concern, given that various governments are adopting increasingly restrictive measures that do not always properly respect the dignity and fundamental rights of the individuals concerned.

Some measures taken regarding foreigners living illegally in given countries are being merged with those taken as part of the necessary fight against terrorism and are generating unwarranted associations in public opinion between illegal immigrants and alleged terrorists. I have underlined many times that terrorism must not be combated with measures that diminish or weaken fundamental freedoms or the guarantees of the rule of law. This would be to show terrorists an unwarranted lack of confidence in the strength of the democratic state and the values on which it is based.

These issues and some others have led me to start issuing legal opinions, thereby developing an aspect of the Commissioner's mandate that had previously barely been exploited because of a lack of staff and of specific requests.

I should also like to take the opportunity to stress the need to do absolutely everything we can to combat the criminal activities of organised gangs that traffic in human beings, especially clandestine immigrants, beggars and prostitutes, and reduce them thereby to latter day slaves and that go so far even as to trade in human organs. We have begun to work with other institutions in this area, and I hope that it will be possible to step up our efforts in future.

We have continued the thematic seminars initiated in previous years, for instance, on relations between religions and human rights, and have launched new series of seminars, including one that began with a meeting in Moscow with military personnel from several countries on human rights and armed forces and is set to continue in Madrid in September 2003.

In keeping with the mandate assigned to me, I have done my utmost to strengthen relations with the ombudsmen and national human rights commissions in the member countries. In the case of ombudsmen, we have supported the establishment of the office in countries where it did not exist at the national or regional level. Our interest has focused in particular on the appointment of ombudsmen in all of the regions in the Russian Federation, a project we are implementing over two years in close co-operation with the European Union. At the end of 2002, my office was assigned responsibility for organising the regular roundtables with European ombudsmen and national human rights institutions, an activity that was previously carried out by the Council of Europe's Directorate General of Human Rights.

I must also mention the valuable assistance I have always received from international and national non-governmental organisations. They have provided consistently provided useful information and analyses during seminars and have greatly contributed to my understanding of local problems when I have met them on the spot before the start of my official visits.

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However, it is not the purpose of these few lines of introduction to repeat the content of the report in condensed form. At this stage, halfway through my term, I believe that it would be useful to make some comments based on my experience over these last three years which might prove helpful when it comes to considering the possibility of improving and expanding the mandate assigned to the Commissioner in 1999, as was recently, in fact, suggested by the Maltese Chair of the Committee of Ministers.

One of my concerns now is the follow-up given to my reports, recommendations and opinions. In this year's report, I have included for the first time a chapter on follow-up to the reports and recommendations issued during 2000. However, I note that there are no provisions in this respect at Committee of Ministers or Assembly level. The use made of the Commissioner's work is therefore somewhat uncertain and appears to be left to his personal initiative in the form of regular or occasional reminders.

The same is true for the relations between the Commissioner and the European Court of Human Rights. I believe that the Commissioner could play a more active role and relieve the Court of certain repetitive cases, taking advantage of his ability to engage in direct dialogue with national authorities during his official visits or, possibly, being allowed to act as amicus curiae before the Court or being given the right to bring certain cases of public interest before the Court - a possibility that is open to ombudsmen in the domestic courts of several European countries.

In addition, even if we have enjoyed excellent relation with a number of the Commissions of the Parliamentary Assembly, the establishment of institutionalised working relations between the Commissioner and the Parliamentary Assembly would, in my view, be a positive development.

Lastly, questions concerning the human and financial resources available to the Commissioner cannot be ignored when the lessons of the last three years are considered.

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I should like to conclude by expressing my sincere gratitude to the countries that have offered me generous support by providing qualified and committed individuals for my office and making voluntary financial contributions. Without this support, over half of the activities described in this report could not have been carried out, given the inadequacy of the material resources and staff and assigned to me.

I am grateful also to the members of my Office, whose commitment has enabled me to present this report based on our common efforts.

Strasbourg, 19 June 2003

Alvaro Gil-Robles
Commissioner for Human Rights

I. ACTIVITIES OF THE COMMISSIONER FOR HUMAN RIGHTS: AN OVERVIEW

The three main tasks of the Commissioner for Human Rights are clearly laid out in his mandate. These are, respectively,

1) The promotion of education in and awareness of human rights,
2) The promotion of the effective respect of human rights, and
3) The identification of shortcomings in the law and practise of member states (with respect to the normative instruments of the Council of Europe).

The Commissioner's promotional activity has continued to concentrate on seminars organised on thematic issues, or in conjunction with regular long-term partners such as religious leaders and, as of 2002 with the armed forces of the member states of the Council of Europe. The Commissioner's activity in respect of the pathology, or effective protection of human rights has continued to be dominated by official visits to member states, during which the panorama of human rights problems are examined and particular issues of concern are concentrated on in discussions with national authorities. These visits result in general reports of the human rights situation in each country visited and contain specific recommendations for its improvement. The Commissioner has also continued to devote considerable attention to more specific large-scale human rights concerns, such as, in 2002, the situations in Chechnya and Kosovo.

Reports and Recommendations

The Commissioner presented five human rights reports during the course of 2002 resulting from official visits to Bulgaria,[1] Greece, Hungary, Romania and Poland. These reports aim at a more comprehensive overview of the human rights situation in the countries visited, or an analysis of, in the Commissioner's opinion, the most salient issues and contain recommendations to the domestic authorities. The full reports figure in appendix and are available on the Commissioner's website and it is not necessary to repeat their contents here. It is worth noting that a number of concerns proved common to several countries visited (including, indeed, a number visited in previous years). The list of issues, some of which are examined in greater detail in section of II of this report, has enabled the Commissioner to draw up a catalogue of concerns on which further activity might be envisaged at an international level, in addition to the obvious need for national initiatives. These issues include the respect for the rights of certain categories of often neglected or vulnerable persons, such as the mentally disabled, Roma, women, children and all victims of domestic violence, specific concerns such as human trafficking and such issues, in conflict or post conflict countries, as the situation of internally displaced persons and disappearances. In all of these areas the Commissioner intends to embark on further activity either immediately in 2003 or before the end of his mandate. It should be noted that it remains the Commissioner's intention to report on all of the member states of the Council of Europe during his mandate.

[1] The visit to Bulgaria took place in December 2001 but the report was presented in April 2002.

The Commissioner may also issue reports and recommendations addressed to first such individual member states authorities outside the context of official visits. Indeed the Recommendation, on certain rights that must be guaranteed during the arrest and detention of persons following "cleansing" operations in the Chechen Republic of the Russian Federation[2], was issued in May last year and reflected the Commissioner's ongoing concern over the human rights situation in Chechnya.

The Commissioner also presented, in September 2002, a special report on the human rights and the rights of refugees and displaced persons in Kosovo, drawn up at the request of the Parliamentary Assembly and following a fact finding mission, in July and August 2002, and an official visit in Serbia and Montenegro (and Kosovo) in early September 2002.

This Annual Report is also the first report to involve a section relating the developments subsequent to the publication earlier reports. The countries thus examined are Georgia, Moldova, Andorra and Spain (the Basque Country), which, in addition to the Russian Federation, were the countries visited by the Commissioner in the first 18 months of his mandate. The response to the Commissioner's Recommendation on the rights that must be guaranteed during the arrest and detention of persons following "cleansing" operations in the Chechen Republic of the Russian Federation is also examined.

Opinions

Whilst the identification of shortcomings in the practise of member states obviously overlaps with the second aspect of the Commissioner's mandate, the third branch also provides for a role for the Commissioner in the identification of legislative shortcomings. Until last year, this role had been fulfilled exclusively in the context of country visits and reports. With the publication of his first two opinions in 2002[3], on certain aspects of the UK derogation from Article 5 of the Convention in August and the review of powers of the Northern Ireland Human Rights Commission in November, the Commissioner has sought to extend his activity in this area and formulate a new approach to this aspect of his mandate. This approach is, certainly, explicitly referred to in Article 8 of his mandate, which provides for the issuing of recommendations, opinions and reports.

The two opinions in question were requested, respectively, by the Joint Committee on Human Rights of the Parliament of the United Kingdom of Great Britain and Northern Ireland and the Northern Ireland Human Rights Commission. Again, the response to such requests, in the form, in this instance, of opinions, falls squarely within the Commissioner's mandate. The Commissioner is, in virtue of Art. 3c, to "make use of and cooperate with human rights structures" and may, in virtue of 5(1), "act on information relevant to [his] functions … [which may be] addressed to the Commissioner by Governments, National Parliaments, National Ombudsmen, or similar institutions in the field of human rights, individuals and organisations."

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[2] CommDH/Rec(2002)1

[3] CommDH(2002)7 and CommDH(2002)16.

Whilst the opinions in question were requested by institutions or authorities on which the Commissioner's mandate places specific emphasis, the general nature of Art 8(1) also allows for the issuing of opinions on the Commissioner's own initiative and certainly this possibility cannot be excluded in the future. It is clear, however, that as the Commissioner's opinions are in no way binding, their impact is reinforced where a national authority is interested in making further use of them.

The two opinions reveal the different nature of the types of opinion that the Commissioner might choose to issue. The first opinion, relating to the derogating measures of the UK anti-terrorism, Crime and Security Act was issued in respect of a legislative initiative. The opinion was, indeed, cited in the Court of Appeal judgement of 25th October 2002, with all the respect due to an opinion whose conclusions were not, ultimately, followed.

The second opinion, on the competences of the Northern Ireland Human Rights Commission was issued in an altogether different context. The competences of the Commission had already been defined by the 1998 Northern Ireland Act, which, however, provided for a review of the same within two years of establishment. The opinion of the Commissioner was, consequently, issued in respect of a review procedure initiated by the UK government based on the submissions of the institution of itself and other interested commentators. The opinion is, as a result, more mediatory in nature – representing the view of an outside party whose concern is to side with neither party but to advance arguments that may subsequently be used by either. This type of opinion on proposed legislative amendments suggests that it is possible for the Commissioner to provide opinion not only on legislation in force but also on the human rights implications of draft legislation.

Seminars

The Commissioner's promotional activity, it was stated earlier, continues to concentrate, in addition to the publication of articles and appearances at different international conferences, whether by the Commissioner, or, as is increasingly the case, by a representative of his Office, on the organisation of seminars, either on thematic issues or with partners whose social role is of particular importance and whose activity and influence inevitably raises human rights related questions.

In this category, the Commissioner has already, since the first year of his mandate, organised annual meetings with the leaders of the main religious communities in Europe. The last such meeting was held in December 2002, in Louvain-la-Neuve, on the relation between human rights and religious doctrines, and sought to examine the compatibility of religious and human rights discourse and to establish the rights and responsibilities of religious communities in contemporary European societies.

The Commissioner also wished to commence a similar ongoing dialogue with the armed forces of member states of the Council of Europe. Again, as institutions integral to society's effective functioning and with considerable influence over their own members and those civilians they come into contact with, there are several

important human rights issues that the Commissioner has sought to examine in concert with military structures. The first such seminar took place in Moscow in December 2002.

Suffice it to say here that the method of these meetings is essentially collaborative. The Commissioner has, moreover, been encouraged by the willingness of both these actors, if the incongruity of combining such diverse groups is permitted, to acknowledge and address the human rights implications of their activity.

Contact visits

The Commissioner puts much emphasis in his co-operation with domestic authorities of all member states - in particular with national Ombudsmen and National Human Rights Institutions – and with domestic non-governmental organisations. In this context - and in addition to the above mentioned official visits resulting into reports and recommendations – the Commissioner visited Armenia, Azerbaijan and Albania with a view to contacting the authorities and Non governmental organisations active in these countries and to obtain a first picture of the human rights situations. The Commissioner's mandate specifically instructs him to avoid the unnecessary duplication and nowhere would this be more evident than where the monitoring procedures of the Committee of Ministers or the Parliamentary Assembly are already active. This is not to say, however, that there may not be a role for the Commissioner in providing additional political impetus on human rights issues of particular concern through his greater independence and direct contact with member State authorities. The Commissioner's statements on the contact visits carried out in 2002 appear in appendix to this Report.

National Ombudsmen and National Human Rights Institutions

In accordance with article 3.d. of the mandate, the Commissioner is to facilitate the activities of national ombudsmen or similar institutions in the field of human rights.

The structural similarities between the Commissioner and national ombudsmen and human rights institutions make them obvious partners for the Commissioner at the national level. This correlation is reflected in the Commissioner's mandate, which requires him to facilitate the activities of national Ombudsmen and "similar institutions in the field of human rights" and to encourage their establishment where they do not yet exist. The Commissioner is, at the same time, authorised 'to act on any information' received from such sources.

The Commissioner's ties with National Ombudsmen have already been well established over the course of the last few years, during his official visits and through the organisation of annual meetings. The Commissioner's starting point, which received pronounced support at the Conference of European Ombudsmen organised by the Commissioner in Vilnius in April 2002[4], is that all Ombudsmen have an important role to play in the defence of human rights. Whilst explicit reference to human rights protection may be absent from the mandates of certain Ombudsmen, it is

[4] This conference was co-organised with the Ministry of Foreign Affairs of Lithuania, in the framework of its Chairmanship of the Council of Europe and with the Lithuanian Ombudsman.

clear that human rights violations by state authorities constitute, at the same time, serious cases of mal-administration, and, as such, fall within the concerns of even the most narrowly defined institutions. All Ombudsmen, moreover, have in common the fact that they represent vital interfaces between individuals and public authorities.

The Commissioner has, at the same time been concerned to encourage close ties between Ombudsmen and organised civil society, as a means both of bringing its concerns to the attention of authorities and of extending the reach of Ombudsman, through NGOs and other representative organised groups, to the most vulnerable sectors of society, who, whilst being most in need of the assistance of Ombudsmen, are frequently ill-informed of the recourses available to them.

The primary channel for the Commissioner's cooperation with national Ombudsmen will, as of 2003, be the bi-annual roundtables of the Council of Europe and National Ombudsmen. The responsibility for the organisation of this event was transferred by the Committee of Ministers to Commissioner in 2002 and the first such event to held under the auspices of the Commissioner will take place in Oslo in 2003. It is the intention of the Commissioner to concentrate these meetings on the expansion of the role of Ombudsmen in the protection of human rights. With the aim of streamlining these meetings, it has been suggested that these meetings be restricted to national Ombudsmen. Aware, however, of the importance of regional Ombudsmen, the Commissioner proposes to organise separate meetings with these valuable institutions that will focus more specifically on their concerns.

The Commissioner has been particularly active in the promotion of Ombudsmen institutions where they do not yet exist. In 2002, the Commissioner cooperated with the Venice Commission in the organisation of seminars on the Ombudsman institution in Armenia and Azerbaijan to assist in the setting up of institutions provided for in both cases by recently adopted legislation.

More ambitiously, the Commissioner will embark, in 2003, on a two year programme with funding partly provided by the European Union on the promotion of regional Ombudsmen in the Russian Federation. At present only 21 of the 89 Republics/Regions in the Russian Federation have Ombudsman institutions. The aim of the Commissioner is to promote the establishment of effective regional Ombudsmen in the context of the current Federal reforms being undertaken in Russia.

Mention must also be made of the considerable contribution made by national Ombudsmen to the Commissioner's official visits. The readiness of Ombudsmen to share their insights and experience of the human rights problems on the ground has proved of inestimable benefit to Commissioner in assessing national human rights problems before discussing them with the relevant authorities.

Ombudsmen are not, however, the only national institutions that the Commissioner is called upon to co-operate with by his mandate. National Human Rights Institutions are coming to play an increasingly important role in the promotion of human rights at the national level. The Commissioner had, however, until last year, not yet developed any significant ties with the few, but burgeoning, national human rights institutions already existing in Europe. The transfer of the responsibility for the organisation of

the biennial roundtables with national human rights institutions (at the same time as the roundtable of national Ombudsmen) marks a significant development therefore. The Commissioner's participation in the 2nd Round Table of National Human Rights institutions in Dublin in November 2002 permitted this institutional gap to be filled in the meantime and already resulted in a number of proposals for future collaboration.

These included notably, the establishment, within the Office of the Commissioner for Human Rights, of a Liaison Office for European National Institutions for the Promotion and the Protection of Human Rights that might assist national human rights institutions to promote their role within, and ties with, the rest of the Council of Europe. The Office will also serve to coordinate the responses of National Institutions to issues of collective concern and encourage their input in the creation of new institutions in other member states of the Council of Europe. The terms of reference of this office are provided in the annex of this report.

It was insisted also that the Commissioner should systematically contact national human rights institutions before his country visits on the same basis as national Ombudsmen. Mention was also made in the conclusions of the Dublin round-table of the role the Commissioner could play both in coordinating the response of national institutions to threats to the independence of any one of them and in assisting in the defining and interpretation of the roles and powers of national institutions through the provision of independent opinions if and when requested.

Indeed, the Commissioner already published his first such opinion in November 2002 in the context of the review of powers procedure established by the Secretary of State for Northern Ireland for the Northern Ireland Human Rights Commission[5]. The opinion, provided on the suggestion of the Northern Ireland Human Rights Commission itself, concentrated on the guarantees of independence enjoyed by the Commission and on the correlation of its powers with its statutory functions. The completion of the review procedure has been delayed by the temporary suspension of the Northern Ireland Assembly, with whose members the Secretary of State for Northern Ireland wishes to examine the various proposals.

The promotion of the establishment of effective human rights institutions throughout the member states of the Council of Europe remains a large and important task for the years ahead. Many questions will be raised regarding the nature of the institutions required in different countries. Whilst the Paris Principles already establish minimum guidelines, they leave considerable room for competing conceptions of the role and competences of national institutions.

Care must, particularly, be taken to ensure that new institutions integrate effectively with pre-existing institutions, such as Ombudsmen and other, more specific institutions, such as Equality Commissions or, say Ombudsmen for Children or the disabled. As an independent institution with close ties to and considerable experience of the workings of the entire spectrum of such institutions, the Commissioner is well placed to offer, where desired, his views on their inter-relation and, hence, the most effective institutions that might be established in different countries.

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[5] CommDH(2002)16, Opinion 2/2002 of the Commissioner for Human Rights on certain aspects for the review of powers of the Northern Ireland Human Rights Commission.

Indeed the co-operation between Ombudsmen and National Human Rights Commissions already represents, in countries where they exist side by side, an area for greater exploration, which the Commissioner would be well placed, through this contact with both kinds of institutions, to facilitate. A final area in which the Commissioner will be required to concentrate in the future concerns, precisely, the specific institutions mentioned above and with which to date the Commissioner has enjoyed only sporadic contacts during some of his country visits. As the Commissioner begins to focus in a more systematic manner on specific thematic issues, bringing together the experience gleaned from his individual country visits, on such topics say, as the rights of the disabled, of the elderly, of women and children, his ties with institutions specialising in these areas will inevitably become proportionately more important to the Commissioner's work.

Non Governmental Organisations (NGOs)

The Commissioner's mandate recognises the important role of civil society in the defence of human rights and places particular emphasis on his cooperation with non-governmental organisations. He is, in effect, encouraged both to take advantage of the experience of NGOs in his own activity and to assist them, in turn, in the fulfilment of theirs.

The Commissioner always seeks to meet, therefore, with representatives of organised civil society during his official visits, whether from human rights organisations, specific interest groups, lawyer associations or trade unions. The information and analysis provided by such organisations are essential for the identification of the concerns that the Commissioner subsequently raises with the authorities he meets with. NGOs have also played an important analytical and promotional role in numerous seminars the Commissioner has organised. The Commissioner has, in turn, sought to promote the role of NGOs in his dialogue with national authorities by encouraging transparency and cooperation with such valuable partners in the defence of human rights.

Indeed, as a result of his close ties with both NGOs and national authorities, the Commissioner has been able to gain considerable experience of the role of civil society in Europe and the difficulties and pitfalls they sometimes face. Particularly concerned by the frequently fraught relations between human rights NGOs and national authorities during his first visit to Turkey in 2001, the Commissioner organised a meeting in Ankara in 2002 between NGOs and government officials to discuss how their relations might be improved and the important role of NGOs accommodated and encouraged. The conclusions of the seminar can be found in the appendix to this report and are, indeed, of relevance to other countries besides. It is on these more general considerations in respect of transitional democracies that this section will concentrate.

The rise and increasingly active role of organised civil society represents one of the more significant developments in the landscape of human rights protection over the last few decades. The place of NGOs in Western Europe has, broadly speaking, been acknowledged by national authorities for some time now. Their emergence, in

increasing numbers and to increasing effect, in the newer democracies of the East testifies to the consolidation of participative democracy throughout Europe. Their emergence in these countries has not, however, always been effortless and unhindered and much remains to be achieved for civil society to arrive at its proper place. Stimulating this development will remain one of the Commissioner's main concerns during his mandate.

In virtue of their active engagement and experience of the conditions on the ground, NGOs are ideally placed to raise concerns regarding current practices, to propose solutions and participate in their implementation. The constructive criticism they provide is, indeed, essential to the healthy functioning of democracy and ought, as such, to be not merely tolerated but encouraged by State authorities. NGOs are, moreover, often more than just external and, perforce, critical opponents of government policy and practise. They contribute also in many areas to the fulfilment of state obligations – in the improvement of prison conditions, the provision of legal representation or counselling to victims of human rights abuses and the training of public officials in such diverse areas as the provision of mental health care or anti-discrimination programmes, to list but a few. This positive social engagement of NGOs provides yet another reason for national authorities to not merely to permit but to promote their activity.

The promotion of the activity of NGOs requires a number of conditions to be met. The respect for the rights to freedom of association and expression is the most obvious. This is to be achieved not merely through the absence of persecution for the expression of contrary views but also, more positively, through a legal framework providing for the establishment of NGOs and the prevention of state interference in their internal organisation and legal activity. Such a framework ought to provide for the possibility of establishing legal personality and raising funds. Indeed, a well-defined framework will encourage more responsible organisations operating with the requisite transparency and accountability. The absence of such a framework, will by contrast, push organisations underground breeding dissent and yet greater antagonisms.

The positive and constructive engagement of NGOs will also be facilitated by greater openness and transparency on the part of state authorities. At the practical level, this ought to include the possibility for appropriate NGOs to visit such sites as detention facilities, asylum centres, psychiatric establishments and other institutions where persons may be exposed to human rights abuses. The constructive criticism of NGOs also requires access to information regarding legislative and policy initiatives. Consultation procedures between public authorities will facilitate cooperation, encourage responsibility and permit the timely voicing of concerns by those with practical experience of the likely impact of proposed initiatives or problems inherent in existing practises. In this connection, close ties between independent national institutions, such as Ombudsmen, human rights institutions or equality commissions, can provide an excellent forum for the airing and analysis of the concerns of civil society, and a conduit to executive and legislative authorities.

It would, however, be naïve, indeed disingenuous, to insist that the rise, especially in emerging democracies, of NGOs has been uniquely positive. The development of NGOs has typically been encouraged, by international organisations in particular, as

fostering the greater democratic participation of civil society and sensitivity of authorities to social concerns. This is, of course, true. At the same time, however, there is a real danger, particularly in the younger democracies, of arriving at a situation where the lobbying and influence of NGOs may tend, rather, to short-circuit democracy. Aware of the appearance of legitimacy public consultation confers on public policies, governments may all to easily be inclined to exploit the benediction of scarcely representative, barely independent organisations rather than submitting policy initiatives to broader public debate. Even without such cynicism the risk exists that the excessive influence of NGOs and other pressure groups may result in majority, but, typically, unorganised voices going unheard. At the same time, but at the opposite end of the spectrum, genuinely popular opposition voices frequently unite in non-governmental organisations rather than properly established political parties. This cannot, in the long run, be a positive development, as the defence of human rights amongst civil society risks becoming increasingly politicised and, consequently, confrontational. It is of the utmost importance therefore, that the development of organised civil society is not encouraged, both domestically and by the international community, at the expense of the emergence of autonomous, responsible and representative party political structures.

The problems adverted to above are all, to greater or lesser extent, inevitable side-effects and teething problems in the transition to democracy, that will, for the most part be resolved by time, more than any other factor. Whilst wishing to sound this warning, the Commissioner has also been greatly encouraged by the professionalism, independence and responsibility of several local NGOs he has met with in Eastern Europe. Their engagement has provided an important impetus to the social awareness of human rights concerns and to reforms for their improvement. Many continue, however, to work under difficult circumstances.

If there is a general conclusion to be drawn from the difficulties faced by NGOs on the one hand, and the risks of the abuse of NGO structures on the other, it is that State authorities have both a responsibility to promote and an interest in establishing clear and transparent relations with the NGO sector. The willingness of public authorities to engage with civil society will, in effect, be rewarded by the increased responsibility and depoliticisation of NGOs. The official acceptance and sensitivity to criticism will, in the long run, encourage that criticism to be constructive. It is only under these conditions that the state and civil society can both fulfil their respective and separate roles. These are, for the former, to govern on the basis of a democratic mandate with consideration for the concerns of representative interest groups, and, for the latter, to criticise with respect for the legitimacy conferred by election.

Co-operation with International Organisations

The importance for the Commissioner of co-ordinating his activity with those of other international organisations is obvious, not only in virtue of the overlapping of concerns, but also considering the limited resources at the Commissioner's disposal. The Commissioner must, in short, be an institution capable of engaging others in its action. For an institution of such short standing, the creation of the necessary working relations, has necessarily taken its time.

The Commissioner is pleased to note, however, the promising developments in this area over the course of the last year with the European Union, the United Nations High Commissioner for Human Rights and the OSCE.

Two organisations, however, deserve special mention for the assistance they have generously and consistently offered to the Office of the Commissioner. Firstly the UNHCR has played a vital role in informing the Commissioner of the situation of refugees and IDPs in the numerous conflict and post-conflict zones he has visited since assuming his functions. These include notably Chechnya, Kosovo, Georgia and Azerbaijan. The assistance of the UNHCR in organising site visits has proved indispensable to obtaining an accurate view of the situation on the ground.

The Commissioner is equally glad to record his gratitude for the cooperation enjoyed with the International Committee of the Red Cross. Again, as with the UNHCR, this was nowhere been more evidenced than in respect of Chechnya, and, especially, with respect to the preparation of the Commissioner's report on Yugoslavia and Kosovo, for which the assistance and time accorded by the staff of the ICRC in organising visits to collective centres and meetings with family associations for missing persons proved invaluable.

Cooperation with Council of Europe bodies

- The Parliamentary Assembly

The Commissioner's mandate places considerable emphasis on his relations with the Parliament Assembly, to which the Commissioner may address reports, and which may, in turn, invite the Commissioner to undertake certain activities. All of the Commissioner's reports are addressed to both the Committee of Ministers and the Parliamentary Assembly, and it is clear that the latter provides an important forum for the voicing of the Commissioner's concerns.

When presenting his previous Annual Report to the Parliamentary Assembly in Lucern, it was suggested that the Commissioner pay greater attention to, and make greater use of, the Recommendations and Resolutions it adopted. Whilst it is important for the Commissioner to maintain his independence, he has, indeed, variously drawn the attention of national authorities to the texts adopted by the Parliamentary Assembly during his visits and in his reports. In 2002 he referred to the Parliamentary Assembly's Recommendation 1582 on Domestic violence against women in his reports on Poland and Romania, to Recommendation 1412 on Illegal activities of sects in his report on Greece and Recommendation 1443, entitled International adoption: respecting children's rights, in his report on Bulgaria. He referred to the Assembly's recommendations on the appointment of legal guardian for unaccompanied juvenile immigrants contained Recommendation 1596 in his report on Poland.

The Parliamentary Assembly has, in turn, (in accordance with Article 3g of his mandate) invited the Commissioner to examine a number of issues. Whilst the Commissioner is not, materially, in a position to accept all these requests, he did, notably, accept the invitation in Recommendation 1569 (2002) on the Situation of

refugees and internally displaced persons in the Federal Republic of Yugoslavia, to "visit the Federal Republic of Yugoslavia and Kosovo with a fact-finding mission with the aim of examining the human rights and refugees situation in Kosovo on the whole and elaborating appropriate recommendations". It is worth noting, however, the Commissioner's subsequent report on this issue did not receive from the Assembly quite the response it might have. A greater reaction is be hoped for to the Commissioner's report on situation of separated children in Europe, with particular emphasis on expulsion procedures which will be presented later this year in response to a similar request in Recommendation 1596 on the Situation of young migrants in Europe. More felicitous has been the co-operation between the Assembly and the Commissioner on Chechnya, which has been an issue of ongoing concern to both since the renewal of hostilities in 1999. The Commissioner has also been glad to address ad hoc committee meetings on specific areas of concern when requested.

Greater co-operation might be envisaged in future in the follow-up phase to the Commissioner's reports. Where member states fail to address concerns identified by the Commissioner within a reasonable delay, the attention of the Parliamentary Assembly, through, for instance, its Monitoring Committee, would certainly add weight to the Commissioner's recommendations. It would, of course, be incumbent on the Commissioner himself to bring these concerns to the attention of Parliamentary Assembly.

- The Committee of Ministers

The Commissioner welcomes the fact that the programme of the Maltese Chairmanship of the Committee of Ministers (7 November 2002 – 15 May 2003) clearly raised the question of Committee of Ministers' follow-up to the Commissioner's activities:

> *"The Commissioner for Human Rights has proved a highly valuable instrument available to the Council of Europe in the enhancement of human rights protection in Europe. To further develop cooperation with this institutional partner of the Committee of Ministers, the Maltese Chairmanship proposes to work on the most effective means by which the Committee of Ministers could provide follow–up to the Commissioner's reports and recommendations*"[6].

Indeed, three years after the establishment of the office of Commissioner for Human Rights, and now that the first Commissioner has completed half of his term of office, this would seem an appropriate time to consider how the Committee of Ministers could derive most benefit from his activities with a view to fulfilling the Organisation's objectives.

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6 CM/Inf(2002)43

The Commissioner regularly presents to the Ministers' Deputies reports on his visits to member states. In these he often makes recommendations, suggesting practical measures the state concerned could take, and sometimes even solutions to problems or shortcomings he has identified. These recommendations are actually constructive proposals and are perceived as such, rather than as criticism or accusations. The Commissioner's visits foster a climate of confidence which makes it easier for him to get his message across to the national authorities and secure implementation of his recommendations, as clearly illustrated by the steps taken by some governments to remedy problems immediately after the Commissioner's visit (consider, for example, the rapid reactions of the authorities following the Commissioner's visits to Greece, Hungary and Poland). It is therefore important that the Commissioner keep this line of communication open for as long as possible. It is to be hoped that the states concerned will draw helpful lessons from the recommendations addressed to them and that, in his annual report - or, if necessary, in specific communications - the Commissioner will be able to inform the Deputies that his recommendations have been or are in the process of being implemented.

Some of the Commissioner's recommendations require the Council of Europe's active assistance from the outset. Others remain a dead letter, so specific measures or programmes are required to facilitate their implementation. This is an area where closer co-operation between the Deputies and the Commissioner might be appropriate. In his future reports and communications, the Commissioner intends to draw the Deputies' attention to the need for Committee of Ministers' intervention to encourage states to implement his recommendations. He would also be prepared to help identify specific activities, or even assistance programmes, to remedy shortcomings in member states' legislation or practice and to offer special assistance to national authorities and to the relevant Council of Europe departments.

- The Commissioner and the European Court of Human Rights

The Commissioner of course takes account of the work and decisions of the European Court of Human Rights. Although he has authority to take action on his own initiative or on the basis of information sent to him by either the authorities or individuals, he feels that there are even more grounds to take action in relation to problems the Court has pinpointed in its judgments.

During his visits to Greece, Romania and Poland, the Commissioner raised the question of the general measures expected for the purposes of enforcement of some of the Court's judgments (Manousakis v. Greece; Brumarescu v. Romania and Kudla v. Poland) and made suitable proposals and recommendations.

It has been noted in several cases that delays in taking general measures or the inadequacy of the measures adopted have given rise to repetitive applications, which in turn lead to an unnecessary and excessive caseload for the Court. This could in the long term have a negative impact on human rights protection and the Commissioner cannot simply ignore this situation.

In his contacts with member states, he therefore intends to continue to raise the question of general measures to remedy structural problems which the Court believes have led to violations of the European Convention on Human Rights. In this context, and with a view to facilitating the Court's work, he would be prepared to study proposed ways of ensuring that information about judgments or about cases still pending before the Court is more rapidly disseminated and more carefully targeted. Co-operation could also be envisaged in this area with the Committee of Ministers, which is responsible for monitoring the execution of the Court's judgments, and with the Parliamentary Assembly, which has for several years taken a close interest in this issue.

The Commissioner and crisis situations

In November 2000, the European Ministerial Conference on Human Rights pointed out that the Council of Europe's potential "*is not sufficiently exploited to respond to serious and massive human rights violations or to prevent such violations*".[7] It therefore considered it "*desirable for the Committee of Ministers to initiate consideration of the protection of human rights during armed conflicts as well as during internal disturbances and tensions, including as a result of terrorist acts, with a view to assessing the present legal situation, identifying possible gaps in the legal protection of the individual and to making proposals to fill such gaps*" .[8]

The relevant committee of experts, the Committee of Experts for the development of Human Rights (DH-DEV), adopted the following conclusions:

> "*Having examined the various fact-finding mechanisms existing within the Council of Europe, it was considered that the Commissioner for Human Rights was the most suitable body to undertake fact-finding in situations where there is a threat or where there are allegations of serious and massive violations of human rights. […] [T]he mandate of the Commissioner, pursuant to Resolution (99) 50, was wide enough to encompass such fact-finding activities, whilst meeting the above-mentioned minimum requirements of effectiveness. On the other hand, it was considered important to give, at an appropriate political level, general encouragement to the Commissioner to make full use of his fact-finding functions whenever such situations may occur. In this context, it would be important to consider ways and means of giving the Commissioner more possibilities to have recourse to external experts (medical, forensic, legal, military, police, etc.) when undertaking such fact-finding. More generally, the importance of giving additional support to the Commissioner's activities was also noted, and he was encouraged, when useful and feasible, to continue to make use of the expertise and knowledge of other international organisations (OSCE, UNHCR, etc.).*

[7] Resolution II of 3-4 November 2000, § 7.

[8] Resolution II of 3-4 November 2000, § 11.

> *Finally, it was also considered essential for the effectiveness of the whole fact-finding exercise that its results trigger off appropriate follow-up by the competent Council of Europe organs."*[9]

DH-DEV therefore recommended "*encouraging the Commissioner to undertake fact-finding in situations where there is a threat or where there are allegations of serious and massive violations of human rights, and [of] examining practical ways and means of ensuring that the Commissioner can have adequate recourse to external experts in performing this part of his mandate*." [10]

It is now for the Committee of Ministers to continue its consideration of this matter.

The Commissioner wishes to point out that he has, since the very beginning of his mandate, considered it necessary to address the problem of crisis situations such as the conflict in Chechnya and the situation of displaced persons in Georgia, and, more recently, at the Parliamentary Assembly's request, the issue of displaced persons in Kosovo. He is prepared to take part in such an exercise in the future.

[9] DH-DEV(2002)008, 20 January 2003, paragraphs 19-21.

[10] DH-DEV(2002)008, 20 January 2003, paragraph 22.

II. HUMAN RIGHTS PROBLEMS IN EUROPE

The Commissioner's three years of activity, his visits to, and reports on, several Council of Europe member states and his almost daily contact with national authorities and civil society show that there are recurrent human rights problems in Europe, and that these are, to a large extent, common to several member states.

This may seem both unremarkable and surprising. One would expect the major problems of modern democratic societies to be similar in nature or, at least, to have similar or common social or historical origins. At the same time, surprisingly, there is no longer any reason to make a distinction between old and new democracies where human rights are concerned, and this is thanks solely to the establishment by the Council of Europe of a single human rights area, an achievement of which it has every reason to be proud.

Although this is a welcome development, it cannot obscure certain harsh realities.

European society has experienced and is continuing to experience a human rights crisis. Just as the process of European construction is reaching a decisive point, doubts as to the future are leading to a gradual radicalisation of our society and a conspicuous lack of solidarity.

Thus we have seen racism and xenophobia, exaggerated nationalism and a radicalisation of religious sentiment that sometimes even takes the form of armed conflict, as it did in the former Yugoslavia and the southern Caucasus, and as is unfortunately still the case in Chechnya. Although there is some hope that we are reaching the end of the armed conflicts that have recently shaken our continent, the resulting human tragedies and the causes of these bloody events are nonetheless still with us. The terrorist attacks of 11 September and their aftershocks in Europe offered a very dramatic reminder, if we needed one. It is therefore perfectly natural that, in his annual report, the Commissioner should take up issues such as the fight against terrorism, the rights of non-nationals, the role of human rights in armed conflicts, the tragedy of displaced persons and disappearances and the key role that religion sometimes plays.

Nor can one help but notice that our society is no longer as caring as it was, that the deprived sectors of society are becoming increasingly vulnerable and that their very existence is sometimes threatened. Social exclusion affects not only minorities – the Roma/Gypsy minority is an obvious example – but also people who, for one reason or another, have become more vulnerable or marginalized. The scourge of trafficking in human beings, particularly in women or children, is perhaps the most dramatic consequence of the despair caused by exclusion, but other phenomena are equally alarming and still awaiting specific action by the authorities: domestic violence, abandoned children, the living conditions of the elderly and of people with disabilities, including people suffering from mental disorders, and prison conditions. Some of these have been a matter of concern for the Commissioner and are dealt with below.

Fight against terrorism and the rights of immigrants and foreigners

The landscape of human rights protection in Europe has, over the last year and half, been dramatically marked by the response of its authorities to the horrific attacks of September 11th 2001. Violently confronted by the potentially devastating consequences of international terrorism, the response of European governments has been immediate. Rhetoric has been swiftly followed by stringent security measures across Europe. Whilst there can be doubt over the need to respond to new threats, important questions arise regarding the protection of human rights in the fight against terrorism. It would sadly appear that, far from constituting a central pillar in this fight, the defence of human rights has been one of its first significant casualties.

The Commissioner for Human Rights has frequently had occasion (whether addressing servicemen in Chechnya or the Committee of Ministers in Vilnius) to insist that, far from undermining the effectiveness of the fight against terrorism, the respect for human rights constitutes a vital element in this fight's success. Terrorism targets not just lives but ways of life, not just a particular society but the way in which that society functions. Respect for democracy, the rule of law and human rights are the core values on which the societies brought together by the Council of Europe are based and terrorist actions strike at the very core of these values. They must, indeed, be combated with firmness and conviction. But are we, now, to display so little confidence in these very values as to progressively unravel the elaborate web of human rights protection ourselves? The message that must be passed, rather, is one of confidence in our values and of the rightness of human rights. Injustice must be met with justice, the threat of terrorist with the legitimate arms of the State.

Whilst measures indiscriminately affecting data protection and the right to privacy of all persons have been introduced throughout Europe, it is not surprising that it is foreigners and ethnic and especially Muslim minorities that have been hardest hit by new security measures to have been introduced since September 11th. The most graphic example of the rolling back of human rights in the wake of September 11th has taken place in the United Kingdom with the introduction of the Anti-Terrorism, Crime and Security Act in December 2001.

The Act provides for the potentially indefinite detention of foreigners that the Home Secretary suspects of being engaged in, or having links with, terrorist activity, for which sufficient evidence is lacking to bring to trial, but who cannot be deported owing to the risk of torture in their countries of origin. The relevant provisions of the Act required a derogation from article 5 of the European Convention for Human Rights. The Commissioner issued an opinion on the Act on the request of the Joint Committee for Human Rights of the United Kingdom Parliament, in which he contested both the existence of a public emergency necessitating such provisions and the strict necessity of measures permitting detention without trial. The Commissioner was also concerned by the discriminatory provisions of the Act in so far as only foreigners were affected. The Act allows for detainees to appeal against the decision of the Home Secretary, on procedural grounds, to the Special Immigration Appeals Commission (SIAC), and appeals from this body to the Court of Appeal on points of law. Whilst the SIAC held the provisions of the Act to be incompatible with article 14 of the ECHR, prohibiting discrimination, the Court of Appeal over-turned its ruling, referring to the Commissioner's opinion, without accepting its conclusions.

To date 15 persons have been detained under these provisions of the Anti-Terrorism, Crime and Security Act. 11 individuals were detained in the months immediately following the Act's coming into force. 2 of these individuals have since left Britain voluntarily, and a further 4 have been detained since April 2002. At least 9 individuals have, therefore, been detained for in excess of one year, in conditions that the CPT considered, following a visit in February 2002, to leave much room for improvement. Whilst their final appeals are still to be heard by the House of Lords, the UK Government obtained the approval of Parliament to extend the application of the measures for a further 12 months from March 2003.

Whilst no other governments have taken measures necessitating derogations, the politically popular identification of foreigners and ethnic minorities as potential security concerns has given rise to numerous proposals and measures across Europe, which negatively affect immigrants and the rights asylum seekers. Concerns over the social tensions caused by high the rates of immigration and poor integration of migrants, in western Europe especially, certainly pre-date September 11th 2001, but moves to tighten border controls and greatly restrict the inflow of immigrants have been given fresh impetus by the security concerns arising from the perceived threats of international terrorism. It is of the utmost importance, however, that the two issues are clearly separated, both in the rhetoric of politicians and in their initiatives. Unfortunately current trends suggest rather the opposite development, with security concerns frequently being introduced to support restrictive immigration policies and substantial reductions in the procedural guarantees afforded to asylum seekers.

The need to review immigration policies, especially at the level of the European Union, is, indeed, evident. Greater harmonisation and stricter control of migratory flows might even be desirable. Such moves must not, however undermine the procedural guarantees available to asylum seekers, who, in the present climate, are most at risk from the popular amalgam of social and security concerns alleged to result from the high rate of immigration and bogus asylum seekers.

The greatest risk at present arises from the popularity across Europe of accelerating the processing of asylum applications. At the EU level proposals have already been made for processing asylum applications immediately at borders. Whilst such measures are yet to be put in place, similar measures have already been introduced at the national level. The UK has, for instance, in its Nationality, Immigration and Asylum Act of November 2002, provided for the immediate deportation of asylum seekers whose applications are "manifestly unfounded" to safe countries, from which appeals against the original decision will have to be made. The practical difficulties of launching appeals from abroad are evident. There is also some concern that applicants will be returned to "safe" countries, which are not there own. A package of new immigration and asylum measures introduced in Denmark in May 2002 provide for equally accelerated procedures (of as little as one day) for applications considered to be manifestly unfounded or, even more worryingly, for applications based on

"variable, contradictory or improbable" information. It is clear, however, that recently arrived foreigners are likely, especially where they have experienced persecution, to be in state of at least mild shock, necessitating a procedure of well in excess of one day before a final and objective assessment of the veracity of his or her statements can be arrived at.

Readmission agreements represent another source of potential concern. The European Union is already considering such agreements with Russia, the Ukraine, China, Algeria, Turkey and Pakistan. There is clearly a concern that the existence of such agreements will result in the immediate return of persons, who might be at risk of torture or persecution in their home countries, with out the appropriate individual processing of asylum applications. A reciprocal return agreement between Turkey and Greece entered into in November 2001, providing for the return of undocumented third country nationals having arrived in either country via the other, has already resulted in concerns that the Greek authorities have returned several persons at risk (in their own countries) to Turkey without hearing their applications for asylum. The readmission agreements between Spain and Nigeria and Morocco have given rise to similar concerns regarding asylum applicants from the latter countries arriving in Spain.

A third development placing asylum applicants at risk concerns the removal of social benefits. A directive, for instance, of the acting Minister of Interior of Austria in September 2002, provided for the removal of welfare benefits (and access to housing to all asylum seekers whose applications had been refused at first instance). It is clearly difficult to see how an applicant can mount an effective appeal without an official address from which he can contact authorities and seek the necessary assistance. Proposals for similar moves can be heard throughout Europe.

A final concern, in the present climate, is the review of the prohibition on the expulsion and extradition of foreigners, suspected of terrorist activities, but at risk of torture or ill-treatment in their own countries, or in the countries wishing to bring charges against them. A European Union Commission Working Document[11] has already been published in which this prohibition, provided for by the jurisprudence of the European Court of Human Rights, is called into question. Already in December 2001, the Swedish authorities forcibly returned two Egyptians to Egypt despite conceding the risk of ill-treatment on the grounds that they were accused of terrorist activity.

Another worrying post-September 11th development concerns the rise in xenophobic violence in many Council of Europe member states. Whether such violence is directed towards Muslim or Jewish communities, the message must be passed, both at the political level and through police action, that such racist acts will not be tolerated. The response of most European authorities to this phenomenon has, indeed, been largely positive. However, the fight against racism and intolerance must be an ongoing concern that requires everywhere far greater attention at the educational level.

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[11] Commission Working Document, the Relationship between safeguarding internal security and complying with international protection obligations, 5 December 2001 (COM 743/201)

The view has been increasingly expressed that a high degree of human rights protection places excessive constraints on the security measures necessary to effectively combat the threat of terrorism. This need not be the case, however. Certainly, a strong response is called for: but any response must respect the rule of law. Detentions must require convictions, convictions trials and trials the presentation of evidence. There is nothing in this to prevent to the rigorous pursuit of criminal activity, especially not, indeed, terrorist activity, for which numerous exceptions are already foreseen in human rights law. Human rights are, moreover, not a pick and mix assortment of luxury entitlements. They come as a package; we ignore one at the expense of all of them and exclude one person from their enjoyment at the risk of excluding all of us. Far from revealing a complacent society, the failure to acknowledge the importance of human rights and the benefits we all enjoy through their respect, is itself an indication of complacency.

The terrorist attacks of September 11th 2001 opened our eyes to a new threat. As with all terrorist activity the target was not just people but an entire value system – in this instance, the very values on which our western societies are based and in which the respect for human rights plays such a preponderant role.

To limit the application of human rights for certain categories of person in the name of fighting terrorism would, therefore, not be to counter terrorism at all, but to play into the very hands of terrorists. What is required rather, from each of us individually and from our political leaders in particular, is the confidence to reaffirm our commitment to the fundamental democratic principles, which the Council of Europe was created to uphold.

The Council of Europe has, indeed, drawn up valuable guidelines on Human Rights and Fight against Terrorism, which were adopted by the Committee of Ministers in July 2002. It will be of the utmost importance to ensure the rigorous monitoring of subsequent measures and practices in the light of these guidelines and this will constitute a priority of the Commissioner's in the future.

Human Rights and the armed forces

The Commissioner for Human Rights has, since the beginning of his mandate, tried to identify human rights concerns on which the spotlight of international scrutiny falls least. Amongst the most notable human rights concerns to receive less attention than they deserve are those that arise in respect of the activity and internal organisation of the armed forces of the member states of the Council of Europe. These concerns are essentially two-fold; firstly, the respect for the human rights of servicemen themselves and, secondly, the respect by armed forces of the human rights of civilians in the course of their activity. Significant changes in the structures and roles of European armies over the last decade have, moreover, impacted considerably on both these aspects, prompting a need to examine the respect for human rights by and within the armed forces in greater detail at both the national and, perhaps usefully, at the international level also.

Wishing to stimulate this reflection and increase the awareness of these challenges, the Commissioner organised a seminar on these issues in Moscow in December 2002, in cooperation with the Federal Assembly of the Russian Federation to which senior members of the armed forces of several member states of the Council of Europe were invited. The conclusions of this seminar are included in the appendix to this report.

The increased recognition of the rights of servicemen has, amongst the older members of the Council of Europe at least, been a gradual, but continual process. The European Court of Human Rights has played an important role in this development, declaring, memorably, that the enjoyment of the rights guaranteed by the Convention does not stop at the barracks gates. Whilst it is obvious that the operational effectiveness of armed forces depends on discipline and sacrifice entailing the restriction of certain rights, servicemen are, nonetheless, whether conscripts or professional, to be perceived as citizens in uniform who cannot be totally excluded from the enjoyment certain rights. The European Court has, accordingly, examined the scope of the rights to freedom of conscience, association and expression, the rights to liberty and fair trial and the right to respect for private and family life, to list but a few of the rights that need to be balanced against the requirements of military life. The respect for the dignity of servicemen, by contrast, admits of no restrictions and the right to be free from torture, degrading or inhuman treatment enshrined in article 3 of the Convention applies, in particular, with full force to all servicemen.

Whilst improvements can be made regarding the respect for the rights of servicemen in all the member states of the Council of Europe, the issue is of one of especially serious concern in some of its newer members. The armed forces of the former Soviet Union have, in particular, faced serious challenges in reforming previous military structures and practises, resulting, often, in large-scale human rights abuses. Hazing, or *dedovchina*, as it is called, remains an institutional reality in almost all these armed forces. Forced labour for hierarchical superiors remains commonplace. The limited enjoyment of the civil and political rights outlined above represents an almost minor concern in relation to the general lack of respect for the dignitary of, primarily, the conscripts in these armies.

Whilst the necessary reforms will inevitably take some time and much remains a matter of changing prevailing military cultures, it is important that initiatives to improve the respect for the human rights of servicemen in the armed forces of Eastern Europe come from above. The awareness of the rights of servicemen amongst both officers and privates remains extremely poor and might easily be improved by special training for the former and the provision of basic information to the latter. Effective complaint procedures are also under-developed and, even where they exist, are rarely used for fear of subsequent reprisals. Conscription procedures and disciplinary mechanisms also require reform.

The extent of the challenge is, indeed, enormous and is undeniably rendered more difficult by economic difficulties. The long-term plans of several of these armed forces to turn entirely professional would certainly improve the situation but their implementation remains a long way off. In the meantime, it is important that the respect for the human rights of servicemen receives the necessary political attention. The failure to respect the rights of the thousands of conscripts that pass through these armed forces cannot fail to have a corrosive and brutalising influence on society in

general. Far from undermining discipline, the respect for the most fundamental rights of servicemen can, moreover, only encourage it. It is evident also that soldiers whose own rights are respected will be more likely to respect the rights of those they come into contact whilst on active duty.

The respect for the human rights of civilian populations by armed forces has, indeed, become an increasingly pressing issue as a result of evolving military roles and the changing nature of military interventions and conflicts. The respect for human rights during military operations has, indeed, become a concern for all armed forces alike. Far from uniquely being required to defend national sovereignty against opposing forces, the activity of armed forces has diversified into such areas as peace-keeping and anti-terrorist / security operations and an increasing variety of civil engagements bringing armed forces into ever closer contact with civilian populations. International humanitarian law does not cover many of these activities and much consideration will need to given to the human rights implications of these activities, particularly, indeed, as many such operations are increasingly being justified through the rhetoric of human rights and the restoration of the rule of law and democracy.

The Commissioner's own experience of these areas is focused on the situations in Kosovo and Chechnya and he has been able to meet with military commanders in Chechnya and the KFOR command in Kosovo. Whilst the situation in the two regions is by no means comparable, both reveal the difficulties and challenges faced by military structures in respecting human rights whilst actively engaged in situations bringing them into daily contact with civilian populations. In both situations considerable ambiguity surrounds the extent of military powers vis-à-vis civilian populations.

KFOR's powers to arrest and detain individuals in pursuance of their mandate to ensure a safe and secure environment in Kosovo, are based only on a wide interpretation of the United Nations Security Council Resolution 1244 and allow, three years into the international administration, individuals to be indefinitely detained without charge, appeal or judicial authorisation. Whilst the security situation in Kosovo may well be such that KFOR powers to, at least, arrest individuals remain warranted (despite the improvements in the security situation and the establishment over the last few years of civil police and judicial mechanisms), the total lack of independent control and the absence of appeal procedures are difficult to justify in view of the evolving situation. The larger question at issue, however, and one that is applicable to all peacekeeping situations, concerns the failure of civil authorities to clearly define the scope of the powers of the military forces whose intervention they have requested. This applies, indeed, not only to peace-keeping operations in the aftermath of conflicts, but also, and yet more pressingly, whilst military campaigns between belligerent forces are still going on. The failure specify precisely the circumstances in which peace-keeping forces can intervene results in armed forces on the ground having to make extremely difficult decisions. The lack of clarity surrounding these issues must be of all the greater concern in view of the increasing possibility for individual soldiers and their commanders of incurring liability for their actions, either in national jurisdictions or, in the future, through the International Criminal Court. These are, clearly, issues that civilian authorities and military commands have a considerable interest in resolving.

The ongoing security concerns in Chechnya reveal the difficulties in respecting human rights during security operations undertaken by military forces that directly affect the civilian population. The importance of clear-guidelines for the permissible actions of soldiers and strictly controlled chains of command is clear. It is equally clear that these elements are all too often lacking in Chechnya. The important and difficult role of civil authorities in controlling the actions of armed forces in such circumstances is also evidenced by the situation in Chechnya. The prosecution services face considerable difficulties both in investigating charges against military personnel, and protecting, as is their Constitutional obligation, the rights of individuals detained by security personnel. The need to make progress in all of these areas is clear. Moreover, the failure to do so seriously risks undermining the success of any political moves to resolve the conflict.

It might, finally, be noted that military interventions, whether in respect of foreign conflicts, liberation campaigns or anti-terrorist operations, are increasingly being justified with reference to the defence of human rights, the rule of law and democracy. Whether or not this is constructive, it has, certainly, made it ever more crucial that military forces respect these principles themselves in the course of their actions. Greater attention to how this can be achieved, on the part of military commands, but also, especially, on the part of civil authorities, will increasingly be required in the future.

Human Rights and Religions

From the very beginning of his mandate, the Commissioner has placed particular emphasis on the rights and responsibilities of religious communities in Europe. He has, as a result, frequently met with religious leaders and discussed their concerns with state authorities during his official visits[12]. The Commissioner has, however, in addition to addressing such country specific concerns, been keen to engage the leading monotheistic faiths in a more general, and collective, dialogue on the broader human rights implications of their preponderant social role. The Commissioner's primary concerns have been twofold; to promote, on the one hand, the respect by State authorities of the individual and collective rights to worship without hindrance and, on the other, to encourage within religious communities themselves the necessary tolerance and respect for the religious practices of other faiths.

The positive social influence of the main religions in Europe is certainly not in question. They have played a fundamental role in shaping the cultural identity and value systems of all European societies and continue to influence the moral and social behaviour of millions of believers and many others besides. The considerable benefits of the social engagement of religious communities, through charitable or educational works, are, moreover, felt across the Continent. Such a significant influence beyond the private, spiritual commitments of individual believers cannot but come with a considerable social responsibility.

[12] Notably, in 2002, in Greece, see CommDH(2002)5, and Bulgaria, see CommDH(2002)1.

The pressing need for religious leaders to assume this responsibility has been thrown into sharp relief in recent years. Migratory flows have, in certain countries, significantly altered age-old religious demographies and the collapse, in these countries, of mono-religious societies, has frequently given rise to new tensions. In other countries, where different religious communities have always lived side by side, the break up of previous political power structures has resulted in renewed outbreaks of intolerance, hostility and even conflict, in which religious differences have played a significant part. Whilst the events of September 11th 2001, drew popular attention to antagonisms between the faithful of Islam and other, Judaeo-Christian, beliefs, the varying religious and social composition of different European societies, has given rise to tensions and intolerance implicating, to different degrees in different places, all the religions present in Europe.

Whilst it is essential to combat the stigmatisation of the faithful of any one religion, the irresponsible actions or teachings of certain believers are of legitimate concern to all members of society. The obligations imposed by the respect for human rights provide a framework for the public control and public activity of religious believers. Indeed they provide, for religious activity, as for any other, guarantees for the free exercise of beliefs and commitments and for limitations where they infringe on the liberty of others to do likewise.

In 2001, the Commissioner sought to elaborate on this legal framework in the context of a meeting of religious leaders and state authorities on Church-State relations. However, it is clear that the relation between human rights and religious beliefs is not limited to the formal guarantees of, and restraints on, freedom of belief. There are, at the same time, more fundamental questions concerning the compatibility of the foundations on which human rights are based with the content of religious doctrines and teachings, which go to the heart of the social role of religious communities.

It was to examine these more conceptual matters that the Commissioner invited religious leaders to a seminar in December 2002 in Louvain-La-Neuve. The meeting's principal aim was to examine the extent to which the values of respect and tolerance at the centre of human rights discourse meet with analogous values in the doctrines and requirements of the leading monotheistic faiths.

Over the course of two days of discussion, the Commissioner was struck by the frankness and enthusiasm with which the participants examined the precepts of their faiths and the often-sensitive question of their relation to the secular requirements of the respect for human rights.

It was clear from the discussions that the relation between human rights and religious beliefs is far subtler than the restriction of the former to the public sphere and the latter to the private. Indeed the obligations imposed by religious commitments on the one hand and the state on the other, are not always quite so easily separated as they might be, at first sight at least, in respect of the payment of taxes.

The appealing, but again simplistic, reduction or explanation of the one in terms of the other was also rejected. To consider human rights as either no more or no less than the rational, secular distillation of the moral teachings inherent in religious faiths would be to simplify both to the advantage of neither.

Rather their respective requirements present, each in their own way, different, if frequently overlapping, expressions of norms of social engagement. More than mere moral precepts, religious commitments appeal to transcendental considerations beyond the rational requirements of human rights. These may, indeed, on occasion yield alternative views on a wide variety of subjects to those that the dialectic of human rights might lead to. Differences may, moreover, arise between one religion and another on these questions.

It was, however, insisted that, whilst religious texts admitted of interpretations that were both compatible with, and inimical to, the respect for human rights, all religions subscribed, through the love of God and mankind, to the values of tolerance and respect for others. Indeed, the religious leaders present were unanimous in their rejection and condemnation of all interpretations of their faiths that promoted intolerance and violence.

A society based on tolerance and respect cannot be constructed without the concerted action and example of all those in positions of influence. For their part, the assembled religious leaders acknowledged their important responsibility actively to promote these values amongst their congregations in the terms expressed by their faiths. It was, however, insisted that the promotion of these values was not a matter that could exclusively be addressed within the structures of each individual religion, but required also the greater acquaintance of all members of society with the teachings and histories of different faiths.

This is clearly a matter in which the State has a considerable interest and responsibility. The sensitive and neutral education within the school system of the different beliefs and histories of all the leading faiths in Europe would undoubtedly contribute to greater understanding and tolerance of religious differences.

The question immediately arises, however, as to the content and teaching methods of such education. It was suggested during this seminar that a Centre be established at the European level that might permit religious and educational experts to examine such issues in greater detail, with a view to assisting national authorities in the elaboration curricula for the culturally and doctrinally sensitive education of religious beliefs. This suggestion certainly merits greater consideration by the Council of Europe, which might be able to make an important contribution to such a project.

To this end, it was agreed that the next meeting of religious leaders to be organised by the Commissioner ought to focus on the dual need for the promotion of respect and tolerance within religious communities on the one hand, and on the role of religious education in ordinary schools on the other. It is hoped that this meeting will provide the opportunity to examine the proposal of a European centre for religious education in greater detail.

Missing persons: Chechnya and Kosovo

The issue of missing persons continues to be a major concern in certain conflict and post conflict areas in Europe. The Commissioner's own experience of this painful and important issue has been concentrated primarily on the situations in the Chechen Republic and Kosovo. Whilst his primary concern in respect of the former has been with the prevention of large-scale disappearances, the situation in Kosovo raises important concerns regarding the willingness and ability of the international administration to resolve recorded cases.

Whilst there have, certainly, been problems regarding the disappearance of Russian security forces in Chechnya, the Commissioner's primary concern with respect to missing persons, both in Chechnya and in Kosovo, has been the disappearance of members of the civilian population caught in the cross-fire of messy internal conflicts. The problem of missing persons, both civil and military, is primarily covered by international humanitarian law, and would, indeed, be greatly reduced if all parties to internal conflicts better respected this body of law. At the same time, however, the prevention and resolution of such cases is also an important human rights concern, particularly where civilian populations are concerned.

In effect, the European Convention of Human Rights (ECHR) imposes numerous obligations on its 44 signatory States regarding disappearances. These obligations concern both missing persons themselves and their relatives. The Strasbourg Court's case law on this subject, although relatively recent, has begun to specify the content and scope of these obligations. For example, insufficient investigations into the fate of a missing person or the failure by the authorities to hand over the information in their possession may be considered a form of torture within the meaning of Article 3 of the ECHR for some of the missing person's family and friends. Likewise, any detention which is not officially recognised by the authorities and which is followed by the person's disappearance constitutes a violation of the right to freedom and security (Article 5) and also of the right to life (Article 2). Finally, observance of the right to an effective remedy (Article 13) requires the authorities not only to pay damages but also to conduct thorough and effective investigations with a view to identifying and punishing those responsible, if a relative claims, on reasonable grounds, that a member of his or her family disappeared when in detention.

Whilst it is possible to derogate from a number of the provisions of the European Convention in times of war or other public emergency, there can be no derogation from the prohibition on torture, regardless of the nature of the conflict. It is to be noted, moreover, that the Russian Federation has made no derogation to Convention rights in respect of the situation in Chechnya and that, whilst the extent to which the interim international administration in Kosovo is bound by international human rights law is at best ambiguous, the international presence has, at least, continually stressed the importance of restoring respect for human rights and the rule of law as an essential part of its mission in Kosovo.

The high levels of disappearances in Chechnya in the three years since the recent conflict began constitute the gravest human rights concern in the region and, whilst only one factor amongst many in the war-torn Republic, contributes considerably to

the lack of security dissuading displaced persons from returning to their homes. The worrying number of disappearances can by no means be attributed solely to the uncontrolled actions of Federal or local security forces but it is in respect of their activity that the responsibility of the state is primarily incurred. The importance of controlling these actions and of greatly reducing the number of disappearances at the hands of Federal forces will continue to be vital to the restoration of trust in the federal and local authorities and the possibility of constructing a viable long-term political future for the Republic.

The Commissioner's concern with disappearances in the Chechnya dates back to his very first visits to the Republic in 1999 and early 2000. He proposed at the time that a civilian authority be established to record allegations of human rights abuses for the subsequent investigation by the appropriate authorities. The proposal resulted in the creation of the Office of the Special Representative of the President of the Russian Federation for Human Rights in Chechnya. The office has, indeed, been able to play a limited role in tracing disappeared persons and securing the liberation of a number of them. It is clear, however, that the main responsibility for preventing disappearances and prosecuting their perpetrators lies with other authorities: primarily the civil and military Prokuraturas (prosecution services).

The majority of disappearances have occurred during special military operations commonly referred to as "zachistki" or "cleansing" operations. On the repeated request of the Commissioner for Human Rights and other bodies, the Prosecutor General of the Russian Federation issued Decree no. 46 on 25 July 2001, which provides for the mandatory presence of prosecutors during such operations. This order was reinforced by a further decree (No. 80) by the Commander of the Federal Forces on 27th May 2002. It would appear that these decrees have, when respected, greatly curbed the number of disappearances during such operations, but that their application remains, at best, sporadic.

Concerned by the continuing insecurity and widespread disappearances, the Commissioner issued a Recommendation[13] in May 2002, in which he strongly insisted on the respect of these decrees. The Commissioner also identified a concern over the lack of access of the civil Prokuratura to the military bases in which detainees are held following military operations. The civil Prokuratura is, however, under Russian law, the only body competent to prosecute civilians and plays an important role in guaranteeing the respect for their fundamental rights, wherever they may be detained.

The Commissioner recommended therefore, that the Prosecutor General establish joint inspection teams composed of civil and military prosecutors that might visit military bases "with a view to meeting detainees and, where applicable, exercising their respective prerogatives to institute legal proceedings in respect of civilian detainees and, if necessary, prosecute for any violations committed by servicemen

when arresting civilians". The Commissioner has since been informed by Mr. Birukov, the First Vice Chief Prosecutor of the Russian Federation, of the creation of such inspection units in Decree N 15 of 30th November 2002. It is also important that relatives and, where applicable, non-governmental human rights organisations are immediately notified of the whereabouts of all persons detained and the Commissioner also made recommendations to this effect.

The Prokuratura also has an important role to play in the investigation and prosecution of members of the security forces alleged to have committed human rights abuses. The number of prosecutions opened in respect of such offences continues to be extremely small in relation to the number of complaints forwarded to the Prokuratura. Putting an end to the climate of impunity that currently obtains in Chechen will contribute to a reduction in the number of future disappearances and provide for the restoration of the rule of law and justice, without which a lasting peace cannot be achieved.

The situation regarding disappearances in Kosovo differs greatly from that in Chechnya in so far as the primary concern is no longer preventing disappearances, but resolving outstanding cases. At the time of the Commissioner's visit to Kosovo in August 2002, the fates of some 3700 persons (2750 Albanians and 850 Serbs) remained unknown[14]. Despite much official rhetoric committing the United Nations Mission in Kosovo to resolving these outstanding cases, and the creation of a new Office on Missing Persons and Forensics, little progress had been made. The Commissioner was able to meet with the head of the Office on Missing Persons and visit the morgue where forensic tests were carried out on located bodies. The Offices lack of funding was greatly undermining its efforts to establish the identity of some 2500 corpses already discovered and to locate the 1200 bodies that remained to be found. The Office itself estimated the sum of money required to make substantial inroads in to this caseload at 300,000 euros and the Commissioner appealed, without success, to member states of the Council of Europe to contribute to this much needed sum.

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

Since the Commissioner's report some progress has, indeed, been made by the Office of Missing Persons owing almost entirely to its indefatigable efforts rather than any increase in the means available to it. By February 2003, it had performed 399 autopsies and identified 141 corpses. It intends to complete the exhumation of the

[14] The most recent Consolidated List of Missing Persons puts the number at 4233.

estimated 500 – 700 corpses in previously unknown grave sites and to DNA test some 1,000 bodies previously exhumed and reburied by the ICTY by the end of 2003. The completion of this programme would represent considerable progress and deserves every possible support, both political and logistical, from UNMIK authorities.

Internally displaced persons in Europe

At the end of 2001, the UNHCR calculated the total number of displaced persons in Europe at 5.98 million people. The nature of the armed conflicts to have ravaged Europe over the last decade has resulted in almost one third of these persons being displaced within their own countries. These persons, the victims, for the most part, of bitter internal conflicts, continue to live extremely precarious lives, often on the very margins of the societies to which they belong. The victims of political deadlocks, or ongoing conflicts, these persons frequently face little prospect of being able to return to their homes and end up, all to often, as pawns in broader political games gravely affecting their immediate living conditions and the enjoyment of their fundamental rights. Far from the concerns of all but the most specialised agencies, the continuing crisis of some 2 million of these 'invisible refugees' constitutes one of the greatest, and most difficult, humanitarian and human rights concerns in Europe.

The distribution of IDPs across Europe, excluding the Russian Federation, for which no precise figures exist, is recorded in the table below:

Georgia	264,000
Serbia and Montenegro	257,000
Bosnia and Herzegovina	367,500
Croatia	17,100
"The former yugoslav Republic of Macedonia"	8,500
Azerbaijan	572,000
Armenia	50,000
Moldova[15]	1,000

Four different categories of conflict resulting in significant numbers of IDPs can be identified. Those resulting from

1. Breakaway republics (Abkhazia, and South Ossetia in Georgia, and Transnistria in Moldova)
2. Territorial conflicts between newly independent states (Armenia and Azerbaijan)

[15] The figures provided for Georgia, Serbia and Montenegro, Bosnia, Croatia, Macedonia, Azerbaijan, Armenia and Moldova represent figures provided by the authorities of each country to the UNHCR at the end of 2002. Whilst the total number of IDPs in Moldova is 8,000 it is estimated that only 1000 have yet to find a durable solution to their situation.

3. Conflicts resulting from the break-up of previous territorial entities (ex-Yugoslavia)
4. Internal conflicts (ongoing in Chechnya and halted in the former Yugoslav Republic of Macedonia)

In the three years since taking office the Commissioner has had the opportunity to meet with displaced persons and discuss their plight with the national authorities in countries falling in to all of these categories. The Commissioner has visited Georgia, Moldova, Serbia and Montenegro (and Kosovo), Armenia, Azerbaijan, and, on four separate occasions, Ingushetia and Chechnya. He has, as a result of these visits, been able to witness the precarious plight of many internally displaced persons and the obstacles they face with respect to either their return to their original residences or their integration into society where they are currently residing.

The most satisfactory solution for the majority of IDPs, the realisation of their right to return to their former residences, depends in great measure on the nature of the conflict in question. Whilst the cessation of hostilities in former Yugoslavia has permitted the return of significant numbers of IDPs (and refugees) in Croatia and Bosnia and Herzegovina[16] in recent years, the situation with respect to the Serbs, Roma, Egyptians and Ashkalie displaced from Kosovo has been largely stagnant since their exodus three years ago. Indeed, the continuing security concerns and the uncertainty over Kosovo's future are likely to put large-scale returns on hold for the foreseeable future, if indeed they can be hoped for at all. The failure to resolve the frozen conflicts between Georgia and Abkhazia[17] and Armenia and Azerbaijan also look likely to prevent significant numbers of returns in these regions for some time yet. The situation in "the former Yugoslav Republic of Macedonia", whilst far from stable, has at least permitted the return of the vast majority of IDPs over the past 18 months[18]. The ongoing security concerns in Chechnya, however, continue to greatly discourage returns, despite the evident desire of the Federal authorities to hasten this process.

Whilst the search for the necessary political and economic solutions permitting the return of IDPs must, in all cases remain a priority, the Commissioner has variously been able to observe the enormous difficulties faced by IDPs and the frequent failure of national authorities to respect their rights in their current places of residence. This is, indeed, the paradox of the situation of many IDPs; whilst they are, on paper, full citizens of their countries, with the same entitlements and rights, therefore, as any other, IDPs frequently find themselves victims of political pressures rendering their integration and access to economic and social rights even more difficult than for

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[16] 500,000 IDPs and 420,000 have returned to their homes in Bosnia and Herzegovina since the entry into force of the Dayton Agreement in December 1995. Minority returns begun to take off only in 2000, since when approximately 250,000 IDPs have returned to their homes. In Croatia some 202,000 of the 220,000 Croatians had returned to their homes since the end of hostilities in 1995 by April 2002. Only 22,500 of the 60,000-70,000 internally displaced Serbs at the end of the conflict have since returned.

[17] Between 40-60,000 Georgians have returned to the Gali district in Abkhazia on a more or less temporary basis since 1998. Since 1994 some 50,000 Azeri's have returned to regions bordering the ethnic-Armenian controlled Nagorno-Karabakh.

[18] The IDP population peaked at about 70,000 in August/September 2001.

refugees. National authorities are, in short, often reluctant to encourage the greater integration of IDP populations into local communities for fear reducing the political pressure on opposing authorities (and the international community) to resolve the conflicts in question.

In the interim, the living conditions of IDPs visited in Georgia, Serbia, Montenegro, Azerbaijan continue to be extremely precarious. Whilst the majority of IDPs live in private accommodation, either rented or with relatives, a considerable number (40% in Georgia, up to 75% in Azerbaijan, 7% in Serbia and Montenegro) live in makeshift camps or 'converted' hotels, abandoned factories, or other collective centres, in over-crowded and frequently unhygienic conditions. Far from improving with time, the situation of many IDPs has, in fact, deteriorated over the past few years, as international aid has been substantially reduced. In Azerbaijan, for instance, the World Food Programme has scaled down the number of beneficiaries from 300,000 in 1999 to 160,000 as of 2002. At the same time, it records an increase in the proportion of households unable to meet its basic food requirements from 74% in 1999 to 90%[19] in October 2001. In Serbia and Montenegro, it is anticipated that most international humanitarian programmes for IDPs will come to end by 2003. The ICRC has, however, identified some 59,000 persons for whom humanitarian assistance will remain essential. The situation in Georgia is such that, nearly ten years after the conflict, both the ICRC and the WFP reintroduced assistance programmes in September 2002.

The reduction of international aid has come at a time when, with the exception of Azerbaijan, which committed $72 million dollars of petrol revenue to IDP needs in 2002, national authorities, especially in Serbia and Georgia, are largely unable to assume the financial burden left by the vacation of international aid. Whilst encouraging the greater integration of IDPs would certainly decrease the burden on state authorities in the long run, and the withdrawal of international aid is one means of stimulating this development, the sensitivity of international donors to the immediate needs of the most vulnerable will continue to be necessary for some time.

The generally high levels of access of IDPs to health and education has been one of the more positive features in the countries visited. Despite having to assume significant additional burdens placing considerable strains on school systems, the school attendance rates in Georgia and Serbia are equivalent to those of the ordinary population. A WFP survey[20] conducted in April 2002 in Azerbaijan points to a worrying decrease in school attendance from close to 100% in the early 1990s to around 80% in 2002 and greater efforts would appear to required to encourage and enable girls, in particular, to attend schools. Whilst the overall health levels of IDPs in all three countries visited is, owing the poor living conditions, worse than that of the population in general, there appear to be few obstacles to IDPs accessing health care on the same terms as other citizens. The cost of medicine remains, however, prohibitive for many IDPs.

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[19] World Food Programme (WFP), 30 November 2001, Household Food Economy Survey Among the Internally Displaced Persons in Azerbaijan (Baku, Azerbaijan)

[20] World Food Programme (WFP), 3 April 2002, Protracted Relief and Operation - Azerbaijan 10168.0, Targeted Food Assistance for Relief and Recovery of Displaced Persons and Vulnerable Groups in Azerbaijan, WFP/EB.2/2002/6/3

The primary cause of concern for IDPs in the countries visited by the Commissioner would appear rather to be with respect to access to employment. Unemployment is already high in all of these countries. However unemployment rates amongst IDP populations of up to 80% in Azerbaijan[21], 50% in Serbia and Montenegro[22] and 40% in Georgia are in all cases well above the national averages. Limited access to the credit necessary to establish small businesses, to employment in the public sector and the reluctance of local businesses to employ IDPs would appear to constitute the primary obstacles. It is, at the same time, clear, especially in Serbia and Montenegro, that overwhelming desire of many IDPs to return presents an important psychological obstacle to the willingness to seek long-term employment in their current places of residence.

IDPs frequently face obstacles in enjoying their civil and political rights on a par with other citizens of their countries. The enjoyment of full electoral rights clearly constitutes an important element in ensuring that the real concerns of IDPs are heard and represented at local and national levels. Whilst IDPs in Georgia have been able to vote in national and municipal elections following the changes to the electoral code in 2001 and Azeri IDPs enjoy the same entitlements, numerous problems have been recorded with respect to the drafting of supplementary lists on which they must be registered in order to vote. IDPs in Montenegro, one-time citizens of the Federal Republic of Yugoslavia and now of Serbia and Montenegro, enjoy full electoral rights at the federal level. However, despite being citizens of Serbia and Montenegro, as any other, the residence requirement for obtaining Montenegrin citizenship has been extended belong the 3 year period for ordinary citizens of Serbia, to 10 for IDPs from Kosovo. This not only prejudices the rights of IDPs to participate in Republic and local elections, but also disqualifies IDPs from enjoying certain tax and employment benefits. The participation of IDPs in local elections in Serbia is frequently undermined by bureaucratic obstacles arising from the requirement that IDPs first de-register in their original place of residence before registering in their new locality. As the necessary papers have either been lost, or have been removed to other parts of Serbia, this is extremely difficult (and costly) for many IDPs, who continue, therefore, to be excluded also from other social benefits offered at the local level.

Such bureaucratic obstacles to the enjoyment of civil and social rights are not the only means by which authorities frequently seek to discourage the greater integration and self-sufficiency of IDP populations. The instrumentalisation of IDPs is frequently expressed through boisterous political rhetoric insisting that an eventual return is the only real solution to the current plight of IDPs. They are all to often misinformed as to the extent of their rights and encouraged to believe that local registration and greater integration will result in the forfeiture of the right to return. Whilst the creation of conditions permitting the free exercise of the choice as to whether to return or not must remain the key task for the resolution of all IDP situations, it is important that IDPs, especially those for whom an imminent return is unlikely, are not encouraged to believe that this is their only option. Whether IDPs wish to remain permanently, or only temporarily, in their current places of residence, or indeed,

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[21] World Food Programme (WFP), 30 November 2001, Household Food Economy Survey Among the Internally Displaced Persons in Azerbaijan (Baku, Azerbaijan)

[22] Norwegian Refugee Council Survey (November–December 2001)

elsewhere, in their countries of origin, executive authorities are obliged provide the same assistance and guarantee the same rights as for all other citizens. Whilst there is a right to return, there is certainly no obligation to do so, to which end, it is necessary that all obstacles to local integration be removed.

The situation in Chechnya differs markedly from those already mentioned in so far as the violence at the origin of the displacement of large numbers of Chechens continues to prevent their safe return, despite the evident desire of the Russian authorities to encourage this process. Whilst Chechen IDPs spread throughout the Russian Federation face numerous obstacles to the enjoyment of their fundamental rights, and frequently report having suffered discrimination at the hands of both civilians and authorities, attention has concentrated primarily on the situation of the approximately 90,000 IDPs currently residing in Ingushetia and, especially, on the 20,000 still remaining in camps by the end of 2002.

During the course of his visits, and in his subsequent reports, the Commissioner has frequently had occasion to note that ongoing security concerns present a considerable obstacle to the return of IDPs and that increased efforts will have to made to reduce the disappearances that continue to take place at checkpoints and during special operations. Lasting confidence in the Federal and local authorities will, moreover, depend on a significant increase in prosecutions for human rights abuses in a region where impunity remains the rule rather than the exception.

Security concerns, whether prompted by the actions of the security forces, combatants or other uncontrolled elements are not, however, the sole obstacle to the return of IDPs. Grozny, especially, remains a town in ruins and the material reconstruction of Chechnya, remains, despite progress made over the previous year, far behind the needs of the population currently residing in Chechnya. The housing situation is, moreover, inadequate for the large-scale return of IDPs; the complexes built recently in Grozny to accommodate returning IDPs are, whilst of a satisfactory quality in the short-term, already over-crowded. An enormous investment in the infrastructure of Chechnya will, therefore, be required over the coming years, and the international community, might, under appropriate conditions, be able to contribute considerably to this process.

Under these conditions, and for so long as the security situation does not improve, it is imperative that the IDPs currently residing in Ingushetia are allowed to remain where they are. Considerable concern has, however, been expressed over the closure of the Aki-Yurt tent camp in December 2002. At the same time, reports abounded of pressure being exerted on the inhabitants of the six remaining tent camps (through threats and the cutting off of gas, electricity and food supplies) to return to Chechnya. This pressure appears to have abated in recent months and the President of Ingushetia, Mr. Zyazikov, has given his personal assurance that no further moves will be made to close down camps against the will of their inhabitants.

In Chechnya, as elsewhere therefore, the two main concerns remain the creation of the necessary conditions for return and, in the interim, the instrumentalisation of IDPs in their current locations. In addition to the obvious and often pressing need to provide for basic material needs, it is essential that IDPs who are either unable or unwilling to

return are neither forced to return or discouraged from integrating locally. The full resolution of the IDP problem in Europe remains a long way off. The return of the majority of IDPs depends on political solutions that are unlikely to be forthcoming in the immediate future. Realism, and sensitivity to the immediate needs of IDPs would, in the meantime, go a long way to alleviating the suffering and demoralisation of many of the forgotten victims of Europe's conflicts.

Rights of the Roma

The enjoyment of individual and collective rights by Roma citizens and communities constitutes one of the Commissioner's main priorities and featured prominently in each of his country reports of 2002. On the basis of these visits, it has not been difficult to conclude that the Roma still face considerable obstacles in the enjoyment of basic rights, notably in the fields of access to health care, housing, education and employment. Whilst economic factors play an important part in these concerns, discrimination, resulting even, in harassment and violence, remains a common problem. In many localities, the Roma continue to be excluded and segregated, treated as aliens in their own countries. During all his visits the Commissioner has visited Roma districts and communities and spoken to local Roma representatives. A brief account is provided below on the main concerns that the Commissioner raised during the country visits that he conducted in 2002.

In Greece, the Commissioner noted that the Roma/Gypsy population was highly vulnerable and at a disadvantage in many areas such as access to health care, housing, employment or schooling. The implementation of an action plan to assist the Gypsies sometimes met with resistance at local level, since local authorities were sometimes unwilling to provide for the settlement of members of this minority group in their localities, going as far even to declining financial assistance from the central authorities set aside for this purpose. After visiting a Roma/Gypsy settlement on the outskirts of Athens at Aspropyrgos, the Commissioner requested the authorities to take urgent measures to improve the extremely poor living conditions of the families residing there. The recurring threat of evictions of Roma/Gypsy families from areas to be used as sites of the forthcoming Olympic Games in 2004 represents an additional concern.

In his report on Kosovo, the Commissioner noted that the vast majority of the displaced Roma in the region had not yet been able to return, partly due to the difficult security situation still facing the Serbs, Roma and other minorities. The living conditions and respect for the human rights of Roma IDPs were generally lower than other IDPs in Montenegro and Serbia. He urged the authorities to do their utmost both to improve the immediate living conditions of all IDPs, including the Roma, and to facilitate the integration of those IDPs that have given up hope or no longer wish to return to Kosovo. The Commissioner noted that the Roma were also disadvantaged with respect to an eventual return to Kosovo, receiving, despite better long-term prospects for local integration, less economic assistance than displaced persons of Serbian ethnicity. Public utilities were, moreover, rarely adequately provided to minority populations and to ethnic Roma, Egyptian or Ashkalie in particular.

Access to basic documents such as Roma in several countries of the former Yugoslavia face significant difficulties in obtaining basic official documents remains a problem endemic in many countries of the former Yugoslavia and one that is particularly evident in respect Kosovan IDPs.

In Hungary, Poland and Romania, as elsewhere in Eastern and Central Europe, the Roma community has been amongst the worst affected by the negative consequences of the transition to market economies. Welfare assistance often lags far behind the most basic needs of Roma communities, whilst unemployment rates, already at high national levels, are higher still amongst the Roma. Many Roma live in entirely inadequate material conditions without, even, elementary sanitary facilities. The high unemployment and the resulting social tensions have resulted in many areas in a recrudescence of anti-Roma sentiments and a notable discrimination in several sectors. Access to education is of particular concern with many Roma children being systematically placed in special classes where education is of a significantly lower standard than the mainstream educational system. This practice clearly tends to the perpetuation of the social exclusion of the Roma and urgently needs to be revised. Roma are often similarly disadvantaged with respect to access to health care and housing. The frequent indifference of the police to crimes committed against Roma individuals also remains a significant problem. The blocking at the local level of action plans elaborated centrally continues to stall progress on several of these issues.

At the same time, the Commissioner has noted a number of successful projects, initiatives and positive practical and legislative measures. The challenge remains to learn from and multiply these experiences, for which greater political will and dynamism is required at all levels, including within the Roma community itself, than has often been evidenced to date. The Commissioner has already made numerous general and specific recommendations in his country reports. The similarity of many of the problems affecting Roma communities in different countries visited by the Commissioner reveals a recurring pattern of discrimination against the Roma throughout Europe and suggests the ready transferability of isolated successes from region to region and country to country. It is with this in mind that the Commissioner has decided to draft a detailed report on the present human rights concerns of the Roma/Sinti/Travellers in Europe identifying shortcomings and presenting possible means of improving the respect for the fundamental rights of Roma, at the local, national and international levels.

One of the possible means of promoting the respect for Roma rights at the international level is the proposed creation of a European Forum for the Roma and Travellers, based on the initiative of the President of Finland, Ms Tarja Halonen. The Commissioner has followed the discussions of this proposal closely and his Office has participated as an observer in the work of an informal Exploratory Group on this matter.

Language, culture and traditions are not the only common features of the Roma populations in Europe – as noted above, the problems they face in their respective countries frequently overlap. Roma are, moreover, often underrepresented in political fora, both nationally and, perforce, internationally. Whilst the main objective must remain an increase in national political participation, the Commissioner firmly believes in the need to provide a platform for the voicing, by Roma representatives

themselves, of the concerns of their communities at the international level. Through the opinions of the Roma themselves, such a platform would be well-placed to identify best responses to the situations in their respective home countries, in terms of achieving full and equal enjoyment of all human rights and fundamental freedoms. During the course of 2003, the Commissioner will continue to follow and support the work towards the establishment of such a body.

Rights of children

Despite the significant emphasis that has been placed on the promotion of the rights of the child during the last decade, many children in Europe continue to be victims of violence, abuse, exploitation and discrimination. In the course of his official visits to Council of Europe member states, the Commissioner has been able to observe and make recommendations relating to a wide variety of concerns regarding the respect for the rights of children. The types of problem in evidence are not difficult to classify. All require greater attention.

There are, first of all, concerns relating to the enjoyment of basic social rights by children from minority and, especially, Roma communities. Secondly, domestic violence continues to be a major concern throughout Europe. There are, thirdly, several categories of vulnerable or special needs children that require specific attention; these include children with mental illnesses, accompanied, or, especially, unaccompanied migrant children, victims of trafficking and juvenile detainees. A final concern that the Commissioner has had occasion to examine concerns abandoned children and relates to adoption policies and the enjoyment of basic rights in orphanages.

The enjoyment of fundamental rights by Roma/Gypsy children

Children belonging to minorities, in particular Roma children, are disadvantaged in many European countries with respect to access to schooling, health care and adequate standards of living. Child mortality among the Roma children is often disproportionately high, due to lack of access to health care and deplorable living conditions that undermine the child's ability to develop to the fullest. Segregation in education, to which Roma children in many countries are subjected to, is also of serious concern. Education provided in such schools or classes is generally of much lower quality than in other schools, and it further isolates Roma children from others, thus denying both the Roma and the non-Roma children the possibility of getting to know each other. Such segregation gives rise to a self-perpetuating cycle of social exclusion. The future of our societies will be shaped up to a large extent according to the values and ideals that today's children absorb and adopt. It is therefore of vital importance to promote tolerance and respect for others among children, starting with programmes at schools. The problems listed above are, to a greater or lesser extent, common to all the countries the Commissioner visited in 2002 and it is clear that the countries of Europe have a long way to go in accommodating and respecting the rights of all Roma children.

Domestic violence

Whilst the home should be an environment where a child can feel protected and cared for, domestic violence affecting children both physically and mentally is still widespread throughout Europe. During the course of the year, the Commissioner took up this issue during his visits to Hungary, Romania and Poland. Although committed within the walls of a home, domestic violence cannot be considered a purely private matter. It is a human rights concern, the prevention of which engages the responsibility of the state. In order to assume their responsibilities in this issue, States must adopt legislation aiming at preventing and ending domestic violence and ensure that such laws are implemented effectively in a manner that safeguards the best interests of the child. Whilst the majority of Governments with which the Commissioner raised this issue are attempting to rise to this challenge, difficulties remain at the level of social attitudes, resulting, frequently, in the dual reluctance of victims to come forward and of police forces to intervene. In addition to putting an end to the impunity of the perpetrators, significant further efforts are needed to prevent such violence, through counselling and awareness programmes.

Children in particularly vulnerable positions

Some of the gravest human rights abuses of children occur with respect to children with mental disabilities, particularly those in psychiatric institutions. In 2002 the Commissioner visited mental institutions in Hungary and Romania, in which the lack of adequate material and human resources combined with outdated practises seriously undermine the ability of such institutions to provide appropriate levels of care. Indeed in both these countries, and in many others besides, a considerable revision of public policy towards children with mental disabilities is required, with greater accent needing to be placed on community care and family support structures.

Juvenile offenders represent a further category of children requiring special attention. Whilst progress has been made in many countries regarding the conditions of detention of children, alternative penalties and a greater emphasis on the reintegration of juvenile offenders in society must remain a priority throughout Europe.

Asylum seeking and migrant children also require special attention, particularly when unaccompanied. Provisions for the appointment of legal guardians for separated children are, as the Commissioner was able to observe in Poland, often under-developed, whilst the access of all arriving children to health care and education varies considerably across the continent.

The Commissioner will examine such questions relating to separated children more closely during the course of 2003, following a request by the Parliamentary Assembly to the Commissioner to make an investigation of the situation of separated children in Europe, with particular emphasis on expulsion procedures.[23] On the basis of this request, the Commissioner will prepare a survey in which he will examine the legal

[23] The draft recommendation on this issue was adopted by the Committee on Migration, Refugees and Demography on 18 December 2002, and the final text of the recommendation was adopted by the Parliamentary Assembly in January 2003, Rec. 1596 (2003).

and material conditions under which separated children are currently being received in and expelled from the Council of Europe member states, be they refugees, asylum-seekers, migrants or victims of trafficking in human beings.

Abandoned children

The human rights issues relating to abandoned children and adoption policies are often particularly complex. Whilst it is evident and easy to insist that the best interest of the child must always prevail, its assessment is often extremely difficult. In the light of these challenges, the Commissioner is of the opinion that policies ought to allow as much as possible for case-by-case decisions, without ruling out completely any possible best solution for any individual child. Indeed, the Commissioner paid particular attention to adoption policies during his visit to Romania. Following the fall of the communist government, the Romanian authorities found themselves facing a considerable challenge in reforming their child welfare system. Given the serious problem of dilapidated and overcrowded orphanages, adoption, and in particular international adoption, initially emerged as the preferred option, which led in due course to a veritable market for international adoption with and the emergence of certain reprehensible commercial practices. In response, the Romanian authorities imposed a moratorium for international adoptions in June 2001. At the time of the Commissioner visit to Romania in October 2002, there was much discussion on whether the moratorium should be lifted because its enforcement had created a regrettable situation, where many children whose adoption procedures were interrupted found themselves in a precarious situation, their fate being again uncertain. The Romanian authorities requested the Commissioner to provide an opinion on this matter, which he did in his visit report, emphasising that the best interests of the child, the importance of a family environment and subsidiarity for international adoption have to be taken into consideration. He also emphasised that the best interest of the child requires that the idea of total subsidiarity of international adoption must be dropped.

The Commissioner noted that the closure of obsolete orphanages, the humanisation of conditions in existing orphanages, the introduction of solutions other than institutionalisation and substantive reform of the legislation on international adoption certainly constituted important advances in the field of respect for the rights of the child in Romania. Even so, the Commissioner stressed that further progress must be made to create a genuine police for preventing child abandonment. In this respect, the Commissioner called on the Government to develop on anti-abandonment awareness and education campaigns, and to set up reception centres, which would support and advise mothers of newborn babies.

Children's ombudsmen

In accordance with his mandate, the Commissioner is to cooperate with, and facilitate the activities of, national ombudsmen or similar institutions in the field of human rights. In the course of 2003, it is the hope of the Commissioner to intensify his cooperation with the European Ombudsmen for Children, to join forces in promoting and protecting the rights of the child in their respective countries.

Trafficking in human beings

The explosion of trafficking in human beings over the last decade represents one of the largest human rights challenges facing Europe today. It is a concern that implicates almost all the member of States of the Council of Europe, either as countries of origin, transit or destination, or as a combination of these three and it is evident that far greater efforts are required both nationally and, most importantly, transnationally, to combat this problem.

Trafficking in human beings occurs for a variety of different purposes, including forced prostitution and other forms of sexual exploitation, domestic labour, farm and construction work, illegal adoption, child marriages, stealing, begging and organ transplantation. While most of the victims are women and children, men are also vulnerable to trafficking. Children frequently fall victim to the most abhorrent practices such as paedophilia, trafficking in organs or mutilation of limbs to make them more 'appealing' for begging. In short, trafficking in human beings has developed into a multi-billion dollar industry, chewing up and churning out hundreds of thousands of individuals each year. Whilst examining this problem in Bucharest, for instance, the Commissioner was informed that in Romania alone an estimated 20,000 people fall victim to some form of trafficking each year. The Commissioner also addressed the problem of trafficking during his visits to Poland and Albania and will be sure, given the extent of the problem, to be active in this area in the future.

While in all the countries the Commissioner visited genuine efforts were being taken to fight against trafficking, the Commissioner identified the following areas in which further developments are required:

- **The need to strengthen witness protection**. Since many of the trafficking networks rely heavily on violence in their operations, the victims and their families are at a severe risk of becoming targets of retaliation should they provide evidence against the traffickers. In the absence of effective witness protection programmes, the victims are understandably reluctant to provide evidence against the traffickers. The situation is aggravated by the fact that the law enforcement agents investigating trafficking are themselves liable to become targets of retaliation by the offenders.

- **The need to provide comprehensive assistance to victims**. In some countries, Governments seem to be relying heavily on the efforts of non-governmental organisations in the provision of assistance to the victims, such as legal counselling, provision of shelters, trauma counselling and reintegration assistance. It is of utmost importance that the Governments assume their responsibilities in this respect, by providing adequate resources for the NGOs working in this field and by ensuring the existence of comprehensive assistance networks.

- **The need to further train the police, border guards, prosecutors and judges.** Victims of trafficking are still sometimes treated as offenders rather than victims. Whilst victims of trafficking will, indeed, often be residing and working illegally in their destination countries, greater understanding is required within judicial and law enforcement mechanisms of the phenomenon of trafficking and the individual

dramas that ensue. Rather than punishing the victims the challenge remains to investigate and prosecute the agents higher up the network of international trafficking rackets.

- **The need to put in place appropriate repatriation mechanisms.** Due to their vulnerable situation, it is of utmost importance that measures are taken to ensure the safety and reintegration of the victims upon return to their countries of origin. Victims are often expelled to their countries under an expedited procedure with no safeguard for their security upon arrival and little cooperation with national authorities in their countries of origin. As a result, they are often sent immediately back to the destination country by the traffickers.

- **The need to strengthen legislation**. There are still countries that do not explicitly criminalize trafficking, or where the crime of trafficking is not defined in the legislation with sufficient clarity, leading to difficulties in the prosecution. In addition, many countries lack sufficient legislation relating to the protection of and assistance to victims. It is important that all Council of Europe member states ratify and implement effectively the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime", adopted in 2001. In addition, the drafting of a European Convention to strengthen the protection of victims and to provide a European monitoring mechanism should be envisaged.

- **The need to address discrimination and lack of equal opportunity.** Whilst the poverty of countries of origin and the relative economic attractions of Western Europe are evidently at the root of all trafficking, the lack of equal opportunities and gender discrimination increase the vulnerability of women to trafficking networks. Discrimination on the basis of ethnicity also increases susceptibility to trafficking, leading to high number of Roma falling victims to trafficking from countries where they have limited access to health care, employment, adequate housing or education.

- **Awareness raising campaigns in countries of origin**. For so long as economic conditions in Europe remain as imbalanced as they are at present traffickers will always be able to exploit poverty and lure victims with the promise of the riches to be earned abroad. At the same time, however, greater awareness of the dangers and working methods of traffickers in countries of origin would go some way to reducing the susceptibility of vulnerable persons to honeyed promises of traffickers.

Trafficking, it has been stated, is a problem affecting almost all the countries of the Council of Europe. Whilst it is evident the measures that need to be taken depend on whether the country concerns is one of origin, transit or destination, it is equally clear that the means available to implement the necessary policies vary hugely across the continent. It will undoubtedly be necessary, therefore, if this pan-European problem

is to be effectively combated, for the required resources to be distributed more evenly. In effect, if Western Europe is to effectively reduce one its largest human rights concerns, it will have to invest heavily in counter-trafficking measures in the countries of origin and transit in the East.

The Rights of Persons with Mental Disabilities

The promotion of the rights of persons with disabilities must remain a constant concern and long-term policy objective of all the member states of the Council of Europe. Whilst the levels of social protection and integration of persons with disabilities varies considerably across Europe (the differences occurring, moreover, not merely between East and West), the growing international support for a UN Convention on the Rights of the Disabled and the declaration of 2003 as the European Year of Persons with Disabilities are indicative of an increasing sensitivity to the importance of the promotion of the rights of disabled persons and, indeed, more positively, to the valuable contribution they should be making to society. It is time, however, for this commitment to be translated into concrete policies and real results on the ground in; the goal of full integration and respect for the fundamental rights of all persons with disabilities remains, in the meantime, a long way off.

One category of persons with disabilities remains of particular and immediate concern. In the course of his official visits and in his discussions with NGOs and national authorities, the Commissioner has been especially struck by the frequently dramatic situation of persons with mental disabilities. In Eastern and Central Europe, especially, authorities are struggling to transform the infrastructure, mentalities and practises inherited from the communist era into acceptable modern facilities and policies. The consequences are most dramatically evident in psychiatric institutions, of which the Commissioner has been able to visit a number in Hungary, Romania and Bulgaria over the past year and half. Dilapidated material conditions, remote locations, antiquated practises and poorly trained, though often committed, staff often give rise serious human rights violations of residents enjoying little to no external protection and almost totally unable to defend their interests.

The authorities spoken to all expressed their sensitivity to these difficulties and are all engaged in serious reform programmes. The scale of the task is, however, enormous and all adverted to significant economic obstacles in addressing the material conditions in these institutions. It is to be hoped that well presented projects will be able to attract international financial support and the Council of Europe Development Bank might conceivably be able to make a significant contribution in this respect. At the same time, it cannot be denied that considerable improvements in the living conditions and quality of care in such institutions might often be provided at little extra cost with the requisite political will to push through and assiduously follow up the necessary reforms.

Indeed, broader policy reforms in the form of greater community care services and support to families would simultaneously reduce the pressure on psychiatric institutions and encourage the greater social integration of persons with mental disabilities.

The situation in psychiatric institutions, whilst the most conspicuous problem, is by no means the only human rights concern arising with respect to persons with mental disabilities. Persons with mental disabilities often face considerable difficulties in enforcing their rights, with limited access to legal aid and judicial and non-judicial protection mechanisms. Practises relating to the judicial finding of incapacity and placement under guardianship are also often far from satisfactory, whilst procedures authorising compulsory placement in institutions and treatment require review in a number of countries.

This list of concerns is by no means exhaustive. It is based on the conclusions of individual country visits already undertaken by the Commissioner, which, without yet allowing for a complete overview of the problems arising with respect to the rights of persons with mental disabilities, have at least been sufficient to advert to the scale of the challenges that remain. The promotion of the rights of persons with mental disabilities throughout Europe will represent, therefore, one of the Commissioner's key commitments in the years to come.

For these challenges are not limited to the countries of Eastern and Central Europe. Throughout Europe, much remains to be done before the goal of the fulfilment of the full potential of all persons with mental disabilities can be achieved. This is, moreover, a broader task implicating not just specialist services and care providers but the whole of society. It will require a significant shift in mentalities, a shift from exclusion to inclusion, from segregation to integration. The recognition of and the respect for the rights of persons with mental disabilities are certainly central to this development. At the same time, however, education and awareness raising campaigns remain vital to the construction of a society ready to acknowledge, accommodate and respect the difference and dignity of all persons with mental disabilities.

III. IMPLEMENTATION OF THE COMMISSIONER'S RECOMMENDATIONS

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FOLLOW-UP REPORT TO THE RECOMMENDATIONS OF THE COMMISSIONER FOR HUMAN RIGHTS FOLLOWING HIS VISIT TO MOLDOVA FROM 16-20 OCTOBER 2000

The Commissioner for Human Rights visited Moldova (including Transnistria) in October 2000 on the invitation of the Government. The Commissioner would like to reiterate his gratitude to the Government of Moldova for their cooperation at the time of the visit and, again, on the occasion of a follow up visit effected by members of the Office from 5 to 8 March 2003. In his first report (CommDH (2000)4), the Commissioner identified a number of specific concerns regarding law and practise in Moldova with respect to human rights. It is the purpose of this report to assess the developments following to the Commissioner's findings and comments. The report is based on the written submissions of the Moldovan authorities and the conclusions of the second visit which included contacts in the Parliament, the Presidential administration, the Ministry of Foreign Affairs, the Ministry of Justice, the Ministry of Internal Affairs, visits to the Prosecutor General, the Parliamentary Advocates (Ombudsmen), the judges' association, the Moldovan bar, a meeting with NGOs and visits to the prison in Cricova and to the Provisional Detention Centre in Chisinau. The members of the Commissioner's Office[24] would like to express their gratitude for the assistance and openness of all those they met with during the course of their visit.

The Commissioner's first report focused on the following issues: the deterioration of social and economic rights; problems concerning linguistic rights; the situation in the region of Transnistria ; the behaviour of the police; the administration of justice; and prison conditions. The present report reviews the developments in these fields and the response of the Moldovan authorities to the points raised by the Commissioner.

The situation as regards linguistic rights has changed since the last elections in September 2001. The Commissioner finds that these issues are now debated in the context of Moldova's report to the Advisory Committee of the Framework Convention for the Protection of National Minorities and in the Committee of Ministers and that he need not take up this issue in the present report.

The issues concerning Transnistria and the human rights problems relating to poverty and the action taken by the Government in the field are considered in the general part of this report.

The administration of justice, the behaviour of the police and the prison conditions are topics that have drawn the Commissioner's specific attention and are dealt with separately below.

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[24] Mr. Christos Giakoumopoulos, Director, and Mr. John Dalhuisen, Private Secretary to the Commissioner for Human Rights.

I. General situation

A serious problem of poverty and the lack of control over a part of the countries' territory (the left bank of Dniestr) are the two major elements of social and political life of the country that necessarily characterize its human rights situation. .
As regards the region of Transnistria, human rights concerns raised in the Commissioner's first report remain. In the meetings with Mr Andrei Neguta, President of the Parliamentary Commission for foreign policy, and with Mr Vitalie Slonovschi, Deputy Minister of Foreign Affairs, confirmed that important and serious activities are undertaken in order to set up a constitutional committee to draft a new constitution that will include Transnistria. The Moldovan authorities expressed the hope that interested neighbouring countries (Russia, Ukraine) and international organisations (Council of Europe and OSCE) will participate and will use their valuable influence to obtain the active participation of politicians from Transnistria.

As regards poverty, the Commissioner referred extensively, in his first report, to the deteriorating socio-economic situation and to the consequent violation of very basic social and economic rights such as the right to a decent standard of living, housing, medical care and basic social services. Most salaries and pensions would not cover more than 50 percent of minimal consumption needs and even these remained often unpaid. Corruption of public officials had become one of the most serious problems of the country, illegal immigration, trafficking of human beings – and of human organs – became a flourishing trade, alcoholism and drug dependency with all their consequences rose to extremely worrying rates.

Against this background, a new Government was elected in 2001 and a series of measures such as increasing salaries and pensions were adopted. In addition, a long-term national human rights action plan was set out, involving Government agencies and NGOs and partly financed by UNDP. The plan focuses on social and economic rights, proposing a series of gradual steps to combat unemployment, to face the increasing migration and to improve the situation of the most vulnerable (orphan children, women, homeless people and disabled persons).

It is quite clear that the new Government has set out the improvement of social conditions and the fight against corruption as its top priorities and that it has a certain will to involve in this project all parts of the society.

Having regard to the findings and conclusions of the Commissioner's first visit, such action must be welcome. Although the opposition has criticised some of the measures of the Government as being "populist", the Commissioner understands that measures such as the payment of pensions and salaries in a country so seriously affected by poverty were indispensable, as were also measures to increase them – albeit slightly. As repeatedly stated, the dramatic absence of the enjoyment of social and economic rights make it impossible for large parts of the population to enjoy civil and political rights such as, *inter alia*, the right to education and the right of access to justice.

The Commissioner finds it however worrying that despite the stated political will to involve all parts of Moldovan society in the action plan for human rights and social cohesion, basic elements of democratic dialogue seem to suffer unnecessary restrictions.

Thus, freedom of the media seems affected by the lack of appropriate guarantees for the independence of national public broadcasting company (Teleradio Moldova). Moreover, freedom of political association is jeopardised by serious restrictions concerning the activities of political parties and by insufficient practical guarantees for parliamentary immunity. These points have been made in a series of reports and expert opinions of Council of Europe bodies and the Commissioner need not to reiterate these concerns.

Similarly, action against corruption appears necessary and it is quite encouraging that Council of Europe assistance and expertise has been sought and is actually provided. The fact that international financial institutions have re-established their aid to Moldova is also a positive sign. Here again however, it is worrying that the fight against corruption is coupled with a diminution of guarantees for judicial independence.

Generally speaking, the Commissioner is of the opinion that the present Government has taken or is about to take a series of measures that are both necessary and appropriate with a view to lead the country out of the deadlock created by social and economic degradation and its detrimental effects on human rights. These measures are however accompanied by a diminution of legal guarantees and by actions that risk to undermine freedom of political parties, judicial independence and freedom of electronic media. The Commissioner believes that these tendencies will shortly be reversed and that any shortcomings in the above areas will be addressed soon with the help of the Council of Europe. This is definitely in the interest of the Government as it will need the support of a well informed society to carry out its ambitious programme.

II. Specific issues

1. Justice

The administration of justice is an area of intense legislative work since the adoption of the new Constitutions. Several amendments but also entirely new laws are being adopted. The Commissioner insisted on three issues that raise specific human rights concerns in respect to the right to a fair trial, within a reasonable time, by and independent and impartial court (Article 6 of ECHR):

- the length of proceedings;
- the execution of court judgments;
- the independence of the judiciary.

One of the issues raised in the first Commissioner's report is the **length of the proceedings**, in particular before criminal courts.

The root causes of the slow functioning of the judicial system are related to the poor material working conditions and to the heavy workload of judges. In 2000, 49.732 cases were introduced before first instance courts and this number rose to 53.172 in 2002. Judges also face a constantly increasing workload: a very important number of new regulations come into force and the competencies of judges increase, by virtue of the citizens' right to a court. At the same time, the material conditions are not appropriate: courts face a dramatic shortage of administrative staff and computer equipment. The provisional assessment of budgetary needs effected by the association of judges indicated that 34.million lei would be necessary for the functioning of the judiciary per year, whereas until 2003 the budget allocated did not exceed 16 million lei.

The Government has taken some steps to address the problem:

- the budget for the judiciary rose from 15,3611 million lei in 2000 to 22,0663 million lei in 2003;

- the number of judges passed from 247 in 2000 to 316 in 2003. It is to be noted that 68 posts of judges were still vacant in March 2003.

Moreover, in accordance with the new constitutional provisions, the previously existing four instances system will be simplified to comprise only three levels of jurisdiction (district courts, regional tribunals and the Supreme Court). The laws implementing the reform are at the final stage of consideration with the help of Council of Europe experts. The abolition of appeal courts will of course deprive the parties of an additional degree of jurisdiction but this might be balanced by the advantage of accelerating the proceedings.

As to the **execution of court judgments,** Mr Dolgheru, the newly appointed Minister of Justice, informed the Commissioner's Office that a special department for the execution of court judgments was about to be created and that the draft revised code of Civil procedure contained several provisions on execution, enabling, *inter alia*, the creditor through a bailiff to seize the debtor's property, to retain his/her salary, to sequestrate his/her bank account. The number of executions of court judgments is thus expected to increase substantially. A certain improvement can already be observed in terms of numbers of court judgments executed although the percentage of non-executed sentences remained the same:

- in 1991 out of 189.091 judgments, 35.031 remained non executed (19%);
- in 2002 out of 267.476 judgments, 51230 remained non executed (19%).

The encouraging results obtained should be further pursued. Although, admittedly, an important part of non executed judgments concern insolvable debtors, some concern the State and it is of particular importance for the credibility of the judicial system that the State abides by court judgments and executes *bona fide* sentences against it.

The independence of the judiciary in Moldova is a serious worry.

The Constitution of Moldova guarantees judicial independence. Appointments are made by the President upon proposal by the Supreme Judicial Council. Judges are appointed for an initial probation period and subsequently confirmed for life appointment. Worries expressed refer to the fact that the President does not follow the proposals made by the Supreme Judicial Council but has, on several occasions, vetoed re-appointment of judges after the expiry of the initial probation period, notwithstanding a positive proposal by the Council. The situation is even more complex as apparently the Judicial Council proposed, in some occasions, several candidates for one post, leaving the decision on judicial appointment to the entire discretion of the President. The fact that the President has such discretionary power and can even dismiss a judge doing away with the opinion of the Council is of course a serious interference with the independence of the judiciary.

It was confirmed in the Presidential administration that the President has indeed refused re-appointment of judges that had been presumably involved in corruption. This is again problematic: Although it is perfectly understandable that corrupt judges should be dismissed and even criminally prosecuted, this cannot occur without the guarantees of the rule of law. The Commissioner's Office delegation has sought in vain to establish what guarantees apply in the procedure leading to the non re-appointment of judges. Thus, although it was asserted, in the Ministry of Justice, that the President makes his decision on the basis of elements contained in the file submitted by the Supreme Judicial Council, it became clear in the discussions with members of the Presidential administration that the President can - and actually does - take into consideration "other relevant information" on the judge concerned. Moreover, it remained unclear whether the President gives reasons for his decision not to re-appoint a judge and whether such decision can be challenged before courts. The representative of the association of judges indicated that no reasons are given whatsoever. Appeals were indeed introduced before ordinary courts but, quite naturally, they were declared inadmissible, as ordinary courts have no competence to decide on issues of appointment of judges. The only limitation to the Presidential discretion in this field is that he cannot initiate on his own the dismissal procedure but should rather wait for a proposal to be made by the Supreme Judicial Council.

It follows that the present Presidential practice on appointment and re-appointment of judges does not provide sufficient rule of law guarantees and seems therefore arbitrary. It is even more so because appropriate procedures for the dismissal of corrupt judges actually do exist in the domestic legal order and have been successfully applied on some occasions by the Supreme Judicial Council. It is thus urgent that the Presidential practice be revised in order to safeguard judicial independence and the rule of law, and in accordance the European Charter of Judges and with international obligations resulting from Article 6 of the ECHR. In this respect, cooperation with Council of Europe experts should be thoroughly pursued.

2. Police

During the Commissioner's visit in Moldova in 2000, NGOs complained about "flagrant human rights violations by police officers", including imposition of arbitrary fines, use of violence, arbitrary detention, ill treatment and even torture. Police faced a serious problem of corruption, policemen salaries covering less than 50% of the official subsistence level per person per month.

The fight against **corruption** has been one of major objectives of the Government since then. According to information received by the Government, the average police salary has been raised by 2,5 times and, in addition, housing is provided to police officers by distribution of apartments.

The functioning of the "Internal Security Department" of the Ministry of Interior (a body competent to investigate cases of criminal activity by the police) has improved. The staff of the Department increased from 14 to 20 and the budget rose from 337,344 lei to 481,920 lei in 2001 and 451,788 in 2002. The activity of this Department, that reached its peek in 2001, covers economic crime and corruption as well as abuse of power, physical violence, protectionism, arbitrary detention and bribery. In 2000, 387 cases were investigated, leading to 74 disciplinary sentences; in 2001 the respective numbers were 445 and 109. 198 of the cases dealt with related to allegations of ill treatment and 58 to allegations of corruption of police officers. In 2002, 238 cases were investigated of which 79 related to ill treatment and 18 to suspicion for corruption; 29 disciplinary sanctions were imposed.

Over the same period (2000 – 2002) the Prosecutor General initiated 314 criminal proceedings against police officers, 48 of which concerned cases of corruption. The courts issued 103 decisions declaring police officers guilty of the offences they were accused of.

The Government believes that although corruption phenomena have diminished since 2001 it is still necessary to improve the institutional and legal framework of action against corruption.

Normative action has also been taken to provide guarantees against arbitrary detention and ill treatment in police custody.

Thus, in accordance with new legislation, **police custody** may not exceed 72 hours. In addition, any person arrested has the right to be assisted by a lawyer of his/her choice or by a State appointed advocate from the very moment of the arrest. Persons arrested have the right to ring their lawyers or relatives. In case of arrest of minors, their parents are informed. The general prosecutor receives ex officio a copy of the "procès verbal" of the arrest and may order the detained to be released at any time and, in particular, whenever the maximum time limits of police detention have been reached.

After the expiry of the 72 hours maximal time limit, a prolongation of detention is only possible through a warrant of arrest to be issued by a magistrate. This **detention on remand** cannot exceed 30 days but can be prolonged several times up to one year.

Decisions to place the accused in detention on remand are likely to be challenged before the court.

It is expected that, through these regulations, cases of arbitrary detention and ill treatment in police custody will at least diminish.

However, worries still remain as to the effective implementation of these regulations. The Ombudsman of Moldova referred to cases where persons have been interrogated without their lawyer being present and cases of ill treatment are still reported. Actually, even after the judicial decision allowing for detention on remand, the accused remain most of the time in police detention centres (police "isolators") for several months. In many case the accused are only transferred to provisional detention centres of the ministry of justice (judicial "isolators") after their conviction by a first instance court. Obviously, for detainees that spend long periods in the excessively overpopulated police isolators, the fact that the legal basis of their detention is a warrant of arrest issued by a magistrate offers a merely theoretical guarantee against abuse. The risk of ill treatment as long as the investigation continues in the hands of the police is high. On several occasions Council of Europe bodies (CPT) and experts (DG I) have confirmed that conditions of detention in police isolators are extremely poor and that the combined effect of overpopulation and of the excessive length of detention may amount to inhuman or degrading treatment. Many detainees that had just been transferred from police isolators to judicial detention centres indicated to the delegation of the Commissioner's Office that ill treatment in police isolators was not exceptional.

In this respect, efforts are still needed to

- reduce overpopulation in police isolators;
- reduce the time the accused spend in these isolators,
- effectively guarantee the presence of lawyers in interrogations;
- improve the investigation means of the police (so that confession is no longer used as the main evidence against the accused).

The Ministry of Interior is fully aware that the situation needs urgent improvement but indicated that the necessary budgetary means are lacking.

Since the entry into force, in July 2001, of legislation prohibiting **trafficking of human beings** and setting severe penalties (10 to 15 years imprisonment and up to 25 years in cases of trafficking of minors, pregnant women, or in cases of trafficking through kidnapping or abuse or with use of violence), the police – together with the General Prosecutor – are particularly active in this field and more than 60 cases of trafficking have been introduced before courts. Government agencies also started to co-operate with NGOs to develop assistance programmes for victims. These developments are to be welcome as they attempt to address one of the most dramatic problems of Moldovan society and they should continue with a view to setting out a comprehensive framework for the protection of victims and witnesses of trafficking. It is obvious that trafficking of human beings cannot be fought in domestic level only and that increased co-operation between countries of origin and between these

countries and the countries of destination is highly needed. Moldova has entered into agreements with some Council of Europe member states in this field and the Commissioner can only encourage this practice. Although ultimately the root causes of trafficking will have to be addressed (insecurity, unemployment, poverty) the suffering caused by trafficking makes it necessary to take immediate action in this field.

3. Prison conditions

At the time of the Commissioner's visit in 2000, Moldova had a very high prison population (270 per 100,000) and the Ministry of Justice was seriously underfunded. Prison conditions were, as a result, very poor.

Measures of deprivation of liberty for rather lengthy periods seem to be frequent in Moldova. Thus, prolonged police detention in the so-called "isolators" appears to be a means to obtain information during criminal investigations; provisional detention is a rather usual measure to guarantee the presence of the accused in trial hearings and can be used even though the accused is not likely to flee; finally, prison sentences are unusually lengthy. The Moldovan authorities are aware of this situation and serious efforts have been made to diminish the number of prisoners that passed indeed from 11,830 in 2000 to 10,690 in the beginning of 2003 (3,850 in pre-trial detention in "isolators" depending from the ministry of Justice, 2,385 in strict regime, 1,790 in special regime, 1,207 in prison colonies and about 1,480 in other penitentiary institutions). Although the overpopulation in prisons is lower than that in "isolators" of the police, it remains that there are more prisoners in Moldova than beds available in prisons (10,376 beds for 10,690 prisoners).

However, overpopulation is only one of the aspects of the situation in prisons, a situation that the authorities themselves qualify as "lamentable".

Despite the fact that the budgetary appropriations for the penitentiary system rose from 46,4 (in 2000) to 71,75 Million Lei (in 2003), the material conditions in prisons remain extremely difficult. For example, the buildings of the Cricova prison complex are heavily dilapidated and there is no visible improvement of the installations and facilities since the Commissioners' visit in 2000. Prisoners placed in the lighter regime (most of them serving sentences up to 8 years) live in large rooms of more than 60 beds and are allowed to move in and out into a small yard, while those of the stricter regime (serving sentences of more than 15 years) are in smaller - and literally dark - cells containing 5 to 7 beds and are only allowed to a short one hour walk per day; after having served two thirds of their sentences, strict regime prisoners can expect to be placed in larger cells and to be allowed to walk in the yard and back during the day.

The recent budgetary increase allowed electricity to be provided for almost one hour per day (which is an improvement compared to the total absence of electricity in 2000) but this is still insufficient. Besides, there is still a shortage of adequate clothing, food and drinking water. Prisoners receive limited portions of bread and sugar and cereals' soup but, apparently, they have not received any meat in the last five or six years and most of them rely on their families and relatives or on NGOs to

get some additional food and clothes. Heating is also a serious problem. Not only it is insufficient during winter but in addition heating installations are often built by the prisoners themselves in the cells and are both unhealthy and dangerous.

In these conditions it is not surprising that many prisoners suffer from illness. Many (950, i.e. 9% of the prison population, according to information provided by the People's Advocate Ms Ianucenko) are affected by tuberculosis and 211 prisoners are affected by AIDS. There is a dramatic shortage of medical supplies as only an average of 10% of the real needs in medicines is covered by the prisons' budget. Despite the serious efforts of the medical personnel in Cricova, the situation does not seem to have improved but rather deteriorated as medical facilities and equipment are outdated and have not been replaced since 1989. Due to the lack of space, many patients are treated in cells and not in the prison's medical centre; the latter are overcrowded merely by older prisoners, unable to take care of themselves in their cells.

The "isolator" in Chisinau is also old and overcrowded. Detainees, including women and minors are placed by 5 or 6 in cells of 2,5 x 5,5 meters. It is not rare that people spend several months or even years in the isolator. Despite the advanced stage of dilapidation, the lack of electricity and the absence of any recreational activities, detainees claimed they were satisfied they had left the isolator of the police where conditions were even harsher. In these circumstances it is rather worrying that the Government has considered transferring the responsibility for running the prisons from the Ministry of Justice back to the Ministry of Interior as an option to improve living conditions. Such a measure, if it were to be put into practise, would certainly have detrimental effects as detainees will entirely depend for very long periods on police authorities and could be exposed to a greater risk of ill treatment.

The problems of overpopulation can be best addressed by a wiser policy on penalties and a more rational use of provisional detention measures. It is expected that the new Penal Code will enable judges to make a more flexible use of prison sentences and a rational use of alternative penalties. Provisional detention should also cease to be the rule and remain an exceptional measure.

What is mostly worrying is the combined effect of overpopulation with the dramatic shortage of food, clothing, heating and medicines that makes the living conditions degrading and intolerable. It is not surprising that these sinister conditions and the lack of security create tensions that can easily turn to violent incidents. The day after the visit of the Commissioner's team in Cricova, a riot took place in the prison resulting into one person being killed and several wounded. Two years after the Commissioner's visit in Moldova and despite the alarming reports issued by the Parliamentary Assembly, the Committee for the prevention of torture (CPT) and the Directorate General of Legal Affairs of the Council of Europe (cf. GD-Mold (2001)1) the situation has deteriorated.

Whilst the existence of administrative practises tolerating inhuman and degrading conditions of detention at this scale affects the credibility of Moldova and ultimately of the Council of Europe, the efforts undertaken by the domestic authorities appear insufficient to redress the situation.

Consequently, there is an urgent need that the Moldovan authorities together with the Council of Europe's competent bodies specifically and precisely consider in the coming months the situation in the prisons and evaluate the concrete material needs with a view to elaborating a short term plan for the improvement of the living conditions in prisons, in particular as regards medical care.

The Commissioner would consider this operation to be of the highest priority.

FOLLOW-UP REPORT TO THE RECOMMENDATIONS OF THE COMMISSIONER FOR HUMAN RIGHTS FOLLOWING HIS VISIT TO GEORGIA FROM 1- 10TH JUNE 2000

The Commissioner for Human Rights visited Georgia in July 2000. It was the Commissioner's first official visit to a member State of the Council of Europe and the Commissioner would like to repeat his gratitude to the Georgian authorities for the cooperation extended at the time and, again, on the occasion of a follow up visit effected by members of his office from 11 to 15 March this year. This report is based on the written submissions of the Georgian authorities on the developments since the first report and the conclusions of the second visit, which included two days of site visits of internally displaced persons resulting from the Abkhaz conflict. The members of the Commissioner's Office[25] would like to express their gratitude for the assistance and openness of all those they met with over course of the four days they spent in Georgia.

The Commissioner's first report[26] focused on four issues:

1. The penitentiary system
2. The police
3. The administration of justice, and
4. The situation of displaced persons in Georgia

This report reviews the developments made in this area and the response of the Georgian authorities to the recommendations made by the Commissioner. Whilst it is not the primary intention of such follow up reporting to include new issues, the emergence of certain violent incidents of religious intolerance in Georgia would appear to merit special attention and are examined at the end of this report.

The Penitentiary System

During his visit in July 2000, the Commissioner visited three penitentiary establishments (Tbilisi No. 5 prison hospital and pre-trial detention centre and Ortchala Prison "Colony") and was struck by the extremely poor prison conditions and the high overcrowding of many detention centres.

With respect to the latter it is possible to detect some improvement, with the total prison population, including pre-trial detention facilities, having decreased from 9100 in 2000 to 6700 in March 2003. Overcrowding remains, however, a persistent problem in pre-trial detention facilities. A return visit by members of the Commissioner's Office to Tbilisi pre-trial detention centre No. 5 revealed that its population in March 2003 stood at 1666 persons compared to a maximum capacity of some 1000 places. The Commissioner's appeal, under such circumstances, for a restriction in the application of pre-trial detention, seems to have gone largely

[25] Mr. Markus Jaeger, Deputy to the Director, and Mr. John Dalhuisen, Private Secretary to the Commissioner for Human Rights.
[26] CommDH(2000)3 of 13th July 2000.

unattended; the practise of releasing suspects on bail remains underdeveloped. The increased sensitivity of Prosecutors and Judges to this mechanism for minor charges would considerably reduce the burden on pre-trial detention facilities that are currently creaking at the seams. The length of pre-trial detentions (members of the Commissioner's Office spoke to several detainees who had been in Tbilisi No. 5 for in excess of one year) also remains as large a concern as it was before.

The Commissioner was also struck during his initial visit by the high number of prison staff. Indeed the total number of staff in the year 2000 was some 4000 persons, at a ratio of 1 to 2.5 detainees, which represents an extremely high ratio under any circumstances and, in relation to the budgetary constraints on the Ministry of Justice, a particularly high financial burden in Georgia. Here again some progress has been made, with the total number of prison staff having decreased to some 3200 in the year 2003 (though the ratio of prison staff to prisoners has if anything increased, the financial burden has, at least, been greatly reduced). At the same time, the Ministry complained of difficulties in attracting sufficient wardens (particularly perimeter guards), owing to the low salaries offered (averaging between 35 and 50 euros a month). The suggestion that the Ministry was considering resorting to conscripts for this purpose would, whilst understandable in the short term, not encourage the development in the long run of the professional civil prison service the Ministry has committed itself to promoting.

Financial considerations were, indeed, according to the Ministry of Justice, at the heart of many of the difficulties it faced in improving prison conditions. Its total budget in the year 2000 was some $4,500,000. The allotment, for 2003, stood at 4,200,000 Euros, compared to the Ministry's estimated needs of 15 million Euros. Given the rise in prices over the previous two years, the financial situation of the Ministry has, it can only be concluded, worsened.

Such financial constraints have resulted in the Ministry's being obliged to resort to certain 'special funds' at its disposal to finance the reconstruction of the juvenile detention centre in Avchala, which the members of the Office of the Commissioner visited, and the nearby establishment for female detainees, which is only a few months away from completion. With respect to the former, it is necessary to acknowledge the considerable efforts made by the Ministry of Justice to provide adequate conditions to its juvenile detention population. The total number of juvenile detainees in Georgia currently stands at 21 (with a further 50 in pre-trial detention) and they are all detained at Avchala in conditions and with educational facilities that can only be described as excellent given the overall situation of the penitentiary system and the Georgian economy in general. It is to be hoped that the reconstruction of the women's penitentiary centre will achieve the same results and the Ministry of Justice was confident that this would be the case.

Such improvements cannot, however, be said to have been made in respect of the conditions at Tbilisi no. 5. Detainees continue to be detained in large numbers in cells displaying advanced signs of material disintegration. Sanitary conditions remain dismal and the budgets for food and medical care continue to permit only the most basic survival – and even then: 280 prisoners are currently suffering from tuberculosis

and, whilst the majority are detained separately in a special prison hospital, 20 remained in isolated accommodation in Tbilisi No. 5. The Ministry of Interior expressed its gratitude to the ICRC for assisting it in this area, which it feels unable to deal with alone within the limits of its resources.

The difficulties for civil society and Church representatives in accessing penitentiary establishments, for monitoring and material and educational projects, had been a particular concern of the Commissioner's during his first visit. The greater use, since this visit, of the Public Oversight Commissions foreseen by the Law on Imprisonment in all penitentiary establishments has considerably improved the situation in this respect. The openness of the Ministry of Justice was acknowledged by the NGOs working in this area that were met with. The Ministry of Justice has, indeed, gone a step further in this direction and established a central Independent Public Oversight Council within the Ministry, which is composed of 17 representatives of civil society and provides a forum for the transmission of their concerns directly to the Minister of Justice. There was some suggestion on the part of NGOs that this mechanism was, under pressure from the Ministry of Interior, receiving less support within the Ministry of Justice than it was immediately after its establishment. The sensitivity of the Ministry of Justice to the concerns of civil society, as evidenced by this initiative, is to be greatly welcomed and the constructive continuation of this mechanism is certainly to be encouraged.

Indeed, at a more general level, the Ministry of Justice has shown considerable sensitivity to the urgent need to reform the penitentiary system it inherited form the Ministry of Interior. It has, therefore, published a "Concept of Reform of the Penitentiary System" in 2002. The three main elements of the proposal are 1) the transition from large, dormitory style "colony" accommodation to a more conventional cell-type system, 2) the decentralisation of prison management and 3) improvement in the training and qualification of prison staff. The second and third aspects of this programme might be implemented at little extra cost and the Georgian authorities ought certainly be encouraged to do so expeditiously. In respect of the training of prison staff, the Ministry of Justice expressed considerable gratitude for the assistance already being received from the international community and the Council of Europe in particular and hoped that this assistance would be continued.

The attempt to address the poor material conditions of current penitentiary establishments is expressed in the first priority of these reforms. The Concept for Reform proposes, indeed, the construction of entirely new prison facilities. One cannot but conclude, however, that the costs of so ambitious a project current exclude any realistic possibility of its being fulfilled. Indeed the Ministry of Justice already faces considerable difficulty in finding the necessary 1 million euros for the completion of a prison already under construction (with the same financial deficit) at the time of the Commissioner's visit almost three years ago. The Ministry of Justice again requested the Commissioner's assistance in securing foreign aid for the completion of this prison (in Rustava). Whilst this project certainly deserves to be supported, it is clearly be essential for the Ministry to be able to show a clear breakdown of the costs involved and, most likely, a financial commitment on its side proving the intention to complete the construction within a reasonable time limit and with appropriate financial supervision. These would appear elementary conditions for

the attraction of foreign financial assistance for this project and the Ministry is to be encouraged to provide such guarantees if it is really serious in its desire to complete the construction of this facility. With this proviso, the Commissioner appeals to Council of Europe member states to assist Georgia in its efforts to build new prisons in line with Council of Europe standards.

It might be added, moreover, that more limited projects, such as the successfully completed reconstruction of the juvenile and women's detention facilities indicate that greater and more immediate results can be achieved when more realistic goals are set. The current failure to attract sufficient funds for the completion of new facilities ought not, therefore, to be seen as justifying or excusing the failure to address the necessary improvements of existing facilities.

On a final, and particularly sombre note, no progress has been made on the case of Mr. Tengiz Asanidze, who was officially pardoned by the President of Georgia on 1st of October 1999, yet who continues to remain in custody in the de facto autonomous province of Adjaria. Since the Commissioner first became aware of his case during his first visit, the European Court of Human Rights had given a deadline of 5th February 2003 for the finding of a friendly settlement to this issue before the case is due to be heard in the Grand Chamber. Without wishing to enter into the political difficulties obstructing the ordered release of Mr. Asanidze, it is clear that every effort must made, by the Georgian authorities and other international actors to secure the release of an individual pardoned by the President of Georgia, declared innocent by the Supreme Court of Georgia and whose case is currently pending before the European Court of Human Rights.

Another case of particular concern relates to the sentencing in Abkhazia in February of this year of Mr. Djologoua to the death penalty for treason. Without wishing to enter into grounds on which Mr. Djologoua was sentenced, the reintroduction of the death penalty in Abkhazia would be worrying indicator of the Abkhaz regime's commitment to the protection of human rights.

The Police

In his report of July 2000, the Commissioner expressed considerable concern over allegations of the widespread ill treatment of persons in police custody and called for greater measures to curb such behaviour and combat the prevailing impression of impunity surrounding such acts.

Since the publication of that report, the most significant development with respect to law enforcement agencies has been the creation, by Presidential decree in December 2001, of a Commission on "Reform of Law and Enforcement and Security Bodies", which, headed by the President of the Supreme Court, Mr. Lado Chanturia, has since published its "Concept for reform of the Security and Law Enforcement Services of Georgia".

The "Concept for Reform" seeks to holistically reform all aspects of law enforcement in Georgia. The principal reforms are presented in three Draft Laws on the Police, a Draft Law on the Prosecutors Office and a Draft Code of Criminal Procedure. Whilst the first four laws would appear to have been drafted already and to have taken the

recommendations of the Council of Europe into account, considerable ambiguity surrounds the progress of the Draft Code of Criminal Procedure. Its official presentation is scheduled for the end of March this year, but as several such deadlines have already been set and exceeded in the past, there is little optimism that this particular one will be met either, or that, indeed, any Draft Code of Criminal Procedure is likely to be adopted before the end of the year. The centrality of the Code of Criminal Procedure to all the other proposed reforms is inevitably resulting in delays to the reform of the Police and Prosecutor's Office and the need for progress in this area cannot be too highly stressed if the positive features of the "Concept of Reform" are ever to be implemented.

The situation with respect to the Code of Criminal Procedure has been complicated further by a number of recent developments. The Ministry of Interior tabled a number of amendments to the existing Code of Criminal Procedure on November 21 2002. These amendments included the proposal to extend the length of police custody from 72 hours to 240 before it would be necessary to bring the detainee before a judge. The Ministry has also declared its desire to have the administration of pre-trial detention facilities removed from the Ministry of Justice and restored to it, a proposal which the Ministry of Justice and the Prosecutor's Office categorically opposed. At the same time, provisions of the existing Code of Criminal Procedure were declared anti-constitutional by a ruling of the Constitutional Court of 29th January 2003. These included an initial 12-hour period in which suspects might be held incommunicado on remand and the limitation of the right to speak to one's lawyer to only one hour per day. The Constitutional Court set a deadline of 1st May 2003 for the necessary amendments to the Code of Criminal Procedure to be made, though, again, the suspicion remains that this delay is unlikely to be respected.

The resolution of these issues is of the utmost importance when it comes to police ill treatment. It would appear that the majority of cases of police ill-treatment occur in cases when the detainee has spent longer than 72 hrs in police custody. Some statistical indication of the extent of the problem may given by the records of the Ministry of Justice, which conducts medical examinations of all detainees transferred to its establishments for pre-trial detention from police custody. Between 2000 and 2500 persons are transferred from police custody to pre-trial detention facilities each year, and last year alone the Ministry of Justice forwarded in excess of 500 cases in which indications of ill-treatment had been detected to the Prosecutor's and Ombudsman's offices. Indications are that the vast majority (80% according to NGOs) of these cases concern suspects detained for longer than 72 hours in police custody. Other indicators suggest, however, that the number of cases of police ill-treatment and excessive length of police custody have decreased over recent years. The regional office of the Ombudsman in Kutaisi, for instance, stated that whilst the number of recorded cases of excessive length of police custody between January 2000 and April 2001 was 57, this number decreased, following the intervention of the Ombudsman, to only 8 for the rest of 2001 and only 3 in 2002. At the same time the number of allegations of ill-treatment decreased from 38 in 2001 to only 8 in 2002.

Whilst this progression, if it is representative, is certainly to be welcomed, and the transparency of the Ministry of Justice's medical checks deserves to be praised, the number of cases officially recorded by the Ministry of Justice must give rise to considerable concern (and not least, the 8 instances of electric-shock treatment detected in 2002).

The suggestions made by the Ministry of Interior regarding the extension of police custody and the transfer of pre-trial detention to its administration cannot, therefore, be supported. It was suggested, during a meeting with the Deputy Minster for Interior, that the police faced considerable difficulties in investigating crimes satisfactorily in the short time afforded them owing to the material difficulties they faced. With respect to the exceeding of the current lawful length of police custody, it was maintained that the number of incidents had decreased considerably in recent years and that, when it occurred, it was primarily owing to the lack of means at the Ministry's disposal (notably with respect to the costs of transport to pre-trial detention facilities) and the severe over-crowding at pre-trial detention facilities, which occasionally resulted in inevitable delays. It is hard not to sympathise with these arguments, particularly in view of the chronic over-crowding of the pre-trial detention facility witnessed at Tbilisi No. 5, mentioned above, and the similar difficulties faced by the Ministry of Justice in transporting its own detainees to courtrooms.

However, none of these reasons can excuse police ill-treatment and the desired increase in the powers of the Ministry of Interior can, in the current climate, only be seen as likely to increase the risk of abuses. The appropriate solution can, indeed, only lie in the necessary and pending reforms and an increase in the material resources of investigators. Moreover, increasing the ease with which confessions might be extracted over a longer period of police custody would run counter to the professed and sincere intentions of the Ministry of Interior to encourage a culture of respect for human rights amongst its staff and police officers and to which end its reforms are primarily directed.

The main thrust of the reforms focus, indeed, on separating the investigative and preventive work of the police force and are designed, in the words of the Deputy Minister of Interior, to transfer the Ministry into a proper administrative Ministry rather than, as he conceded, the large police station it might all to easily be perceived to be at the moment. These reforms are indeed to be welcomed greatly and their speedy implementation must be a priority. Also to be welcomed is the emphasis the Ministry appears to be placing on the human rights awareness of its staff. It has, for instance, issued a Code of Police Ethics by Ministerial Decree rather than waiting for its integration in the reforms still being held up in Parliament. At the same time, the Ministry of Interior has placed considerable emphasis on the training of police officers and investigators and the Deputy Minister expressed his desire to increase cooperation with international experts in this area. The Ministry was, indeed, particularly sensitive to the fact that the proposed reforms would not succeed if the same persons were to perform new functions with new requirements but with same old-fashioned mentalities. This emphasis on training and the appeal for foreign assistance ought to be endorsed.

Training cannot, however, on its own be sufficient to eradicate abuse by police officers. Greater transparency in its workings and the prosecution of offences must play a considerable part in reshaping the culture and practise of police officers. With respect to the first of these issues some developments can be noted. The Ministry, has for instance, sought to improve its relations with NGOs and the Georgian Ombudsman. Pilot projects, in the form of public monitoring councils similar to those established by the Ministry of Justice for its penitentiary establishments, providing for inspections by civil society of the district police stations of Kutaisi and Gori, have been welcomed by NGOs and their extension to other regions is to be encouraged. Indeed, NGOs met with acknowledged the greater openness of the Ministry of Interior to their concerns, though a number considered the change to be reflected more in the Ministry's discourse than in its actions. Be this as it may, the development is a positive one and the Ministry is encouraged to increase and expand on this cooperation.

With respect to the disciplining and prosecution of human rights abuses by police officers the situation is more ambiguous. The position of the General Inspectorate, the internal disciplinary organ, has been strengthened within the Ministry and its staff has been increased, notably with respect to its legal personnel. The results for 2002, in the statistics provided by the Inspector General, were as follows: on the basis of 1200 random inspection of police stations, 287 cases were forwarded to the prosecutors office (resulting in 57 pending criminal cases), 92 policemen were dismissed (12 of high rank), 72 were demoted (33 of high rank) and 382 received other disciplinary measures. Precise indications of the nature of the offences alleged were not provided. If these figures are to be compared with those provided for the Commissioner's initial report, it is hard to detect a notable improvement: it was claimed at the time that between 1996 and 2000 there had been some 5200 disciplinary measures and almost 2000 dismissals (averaging, therefore, some 1000 and 400 respectively per annum, and as such more than were recorded in the year 2002). At the same time the Deputy Prosecutor General provided statistics which revealed an increase in the number of criminal proceedings opened in respect of human rights abuses by police officers compared to those recorded in the Commissioner's earlier report: namely 171 criminal proceedings opened (against 203 officers) in 2002 compared to 468 over the period 1996 to 2000. The Deputy Prosecutor was adamant that no allegations of ill-treatment or other human rights abuses, whether received from the Ministry of Justice, NGOs, the Media or the Ombudsman, went without an appropriate reaction on the part of his Office. The difficulty, he insisted was that, whilst offending police officers might previously have been able to come to a convenient arrangement with the prosecuting authorities, the closing of this avenue had resulted in alternative 'arrangements' being reached between the officers and the victim's themselves, who were increasingly reluctant to testify. At any rate, a slight improvement in the activity of the Prosecutor's Office in respect of police abuses was, indeed, acknowledged by the Ombudsman herself.

The extent of the problem, as revealed by the Ministry of Justice's reporting and, indeed, conceded by the Ministry of Interior itself, is such that considerable improvements still need to be made in this area. Much of the difficulty stems from the simple fact that ordinary police officers receive only 80 Lari (or 40 Euros) per

month in wages. As the minimum subsistence level is considered to around 300 Lari (for a family of four), and the majority of police officers are said to live in manner beyond such as even this sum would afford, little speculation is needed as to how the shortfall is commonly made up for. It must be insisted, however, that no economic hardship can justify the ill treatment of persons in police custody and that further efforts are still required if this problem is to be satisfactorily addressed now.

It is, in conclusion, difficult to detect a real improvement with regards to police behaviour despite a number of positive signs. Whilst the Ministry of Interior has shown considerable sensitivity to the problem of police ill-treatment, and professes an increased desire to transparently resolve the problem, its proposed amendments to the Criminal Procedure Code risk undermining many of the improvements it officially aspires to. Operational efficiency, cannot, in a country governed by the rule of law, be allowed to be achieved at the expense of fundamental individual rights. The need for the full and speedy implementation of the "Concept for Reform" is obvious, as is the provision of the necessary funding to make these reforms effective.

The Administration of Justice

In his earlier report the Commissioner raised two specific concerns regarding the administration of justice. These were the execution of court judgements and the absence of an independent and effective bar association.

1. The Execution of Judgements

The first of these concerns would appear to have been partly addressed by an amendment in December 2002 of the Law on the Enforcement of Proceedings of 7 May 2002, which strengthens the powers of the relevant department within the Ministry of Justice. The rate of execution of civil judgements would appear, in any case, to have improved on the 80% level recorded three years ago and was, somewhat surprisingly, no longer considered a serious problem by the lawyers, NGOs and judicial officials spoken to on this matter.

2. The Establishment of a Bar Association

The situation with respect to the establishment of a Bar Association and the regulation of the role of, especially, criminal defence lawyers remains more complicated. Whilst it was and is widely acknowledged that the standard of legal representation in Georgia is, at best, variable, attempts to regulate the activity of lawyers have been strongly resisted by many within the legal profession. Indeed a Law on the Bar was adopted in Parliament in June 2001, but its implementation has subsequently proved impossible, to such an extent that recent legislative amendments to have passed two out of three parliamentary readings are in danger of effectively killing off the Act altogether. The origin of the problem would appear to reside in the fact that the legal profession in Georgia is almost totally unregulated, or at least, knows no state intervention whatsoever. At present the Collegium of Advocates functions more or less as a trade union for lawyers without, it would appear, membership's being a precondition for practising law or representing clients in court. Indeed, at the time of the Commissioner's report and still today, there are no formal requirements whatsoever for becoming a professional lawyer. The law on the Bar was intended, therefore, to

introduce some order into this state of affairs and to raise the standard of lawyers notably through the requirement of examinations. The main thrust of the legislation is to establish a Bar Association that would come into being at the moment 100 persons would have passed an examination set, initially, by the High Council of Justice, but which would subsequently be autonomously regulated by the Bar Association itself. The first attempt to organise such examinations was in 2002, but it proved impossible to secure the cooperation of existing lawyers. The second such attempt is due in June 2003 but, as indicated above, resistance remains strong.

It would appear that resistance focuses on competing conceptions of the role of lawyers between those, primarily represented by the Collegium of Advocates, who believe that the State has no business interfering in the free exercise of such a profession, and the Ministry of Justice, which is concerned to address the poor standard of many lawyers currently practising in Georgia. Whilst vested interests on the part of certain lawyers clearly concerned by the prospect of failing such a qualification procedure, there remains, at the same time, some concern that the procedure itself will not be free from improper influence.

Given the importance of raising and maintaining the standards of the legal profession in Georgia, it would appear imperative that the Ministry of Justice adopt a more insistent attitude to implementation of the Law on the Bar and that the High Council of Justice make every effort to ensure the transparency an objectivity of the initial examination procedure.

The situation of refugees and persons displaced within and outside Georgia

The Commissioner's first report focused on the situations of various categories of displaced persons either in Georgia or currently wishing to return. These included the situation of Chechen refugees primarily residing in the Pankisi valley, the Meskhetian Turks deported from Georgia in 1944 to other parts of the Soviet Union and currently wishing to return, and IDPs resulting from the de facto independence of South Ossetia and Abkhazia. The follow up mission concentrated on the situation of the officially registered 250,000 internally displaced persons from Abkhazia who constitute the bulk of those displaced persons currently residing in Georgia.

1. Chechen Refugees

Since the Commissioner's first report numerous, and occasionally worrying, developments have taken place in respect of the Chechen refugees in Georgia. As of February 2003, this number 4174, the vast majority of which continue to reside in the Pankisi Gorge and of which 181 are currently registered in Tbilisi.

At the time of the Commissioner's initial visit, the valley was largely uncontrolled by the Georgian authorities, giving rise to widespread criminal activity and claims, on the part of the Russian authorities, that the valley provided refuge to recuperating Chechen combatants. This was not, following a visit to the valley, the Commissioner's impression. Nonetheless, under increasing pressure from the Russian authorities (including notably a letter sent by President Putin on September 11th 2002 to the UN Security Council, the UN Secretary General and the OSCE announcing

possible strikes in the valley), the Georgian authorities made several moves to bring the situation in the Pankisi gorge under some sort of control. As of September 2002, troops from Georgian Ministry of Interior have conducted several checks in the valley. Similar operations have also been conducted in Tbilisi, notably on 7th December 2002, when 100 Chechens were detained and questioned. In a separate incident, on the same day, 5 Chechens were allegedly killed. The extradition of 5 Chechens to Russia on 4th October 2002, and a further 8 afterwards following the obtaining of procedural guarantees from Russia by the European Court of Human Rights has increased the feeling of insecurity amongst the Chechen refugee population in Georgia.

For so long as the situation in the Chechen Republic is such that the refugee population in Georgia cannot freely return, it is incumbent on the Georgian authorities to provide all the protection afforded by the Geneva Convention. Whilst the restoration of order in the Pankisi Gorge must remain a priority for Georgian authorities and a concern of their Russian counterparts, it is essential that the necessary measures be conducted, by the Georgian authorities, in an even-handed manner and in full respect of the rule of law.

Whilst the Commissioner is unable to comment on the presence of Chechen combatants in the Pankisi Gorge, and his Office did not visit the area on its recent visit, the possibility of the sporadic infiltration of such elements cannot be excluded. At the same time, it is of the utmost importance that the civilian population seeking refuge in Georgia receives the assistance and protection they require. The work of the UNHCR and other international donors is vital in this respect and it is important that their work is not disrupted or undermined by the security measures undertaken by the Georgian authorities.

2. The Return of Meskhetians to Georgia

Very little to no progress has been made regarding the elaboration of a legal framework permitting the return of Meskhetians to Georgia, which represents one of Georgia's commitments on its accession to the Council of Europe, since the Commissioner's visit in 2000. A preliminary Draft Law on Repatriation (officially the "Law on the repatriation of persons deported from Georgia during the 1940s under the Soviet regime") was, indeed, submitted to the Council of Europe for expertise in 2001. However, unable to accept the proposed law, the Council of Europe requested a certain number of amendments, which were, in turn, not adequately incorporated in the second Draft Law presented to the Council of Europe in 2002. A third such attempt is currently underway.

Whilst the return of Mesketians to Georgia evidently raises a number of political and practical problems, there is a clear need to make some progress on this matter. In connection with this issue, the Deputy Minister for Foreign Affairs raised the discriminatory treatment of the approximately 15,000 Meskhetian Turks currently residing in the Krasnodar region of Russia. It must be stressed, however, that quite

regardless of the treatment received by Meskhetians in this region and the offer, the terms of which remain to be finalised, of the United States to grant entry to its territory to some or all of these persons, a primary responsibility remains with the Georgian authorities to provide, at least, for the legal possibility of the return to Georgia of Meskhetians wishing to do so.

3. The Ossetian Conflict

Of all those persons displaced as a result of internal or neighbouring conflicts, the 60,000 persons displaced as a result the Georgian-South Ossetia conflict have received the least attention from the international community. The humanitarian situation, however, particularly in South Ossetia, remains precarious, whilst international aid has steadily decreased.

Despite a hitch in the peace settlement talks in early 2002, the settlement machinery has since resumed its negotiations and a meeting of the Joint Control Committee (composed of Georgia, Russia, North and South Ossetia and the OSCE) met in May 2002 in Borjomi to elaborate a final draft of the Programme on Return, Integration and Reintegration of IDPs and refugees. It is not clear, however, what progress can be made in the near future.

Freedom of movement is generally enjoyed across all the borders involved. The main obstacles to return, in all the directions involved, would appear rather to be economic than political. The extreme poverty, and rampant criminality, in South Ossetia greatly discourages the return of the approximately 10,000 Ossets to have left South Ossetia for North Ossetia and the 10,000 Georgians to have left South Ossetia for Georgia. Similar economic factors would appear to apply to the return of the estimated 30,000 Ossets to have left Georgia for North Ossetia, where the economic opportunities are greater. Indeed successful long-term returns are apparently only viable with the economic assistance of the UNHCR, which has, as of December 2002, contributed to the return of some 1320 families (4,442 persons) in the various directions between South and North Ossetia and Georgia proper.

4. The Abkhaz Conflict

A political solution to the Abkhaz conflict appears no closer now, than it did during the Commissioner's first visit. Whilst the Georgian authorities declare themselves ready for further negotiations and piecemeal progress on the political settlement of the conflict and the return of IDPs, they heavily lament the absence of a similar attitude on the part of the Akhaz authorities and regret the influence, as they see it, of Russian involvement preventing greater progress being made towards the restoration of Georgia's territorial integrity as upheld by the United Nations Security Council.

During his visit to Georgia the Commissioner raised, in cooperation with Mr. Boden, the then Special Representative of the Secretary General of the United Nations for Georgia, the possibility of organising a meeting between the Georgian and Abkhaz authorities to discuss the constitutional aspects of a possible solution to the conflict with both of the respective authorities. A first seminar to this effect was indeed held in Pitsunda, Abkhazia, in February 2001, through the organisation of Ambassador

Boden and with the participation of the Venice Commission. The second such meeting, scheduled to be held in Tbilisi in June 2001, was regrettably cancelled owing to violent incidents in Abkhazia and it has not, since, proved possible to resurrect the initiative. Should an interest be expressed by all concerned in the resumption of this avenue of dialogue, the Commissioner would certainly be glad to contribute all he could.

In the meantime, the ongoing attempts of the Special Representative of the United Nations in Georgia (currently Mrs. Tagliavini) to promote the peaceful settlement of the conflict have concentrated on gaining the acceptance of both side of "Basic Principles for the Distribution of Competences between Tbilisi and Sukhumi". These attempts have to date met with considerable opposition on the part of the Abkhaz authorities. Indeed, the most recent report of the Secretary-General of the United Nations, of 13th January 2003 expressed considerable pessimism with respect to a likely resolution of the conflict.

Whilst this situation continues, the Georgian authorities and the vast majority of IDPs themselves, continue to insist on the enjoyment of the right to return, on which very little progress has been made since the Commissioner's initial visit. Already at the time of the Commissioner's visit, it was estimated that between 40 to 50,000 IDPs had, on a more or less permanent basis, returned to the Gali region. The estimates have not changed since then and nor have the precarious security and economic conditions in which they live. The total number of IDPs from Abkhazia currently registered in Georgia was as of December 31st 2002, 249,173,, of which 90,000 are said to residing in Tbilisi and 130,000 in the regions neighbouring Abkhazia. The real number of IDPs currently residing in Georgia is estimated at significantly less since many are said to have emigrated, having either sold or retained their IDP cards. The current living conditions of IDPs continue, in many cases, to be dire. Some 117,000 of (all) IDPs continue, ten years on, to reside in some 800 collective centres and those in private accommodation frequently live no better.

Registration as an IDP entails a number of benefits. Most importantly, IDPs in private accommodation receive 14 lari (7 euros) a month. Those in collective centres receive 11. The delays in the payment in this allowance recorded by the Commissioner 2 years ago, would appear to have stopped. However, the allowance has not been raised in 7 years, though the cost of living has increased in this time, and is far from covering even the most elementary needs of those in the worst situation. IDPs in collective centres receive free water and electricity with the same irregularity as other citizens. Their access to healthcare and education is also the same as for other Georgian citizens, though 10th and 11th grade schooling, which is usually subject to a fee, is free for IDPs. IDPs complain that the health care received is inadequate and that they frequently have to pay prohibitive sums for medication. They are, in this field, discriminated against only in virtue of their relative poverty and not in the de jure denial of rights enjoyed by other sectors of the population. Officially, indeed, certain particularly vulnerable categories of person enjoy additional benefits with respect to health care.

International aid to IDPs has decreased substantially in recent years and the State no longer distributes aid in kind or food supplies as was still periodically the case two years ago. Under such circumstances, the living conditions of those unable to find

employment has, if anything, worsened over the last few years. With respect to employment, it might be noted that the situation is difficult for almost everyone in Georgia. IDPs continue, however, to bemoan a general stigmatisation that frequently obstructs their access to regular employment. The UNHCR has been running numerous non-formal education and micro-finance programmes, the reach of which has been quite wide and the results of which, if the impressions gained by the members of the Office of the Commissioner in discussions with beneficiaries are representative, have been extremely positive (15,000 were said to have benefited from such programmes in the Imereti region alone).

Regarding the improvement of the current living conditions of the IDP population, there is a noticeable concern amongst the Georgian authorities that their greater integration will lessen the pressure, both internationally and domestically, for a political settlement to the Abkhaz conflict and it is difficult to escape the conclusion that similar fears are encouraged within the IDP community itself. IDPs spoken to almost all insisted on their right to return as the sole possibility for improving their current living conditions. There was a general impression that abandoning the official IDP status and the meagre entitlements entailed would result in the forfeiting of the right to return and reclaim one's property in Abkhazia.

The Georgian authorities have, however, since the Commissioner's earlier visit, removed certain discriminatory provisions obstructing the integration of IDPs, notably with respect to electoral rights. Whilst IDPs were, previously, unable to vote in local and majority (1st past the post) parliamentary elections, they may now do so in virtue of the new Unified Electoral Code of 2001. Their ability to do so effectively, however, is greatly undermined in practice by lack of information regarding their rights (many spoken to were quite unaware of the current situation) and vagaries in drawing up of the supplementary lists on which IDPs registered. It is important that this situation be clarified in the run up to the forthcoming Parliamentary elections in November.

As regards the right of IDPs to stand for elections, the situation is somewhat more complicated. Neither IDPs nor many officials spoken to appeared to be aware of the exact situation, with the former frequently decrying their inability to stand for election, and several of latter seeking to justify the limitation. The actual situation is that IDPs are in fact entitled to stand for all elections. Their ability to do so, however, is conditional on their abandoning their IDP status and reregistering as a resident of their current administrative region. They would, under these circumstances, stand for election as any other citizen of Georgia. However, many IDPs are reluctant to take this step for fear losing their right to return, though, it might be said, the reality is such that any IDP actually interested and, under the current conditions in Georgia, in a position to do so would be unlikely to have great concerns on this account. The confusion surrounding this issue is, however, symptomatic of the general attitude towards the greater integration of the IDP community.

The situation is complicated still further by the extension of the parliamentary mandates of the 10 Abkhaz parliamentarians elected to the Tbilisi Parliament prior to the conflict. It is currently foreseen that these Members of Parliament will be allowed to continue sitting following the forthcoming elections. The presence of these MPs

was previously offered as a reason for not allowing IDPs to vote for constituency parliamentarians as they were, it was argued, already represented. This situation no longer prevails. However, whilst the political imperatives of retaining such members of Parliament, as indeed, of continuing to support the separate Abkhaz Government in Exile, are clear, the situation is certainly somewhat awkward. No longer being elected, it is not clear whom these MPs are really representing. At the same time, their presence in Parliament is, at least, no longer enjoyed at the expense of the direct representation of IDPs in the constituencies in which they are currently residing, for it is clear that the changes to the electoral laws permit IDPs to be represented as residents of a particular region. Their continuing representation through "Abkhaz" parliamentarians, might therefore, be perceived as a double representation, but it does, at the same time, at least loosely permit their specific representation as Abkhaz IDPs. Some suggestions have been made that special elections might be organised within the IDP community for the renewal of the Abkhaz parliamentary seats, so as to encourage the greater representativity of these members. This would, however, obviously lead to a much more obvious double representation. Whatever solution is finally adopted, it is important that the right to vote as any other citizen in constituency elections be maintained.

Whilst the free exercise of the right to return must remain the key priority of all concerned with situation of Abkhaz IDPs, it is important that the message is passed to IDPs that greater integration need not entail the forfeiture of this very right. It is clear, that the Georgian authorities face considerable material difficulties in improving the living conditions of their IDP population. However, greater sensitivity to their current needs and rights, as citizens of Georgia on a par with all others, is to be encouraged. The separation of the humanitarian benefits associated with IDP status from the legal rights enjoyed with respect both to return and integration has certainly begun with the restoration of certain electoral rights and must be continued now, not only with respect to the right to stand for election, but, more importantly, in the attitudes of both officials and IDPs themselves.

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It is, in conclusion, certainly possible to detect an improvement in some of the areas of concern to the Commissioner since his initial visit. It is clear, however, that the current economic climate, the political instability and the various unresolved internal conflicts, continue to delay several much needed changes, both legislative and, most importantly, in practise. Despite the ambitious reforms proposed in many of the areas of concern to the Commissioner, improvements have, to date, been made only around the edges. The need to pursue these reforms, many of which are purely organisational and entail no additional cost is, for the most part therefore, purely a matter of political will. The Council of Europe is playing an important role in the consolidation and implementation of these reforms, both through legislative expertise and extensive training programmes. The expressed commitment of the Georgian authorities to this cooperation remains, however, to be transformed into concrete results in many areas.

The recommendations provided below outline the main areas of concern that remain to be addressed, or have subsequently arisen, since the Commissioner's first visit:

The Penitentiary System

1. Reduce the burden on pre-trial detention facilities through the greater use of bail procedures for minor offences;

2. Ensure that the competence for the running of pre-trial detention facilities remains with the Ministry of Justice;

The Police

3. Rapidly implement the police reforms proposed in the "Concept for reform of the Security and Law Enforcement Services of Georgia";

4. Enact a new Code of Criminal Procedure in line with Council of Europe standards and the recent judgments of the Georgian Constitutional Court;

5. Extend the human rights training programmes for police officers with the continued assistance of the Council of Europe;

6. Extend the pilot projects for NGO monitoring of police stations in Kutaisi and Gori, in the form of public monitoring councils, to other districts;

The Administration of Justice

7. Implement the Law on the Bar adopted in June 2001 through the organisation of transparent and objective examinations;

Refugees and Displaced Persons in Georgia

8. Ensure that all Chechen refugees receive the protection afforded by the Geneva Convention and enjoyed under the Georgian Constitution;

9. Ensure the unhindered access of humanitarian organisations assisting Chechen refugees in the Pankisi valley;

10. Provide for the legal possibility of the return of Meskhetian Turks to Georgia through the enactment of a Draft Law on Repatriation in line with Council of Europe expertise;

11. Ensure the transparent and accurate drawing up of voting lists for all IDPs;

12. Encourage and facilitate the integration of IDPs on a par with ordinary Georgian citizens.

Finally, the Commissioner finds that the conditions in many prison facilities in Georgia remain extremely poor and may amount occasionally to inhuman and degrading treatment in contradiction to standards required by Council of Europe instruments.

Consequently, the Commissioner recommends that the Georgian authorities, in the coming months and with the assistance of competent bodies of the Council of Europe, elaborate realistic prison reform programmes for the material infrastructure of the Prison service, including of the estimated financial costs, so as to attract international support for the construction of new detention facilities.

FOLLOW-UP REPORT TO THE RECOMMENDATIONS OF THE COMMISSIONER FOR HUMAN RIGHTS FOLLOWING HIS VISIT TO THE PRINCIPALITY OF ANDORRA FROM 10-12 JANUARY 2001

The Commissioner for Human Rights visited Principality of Andorra from 10-12 January 2001 on the invitation of the Andorran Government. In his report of this visit, published on 21 March 2001[27] the Commissioner identified a number of specific concerns regarding law and practise in Andorra with respect to human rights. It is the purpose of this report to assess the developments following to the Commissioner's findings and comments. The Commissioner would like to express his gratitude once again for the full cooperation of the Andorran authorities at the time of his initial visit and again during the preparation of this report, which is based on the submissions of Andorran Ministry of Foreign Affairs, in cooperation with the Ministries of Justice, Interior and Health, and information provided by Andorran civil society.

1. The Rights of Foreigners

Andorra continues to be a country in which approximately two thirds of its total population (of c. 70,000) are foreigners.

a. Electoral Rights

Voting rights are conditional on the possession of Andorran nationality, which can be obtained by foreigners following an uninterrupted period of residence in Andorra of 25 years and by passing an examination set by a committee on nationality. Andorran nationality is otherwise acquired through birth in the Principality or through marriage to an Andorran national. Whilst registered foreign residents are entitled to vote in municipal elections in many European countries this is still not case the case in Andorra.

b. Economic Rights

The tight restrictions on the commercial activity of foreigners in Andorra continue to remain in place. The establishment of a private enterprise is conditional on its capital being two-thirds Andorran, by which is meant belonging to legal or physical persons of Andorran nationality or foreign persons having lived in Andorra for a minimum of 20 years. Representative functions, such as the President, or senior directors of enterprises, must also be held by persons of Andorran nationality or of 20 years residence in Andorra. In virtue of a tri-partite Convention signed by Andorra, France and Spain on 4 December, the qualification period for such rights by Spanish and French nationals is due to be reduced to 10 years on the Conventions entry into force on 1st July 2003. There are, however, no indications that these lengthy qualification periods will be reduced more generally for all foreigners.

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[27] CommDH(2001)1

c. The situation of irregular immigrants awaiting the attribution of a work permit

The situation in respect of this issue was of particular concern to the Commissioner during his initial visit. At the time of the Commissioner's visit, the demand for foreign labour in Andorra exceeded the official quotas for foreign work permits, resulting in some 4000 foreigners holding what are commonly referred to as "pink notes", which are given to foreigners who have applied for, but not yet obtained a work permit. The situation of these foreigners was due to be regularised by a new law on immigration adopted by Parliament in December 2000. This law finally came into force in September 2002 and the Andorran authorities have, in the previous 6 months, regularised the situation of all pink note holders.

2. Access to a lawyer from the outset of police custody

During his visit the Commissioner raised concerns previously expressed by the CPT[28] regarding the immediate access of persons in police to custody to a lawyer. The relevant provisions of the Code of Criminal Procedure, which provide for the access to a lawyer after a preliminary period of 24 hours, remain in force.

3. Prison Conditions

There are currently two prisons in Andorra: Casa de la Vall and Comella. The Commissioner had been particularly concerned by the conditions in the former and had requested that it be closed as quickly as possible. At the time of the Commissioner's visit plans had already been formulated, and land purchased, to expand the Comella prison, so as to allow for the closure of Casa de la Vall.

The commencement of the necessary construction work on Comella prison was, however, delayed by the revision of the original plans by the new Minister of Justice following the general elections in 2001. It was decided to expand the original project (from a surface area of 3310 m² to 4598 m²), which necessitated the purchasing of additional neighbouring land. The negotiations for the necessary purchases took the best part of two years, but are now complete and construction work finally begun in February of this year. It is foreseen that the construction work will take one year and that, consequently, Casa de la Vall will finally be closed around the beginning of 2004.

4. The Restructuring of the Judiciary

There were some concerns at the time of the Commissioner's visit, that the low number of judges, or "batlles" (only 9), reduced the efficiency and quality of judicial proceedings, as the specialisation of judges was barely possible given the number of cases so small a number were obliged to deal with. Nor was there any particular specialisation, or direct attribution to individual judges, of administrative or legal staff.

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[28] (CPT/Inf(2000) 11), following a visit from 27 to 29 May 1998.

Since the Commissioner's visit, the Andorran authorities have sought to address this problem. Structural reforms to the "Batllia", begun in January 2002, have resulted in the increase in the number of Batlles to ten and the specialisation of each, with his own support staff, in specific legal domains. Whilst it is still too early to assess the impact of the changes definitively, initial indications are that the quality and speed of judicial proceedings have improved as a result.

5. The Social Security System

The Commissioner had expressed some concern in his initial report over the loss of the medical insurance provided by the Andorran social security service (Caixa Andorrana Seguretat Social, CASS), by both the contributor and his or her dependants following 25 days unemployment. Whilst unemployment continues to be almost non-existent in Andorra, this extremely strict requirement must inevitably give rise to individual cases of hardship. Whilst this system remains unchanged since the Commissioner's visit, a new law on the social security system is currently being prepared in which alterations to the acquisition and termination of welfare rights are being considered. The speedy implementation of a more flexible system catering for the needs of the most vulnerable is certainly to be encouraged.

6. Labour Law

The Commissioner raised a number of concerns in his initial report regarding the right to form trade unions and to the right to strike. Both these rights are provided for in the Constitution, the former in article 18, and the latter in article 19 which grants the right to both workers and employers to defend their economic and social interests. Concerns were expressed at the time of the Commissioner's visit relating to the difficulties in establishing and running trade unions in the absence of specific legislation on this matter. Indeed, legislation expanding on the rights guaranteed by article 18 of the constitution was already in the pipeline at the time of the Commissioner's visit and no progress been made on this issue since then. In the meantime, however, laws on Associations and on the Register of Associations, as required by article 17 of the Constitution (guaranteeing the right to association), have been adopted on the 24th July and 1st August 2001 respectively. The Law on Associations contains a provision extending its application to professional and trade union associations until such time as a specific law regulating their establishment and functioning is adopted. Whilst this development has removed some of the ambiguity surrounding the legal personality of trade union or professional associations, this interim solution ought not to be allowed to continuing delaying the passing of more specific legislation.

The absence of specific legislation elaborating on the right to strike ostensibly guaranteed by article 19 of the Constitution, and which is required by that article, has not been remedied since the Commissioner's visit. It would appear to be the position of the Andorran authorities that the as the provision of the Constitution is directly applicable as a fundamental right, there is no pressing need for further detailed

legislation. However, it is clear that the absence of specific legislation creates considerable uncertainty with respect to the extent of, and conditions on the exercise of the right to strike and consequently discourages its use in practise. The Andorran authorities are, as a result, to be encouraged to adopt the legislation foreseen in the Constitution.

7. Domestic Violence

The Commissioner had, finally, expressed his concerns over the phenomenon of domestic violence in Andorra, which was at the time of his visit, and continues to this day, to be a subject of some preoccupation in the Andorran media and public opinion. The Andorran authorities have taken several measures in an attempt to address this phenomenon focusing on the adoption in June 2001 of an Action Plan for cases of Domestic Violence (APDV), which was adopted by Ministry of Health and Welfare in cooperation with the Ministries of Justice and Interior. The Plan of Action is heavily based on the relevant recommendations of the Council of Europe.

The plan seeks to address the phenomenon of domestic violence through the coordination of state services in four main areas: health care, psychological assistance, the police and the judiciary. In each area working groups have been created that present their conclusions and recommendations to a Follow Up Commission presided by the newly created Secretary of State for Family Affairs and composed of one member of each working group. A fifth working group composed of NGOs working on women's affairs is to be established during 2003. The APDV places considerable emphasis on the training of all those from the various different services called upon to deal with the problem of domestic violence. The attempts of the Andorran authorities to combat the phenomenon have also included numerous publicity campaigns. A 24-hour hotline with professional receptions linked to the services grouped under the Action Plan has also been established

At the time of the Commissioner's visit, there were numerous calls for the creation of a special centre or shelter for victims of domestic violence. The Andorran authorities have not responded to these appeals. They maintain that the measures currently in place, namely a system of host families and agreements with a number of hostels, provide sufficient temporary shelter. There are also plans to establish links with shelters abroad for those wishing to leave their immediate social surroundings. It remains the case, however, that a specialised shelter would provide a centre in which victims of domestic violence might have easier and greater access to the various support and protection services.

Whilst it is too early to assess the full impact of the Action Plan, NGOs testify to the increased sensitivity of the Andorran authorities to the problem of domestic violence and their comments regarding the necessary measures. The number of reported cases of domestic violence has also decreased, with the Association of Andorran Women receiving 30 complaints of domestic violence in 2001 compared to twice that number in 2000.

FOLLOW-UP REPORT TO THE RECOMMENDATIONS OF THE COMMISSIONER FOLLOWING HIS VISIT TO CHECHNYA (RUSSIAN FEDERATION) AND ON THE RECOMMENDATION 1/2002

The Commissioner has visited Chechnya on several occasions since he took office and has always closely followed the human rights situation there, through ongoing dialogue with the highest Russian authorities, the Chechen local authorities and representatives of civil society – mainly the non-governmental organisations involved in safeguarding human rights in Chechnya. During his visits he noted that the civilian populations' human rights had been and still were being violated by both Russian federal troops and Chechen fighters.

The post of Special Representative for Human Rights in Chechnya was established in response to the recommendations the Commissioner had made during his first two visits in November 1999 and February 2000. The Council of Europe had helped by seconding three members of its staff as experts.

During a third visit to Chechnya, in February and March 2001, the Commissioner made a number of recommendations with a view to improving the human rights situation. He drew attention to the need to put an end to impunity, as well as pointing to the measures that should be taken by the Russian authorities, in particular the *Prokuratura*[29].

In November 2001 a seminar on the protection of and respect for human rights as the basis for the democratic reconstruction of the Chechen Republic was held in Strasbourg to initiate dialogue on respect for human rights among the federal and local authorities and civil society[30].

After being informed in January 2002 by various sources that human rights violations in Chechnya were continuing and even increasing, the Commissioner himself wrote to Mr Ustinov, the Principal State Prosecutor of the Russian Federation, In February 2002 expressing great concern. Indeed, according to information regularly sent to Strasbourg by NGOs working in Chechnya, not all of the Commissioner's recommendations about eliminating impunity and insecurity had been implemented, and the civilian population continued to suffer from human rights violations committed by both Chechen separatist fighters and the Russian federal forces.

Among the most serious problems reported to the Commissioner were undoubtedly the violations committed by some representatives of the federal forces in the course of so-called "cleansing" operations and the disappearances of people during such operations. According to the NGOs, many of these military operations ended with a large number of people being detained by members of the armed forces at unspecified locations not known to the local authorities or the detainees' families. These were usually military bases or other places where troops were temporarily based.

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[29] See the 1st Annual Report of the Commissioner for Human Rights (2000)

[30] See the 2nd Annual Report of the Commissioner for Human Rights (2001)

Under current Russian legislation, all detainees must either be released, if the authorities can bring no charges against them, or be handed over to the Prokuratura so that their cases can be investigated.

It has however emerged that, in practice, the civilian prosecutors responsible for investigations involving civilians never conducted enquiries at military bases, whereas this type of case did not come within the remit of the military prosecutors, since they were only competent to deal with cases involving service personnel. The resulting denial of justice unacceptably weakened the protection of Russian citizens' rights by depriving them of their right of access to justice.

In view of this, the Commissioner sent the Russian authorities Recommendation CommDH / Rec(2002)1 concerning certain rights that must be guaranteed during the arrest and detention of persons following "cleansing" operations in the Chechen Republic of the Russian Federation. One of the measures suggested in this recommendation was the setting up of joint teams of civilian and military prosecutors, enjoying easier access to all military installations.

However, as he did not receive an appropriate reply to the recommendation and was continuing to receive very alarming information from the Chechen Republic, the Commissioner decided to return to Chechnya to see the situation for himself and assess changes that had taken place since his previous visit.

Although this annual report is not intended to cover the Commissioner's recent visit to Chechnya, it is necessary to point out that, in his contacts with the federal and local authorities, the Commissioner stressed the need to put an end to impunity in Chechnya. Special emphasis was placed on this during his meeting in Moscow with Mr Birukov, Deputy Prosecutor General of the Russian Federation, and Mr Fridinski, Deputy Public Prosecutor General of the Russian Federation in charge of the Caucasus region. At this meeting the Russian representatives assured the Commissioner that they attached great importance to human rights protection and the rule of law. They told the Commissioner that, following his recommendation, it had been decided to set up "joint inspection teams". In a letter he sent to the Commissioner on 25 February 2003, Mr Birukov, the Deputy Prosecutor General of the Russian Federation, pointed out that this decision had been issued in Decree N° 15 of 30.11.2002 of the Prokuratura of the Chechen Republic.

While the Commissioner welcomes the Russian authorities' initiative, he believes that the only way genuinely to improve the situation is to make sure that there are no more disappearances. He calls on the Russian authorities to shed light on all the disappearances and to bring the guilty parties to justice. The Commissioner will continue to closely monitor the situation as regards respect for human rights in Chechnya.

FOLLOW-UP REPORT TO THE RECOMMENDATIONS OF THE COMMISSIONER FOR HUMAN RIGHTS FOLLOWING HIS VISIT TO THE BASQUE COUNTRY FROM 5-8 FEBRUARY 2001

From 5 to 8 February 2001 the Commissioner for Human Rights visited Madrid and the Basque Autonomous Community (Bilbao, San Sebastian and Vitoria) in response to the continuing violation of human rights as a result of the terrorist activity. The ensuing report, submitted to the Committee of Ministers and the Parliamentary Assembly of the Council of Europe on 9th March 2001, reflects the concerns brought to the Commissioner's attention by various sectors of the Basque population, notably by non-governmental organisations, trade unions, leaders of Basque political parties, various authorities, members of Basque Government and Parliament and the Ararteko (Ombudsman), as well as by members of the Government, spokespersons of the Congress of Deputies and the President of the General Council of the Judiciary that the Commissioner met in Madrid.

This report refers to the follow up to the recommendations included in the report of 9th March 2001. It is based on information requested to this end and provided by the Government of Spain and by the Department of Interior of the Basque Government.

The Government indicates that it pursued and reinforced its policy aiming at the elimination of all impunity, not only for those who commit directly terrorist acts but also for those who cooperate in or encourage such acts, those who provide financial support (even when the funds come from public financing) or any other kind of support and, in general for those who spread terror by threat, exclusion or fear. This policy resulted in several legislative initiatives referred to in the Government's reply appearing in Appendix A. The Government further recalls its international initiatives to combat impunity of terrorist criminal activity and its fundamental lines of action for its presidency of the Committee against terrorism of the Security Council of the United Nations. From 5 to 8 February 2001 the Commissioner for Human Rights visited Madrid and the Basque Autonomous Community (Bilbao, San Sebastian and Vitoria) in response to the continuing violation of human rights as a result of the terrorist activity.

The Government of Spain indicate the following:

> *"In respect of the concrete problems raised by Commissioner Gil-Robles with regard to the increase of urban violence "kale borroka" or "urban terrorism", the above mentioned legislative measures, and in particular the revision of the Penal Code – by virtue of which actions of urban violence are qualified as terrorist acts - as well as the amendments to the Law on the responsibility of minors for acts of terrorism, allowed to achieve a radical decrease of urban terrorist acts as shown by the statistics below. The heavier penalties and the requirement of effective compensation provided for in the new legislation further increased the remarkable dissuasive effect:*

In 2001	*370*
In 2002	*180*
In 2003	*55*

Even though the concerns and fears generated by terrorist acts and the "Kale borroka" have decreased, the Government maintain that there still exists an intolerable degree of threat and that it is necessary to continue to fight against this type of criminality by increasing escorts and by reinforcing the protection of persons under threat. The Government consider it of utmost importance that the Ertzaintza (the basque autonomous police) reinforces its action qualified as decisive in this field.

The Department of Interior of the Basque Government submitted a detailed reply, including precise statistics, that appears in Appendix B. The figures provided indicate a significant reduction in the number of violent incidents and an equally important increase in the number of arrests effected in their respect. Whilst there were 536 incidents of street violence of a terrorist nature related to the "kale borroka" in 2001, this number decreased to 353 in 2002 and stood at only 22 for 2003 by 17th March. The number of arrests by the autonomous Basque Police rose from only 56 in 2001 to 105 in 2002 and 10 until March 2003. The information regarding the arrests and prosecution of the suspected perpetrators of several of these crimes is of note, especially as concerns the dissolution of particularly dangerous organised structures, such as the groups "Y", to which many persons referred during the Commissioner's visit. This dismantling and significant reduction of this branch of the terrorist activity in the Basque Country is to be greatly welcomed.

The Department of Interior further indicates that at this moment 903 persons in the Basque Autonomous Community require police escorts and a further 310 have police protection outside their homes.

Finally, both the Government of Spain and the Department of Interior of the Basque Government refer to judicial action affecting the legal existence of political parties linked to the action of ETA:

First, the Supreme Court annulled 241 electoral platforms (electoral groupings) and the Constitutional Tribunal confirmed this decision as far as 225 of these groupings are concerned.

Moreover, the Supreme Tribunal declared illegal and dissolved the parties Batasuna, Herri Batasuna and Euskal Herritarroc (the last two having latterly been integrated into the first) in a judgement of 27th March 2003, in accordance with the dispositions of Art. 9 of the Organic Law 6/2002 on Political Parties of 27 June. This article provides for the declaration as illegal of all political parties that 'promote, encourage or justify violence", that "consider terrorist acts to be political" and that "promote, spread or participate in homages" to those who commit acts of violence. The decision of the Supreme Court is currently being appealed before the Constitutional Court and it is not for the Commissioner to comment on a case in which the final decision is still pending.

In general, the information provided shows the extent to which the terrorist activity placed an unbearable pressure on Basque population in general and on the individuals mostly directly threatened by ETA in particular. It also shows the scale of ETA's terrorist activity and the large number of crimes committed over the last two years, to which must now be added the two recent assassinations in the Autonomous Community of Navarre. It is only right under such sad circumstances to express once again one's respect and solidarity with the victims of terrorist attacks and their families; to recall at all times their sacrifice and the need to fight effectively against the criminal acts of terrorists and the organisations that justify and harbour them, whilst fully respecting democratic values and the guarantees of the rule of law.

APPENDIX A

REPORT

(Original document: unofficial translation into French)

I. Action taken following the report

Following Commissioner Gil-Robles' report of 9 March 2001, the Spanish government has maintained and stepped up a policy aimed at eliminating any scope for impunity, not only for those who commit terrorist acts but also for those who collaborate in or encourage such acts, provide the perpetrators with funds (even drawn from public funding and grants) or any kind of support, and, in general, those propagating the effects of terror through threats, exclusion and fear.

The tangible result of this policy has been a series of legislative initiatives, most of which have already been passed by Parliament and have entered into force:

- **Organic law[31] 7/2000 of 22 December amending Organic law 10/1995 of 23 November, the Criminal Code and Organic law 5/2000 of 12 January, governing the criminal liability of minors in relation to terrorist offences.** Its aim is to make it easier for the State to adopt new instruments to effectively combat outbreaks of violence and acts of praise or support for or complicity with terrorism, for which, owing to the complexity of interpretation or the shortcomings of the existing norm, there were no adequate criminal law solutions, in the interests, for example, of providing better legal protection for the members of local authorities in the legitimate exercise of their representative functions.

- **Organic law 1/2003 of 10 March guaranteeing democracy in town councils and the security of municipal councillors**, amending the Criminal Code, Organic law 2/1986 of 13 March on Security forces and agencies, the Law on Criminal Procedure, Organic law 3/1987 of 2 July on the funding of political parties, Organic law 5/1985 of 19 June of the general elections system, and Law 7/1985 of 2 April regulating the bases of the local government system.

- **Law 11/2003 of 21 May regulating the joint criminal investigation teams within the framework of the European Union, and Organic law 3/2003, of the same date**, complementing the first one as regards the transposing of the European Union Framework decision of 13 June 2002 to the Spanish legal system.

- **Law 12/2003 of 21 May preventing and stopping the funding of terrorism, and Organic law 4/2003, of the same date**, complementing the previous law.

- Reinforcement of administrative procedures to ensure that those sentenced for terrorist offences pay victims the compensation fixed by the courts. The draft **Organic law on measures of reform to ensure the total and effective application of sentences** recently went before the Senate, once the procedure before the Congress

[31] Constitutional law requiring a reinforced majority.

of Deputies was complete. In addition to amending articles 36, 76, 78, 90, 91 and 93 of the Criminal Code and article 989 of the Law on criminal procedure, the bill is also aimed at amending article 72 of the General law on prisons, with a view to linking the present or future wealth of convicted terrorists to the payment of compensation and damages to victims.

- Draft **Organic law amending Organic law 1/1979 of 26 September on the General law on prisons** recently submitted to the Senate. This aims to improve conditions and guarantees for prisoners regarding access to higher education, establishing quality standards based on special circumstances within the penitentiary system, while making such arrangements compatible with the fact that terrorist prisoners are not granted any benefits or privileges.

- **Organic law 5/2003 of 27 May, amending Organic law 6/1985 of 1 July on the judiciary, Organic law 1/1979 of 26 September on the General law on prisons and Law 38/1988 of 28 December on judicial demarcation and planning**, which are creating **Central courts for prison supervision** in order to unify criteria concerning supervision of sentences relating to offences investigated and judged by the *Audiencia Nacional* and to avoid any problems arising between the centralisation of the investigation and the procedure corresponding to the latter's court bodies, as well as supervision of sentence application within a different framework and court.

- The reform introduced by the Law on political parties is of crucial importance, its aim being to guarantee and require that parties' activities are in line with elementary democratic principles, respect individual rights and freedoms and do not promote violence and terror. After completion of the parliamentary formalities, **Organic law 6/2002 of 27 June on political parties**, unanimously declared constitutional by the Constitutional Court in its judgment 48/2003 of 12 March, gave rise to the decision of the Supreme Court chamber of 27 March 2003, which held unanimously that the Herri Batasuna, Euskal Herritarrok and Batasuna political parties were illegal and to be disbanded. Furthermore, this decision ordered the annulment of those parties' entries in the Register of political parties, the ceasing of all activity and the opening of the corresponding property liquidation process.

On 3 May the Special chamber of the Supreme Court annulled the proclamation of 241 electoral platforms, and 225 of those annulments were confirmed by the Constitutional Court. These measures brought about the dismantling of ETA's "political front", excluding it from institutions and enabling the vast majority of citizens in the Basque country and Navarro to participate in the electoral process of 25 May in conditions that were freer and more dignified.

With a similar intention of putting an end to impunity, there is also a drive to encourage stronger political and judicial teamwork in combating terrorism at international level. It is for this reason that, during the Spanish Presidency of the European Union, there was emphasis on a series of initiatives designed to consolidate an area of security, freedom and justice that gave rise to such important decisions as the approval of the Framework decision on the European arrest warrant, which obviates the need for any extradition proceedings between member states, and the Framework decision on the harmonisation of the criminal offence of terrorism.

Also noteworthy is the stepping up of bilateral relations between Spain and France, apparent from the present operational cooperation between the two countries, now bearing fruit with the arrest of several ETA leaders and the heads of different cells; safe houses (*pisos francos*) and cars used by terrorists have been discovered and operational equipment of various types has been seized. Since the beginning of this year alone, there have already been 20 arrests linked to ETA, including important figures in the military wing, such as Juan Antonio Olarra Guridi, Ainhoa Múgica Goñi, Ibon Fernández Iradi (later escaped) and Ainhoa García Montero.

The Spanish government considers terrorism and all its manifestations as criminal and unjustifiable acts whatever the supposed grounds. Terrorism represents a serious threat to civilisation, democracy and peace in general, and all States must unite their efforts to counter it. That is the idea underlying the entire policy promoted and developed by the Spanish government both domestically and within the international forums in which Spain participates in one way or another.

At present Spain holds the chairmanship of the Counter-terrorism Committee (CTC) set up within the United Nations Security Council, where priority strategies are developed. These are the following:

- reinforce the committee itself,
- broaden the means of supervising and assisting less well prepared countries,
- cooperate with disarmament agencies, particularly those dealing with weapons of mass destruction,
- consider the possibility of authorising the Committee to draw up a general list of terrorist organisations,
- encourage coordination where international and regional bodies are concerned.

II. Specific questions on which a report is requested

Concerning the specific pattern described by Commissioner Gil-Robles on the practical aspects of development of violence in the streets - *kale borroka* or urban terrorism - the aforementioned legislative measures, particularly the reform of the Criminal Code, in which actions generated by street violence are considered as an act of terrorism, and the change in the law governing the criminal liability of minors in relation to terrorist offences, have led to a substantial drop in terrorist acts in the streets, as shown by the figures below. The length of sentences and the effective levying of compensation established by the new laws are having a highly dissuasive effect in this respect:

year 2001	370
year 2002	180
year 2003	55

Both the national police force and the *Guardia Civil* have made numerous arrests in this lapse of time linked to commando units that have infiltrated Spain (Donosti in September 2002, or Madrid in December) and also to collaboration with the armed group or urban terrorism itself. The *Ertzaintza* has also made several arrests on this last count.

The result of all this has been a fall in the number of terrorist attacks (two this year) and in activism in the streets (see above).

Even so, the terrorist threat remains real for every local community figure designated by ETA as a target in several of its communiques (chiefly policemen, journalists and intellectuals, judges and prosecutors, prison authority officials and politicians of non-nationalist parties). And, albeit selectively, it is against members of local communities that the vast majority of acts of urban terrorism have been directed.

This means that, although decisive advances are being made in the fight against terrorism and a quantitative reduction has been achieved in the level of worry and fear in everyday life, there are still intolerable levels of constraint and persistent threat that we must continue to tackle as energetically as possible. It should not be forgotten in this connection that, over the period concerned, the number of bodyguards assigned to protect individuals had to be increased given the higher risk during an election year when ETA's communiqués named as targets municipal councillors and officials of the Popular Party, the Socialist Party, the UPN and the UA, as well as the headquarters of those parties and any of their political and electoral events.

That is why the State security forces and agencies keep up their intense activity. And it is also why we think it desirable that the *Ertzaintza* step up its efforts too, particularly as, through its powers and territorial coverage, it is the body that best knows the situation in each village, is first to examine the clues left behind by each terrorist attack or act of violence in the streets of the Basque country and has the strongest capability for avoiding or preventing the illegal use of public areas to support terrorism and heighten fear among citizens.

To conclude, it is worth pointing out that this need to restore public order in the streets, at all levels, is seen as having decisive importance in this phase of combating terrorism, since the citizens' and human rights movements actively involved in defending freedom and democracy are already numerous and taking on growing social significance. The members of these movements have become yet more names on the blacklist of individuals under threat, as can be seen, sadly, from the assassination of the socialist militant and leader of *Basta Ya*, Mr Joseba Pagazaurtundua.

APPENDIX B

INFORMATION FOR THE FOLLOW -UP TO THE REPORT OF THE COMMISSIONER FOR HUMAN RIGHTS OF THE 9TH MARCH 2001.

Information provided by the Department of Interior of the Basque Government. Translation from Spanish by the Office of the Commissioner for Human Rights

In a letter received by this department on 7th February 2003, the Commissioner for Human Rights of the Council of Europe requested information for the follow up to his Report of 9th March 2001 regarding "… the respect for human rights in the light of the terrorist activities of ETA and the street violence referred to as "Kale Borroka".

To this end, the following information is provided.

Number of attacks carried out by the terrorist organisation ETA by year

	Basque Autonomous Community	Rest of the Country
2000	36	29
2001	24	23
2002	12	15
2003	2	-

Number of people assassinated by the terrorist organisation ETA by year

	Basque Autonomous Community	Rest of the Country
2000	8	15
2001	10	5
2002	1	4
2003	1	-

Number of attacks carried out by the terrorist organisation ETA by group affected

Basque Autonomous Community

GROUP	2000	2001	2002	2003
Ertzaintza	1	4	2	1
Other Police	3	2	-	1
Army	1	1	-	-
Politicians	7	4	3	-
Businessmen	2	-	-	-
Economic Interests	16	4	3	-
Judges and Prosecutors	-	1	-	-
Journalists / Media Outlets	2	2	3	-
Civil Servants	1	-	-	-

Public Buildings	2	5	1	-
Others	1	1	-	-

Rest of the Country

GROUP	2000	2001	2002	2003
Ertzaintza	-	-	-	-
Other Police	5	1	3	-
Army	7	3	-	-
Politicians	7	2	-	-
Businessmen	-	-	-	-
Economic Interests	5	12	9	-
Judges and Prosecutors	2	-	-	-
Journalists / Media Outlets	2	-	-	-
Civil Servants	-	-	-	-
Public Buildings	1	3	3	-
Others	-	-	-	-

Number of Persons provided with police escorts in the Basque Autonomous Community

- Number of Persons with escort: 903
- According to an existing agreement between the Basque Government and the Junta de Seguridad of the National Government the police escorts are distributed evenly between both administrations
- In addition to the police escort services, the Ertzaintza provides 310 further purposes with exceptional preventive protection measures (guarding of houses etc)

Information on the street violence terrorist acts ("Kale Borroka")

	Number of acts
2001	536
2002	353
2003	22

Arrests made by police services

*****Only arrests made for acts of street violence classified in the Penal Code as terrorist offences are included. Arrests made for disturbing the peace, public disorder, and which would raise statistics considerably, are not included.

	2001	2002	2003	Total
Ertzaintza	56	105	10	171
National Police	5	13	-	18
Guardia Civil	3	27	-	30

Targets of street violence by group

GROUP	2001	2002	2003
Ertzaintza	57	36	2
National Police / Guardia Civil	14	3	-
Municipal Police	2	-	-
Military Personnel	6	2	-
Private Security	-	1	-
Partido Popular	10	4	1
Partido Socialista	16	5	-
Unidid Alavesa	3	1	-
Eusko Alkartasuna	1	2	-
Basque Nationalist Party	7	8	4
Unions / Associations	2	2	-
Banks, Cash Dispensers, Economic interests	198	98	5
Communication networks	7	3	-
Public Buildings and enterprises	66	28	1
Means of Transport	71	65	3
Other / Urban Infrastructure	76	95	6
TOTAL	**536**	**353**	**22**

Conclusions on the action of the Ertzaintza against street violence

1. There has been a significant decrease in the number of acts of street violence since the publication of the Report of 9th March 2002.

2. This quantitative decrease has also been accompanied by a qualitative reduction in the threat represented by terrorist activities. The vast majority of attacks have been directed against public buildings, transport networks, cash dispensers, banks and urban infrastructure (286 out 353). Even if this does nothing to diminish the criminal nature of the offence, since according to law they are also defined as terrorist actions, it is nonetheless clear that the pressure exerted by this kind of attack on threatened organisations is quite different from that which results from actions against individual houses and private vehicles. The large-scale deployment of police escorts and the preventive security measures of the Ertzaintza in specific areas has contributed directly to this improvement.

3. The attacks against private property (homes or vehicles) have almost exclusively targeted members of the Ertzaintza. This clearly represents a violent and degenerate response to the effective and constant measures taken by the police against those who commit terrorist acts in any of their penal forms.

4. The security measures taken by the Ertzainza have clearly had a positive effect. This is evidenced by the comparison with results obtained by other police forces responsible for combating terrorism in Euskadi, with the most revealing statistic being the number of arrests made during 2002 (calculated, excepting the possibility of error, on the basis of publicly availably statistics). It ought to be borne

in mind, moreover, that the Guardia Civil and the National Police are able to concentrate almost all their efforts on its antiterrorist activity since they do not have the additional responsibility for ordinary urban security, which is a matter exclusively within the competence of the Basque Government.

5. In addition to the preventive measures, which, as described above, have resulted in a reduction in urban violence, it is worth stressing the effectiveness of the investigations undertaken. These investigations have enabled the arrest and trial (before the Audencia Nacional) of the perpetrators of a significant number of acts of urban violence and, notably, those considered to have been amongst the worst to have been committed in 2002 in virtue of their public repercussions, the degree of organisation behind the attacks and the extent of the damage caused.

In addition to individual arrests, this investigative work has enabled structures responsible for the organisation of street violence operations to broken up (the "Y" groups).

Of the many police interventions carried out by the Ertzaintza of Ezkerraldea, a number are worth mentioning specifically in virtue of their importance in breaking up organised structures and the judicial proceedings brought in respect of the offences committed. These include the interventions in the Left Bank (Biscay, October 2002) and the Right Bank (Biscay, October 2002), Duranguesado (Biscay, November 2002), Ibaizabal (Biscay, November 2002) and Donostialdea (February 2003).

6. The effectiveness of the response of the Ertzaintza has been recognised and appreciated by the vast majority of Basque society. Thus, to give but one example, a sociological study of March 2002 revealed that, of all institutions, the Ertzaintza was the most appreciated and highly esteemed (78%), which represents an increase of 12 points on a similar study conducted in 1999; the Erzaintza was thus rated above the Parliament, the Judiciary, the trade unions and political parties.

The media has amply reported the operations of the Ertzaintza and a brief press review is appended to this note.

Vitoria-Gasteiz, 17 March 2003

Fdo. Javier Balza Aguilera

Consejero de Interior

IV. BUDGET AND STAFF

BUDGET

CCM	Article		Budget
70100	0000001	Remuneration of the permanent staff	393,200.00
70100	0000003	Remuneration of the temporary staff	52,400.00
70100	0000013	Employees MAD	1,316.00
70100	0000036	Emoluments of the Commissioner for HR	173,600.00
70100	0000080	Official journeys	120,500.00
70100	0000115	Interpretation	28,100.00
70100	0000116	Translation	34,000.00
70100	0000124	Document production and distribution	5,605.23
70100	0000129	Experts Consultants	7,000.00
70100	0000167	Representational expenses	3,600.00
70100	0000170	Meeting expenses	61,500.00
70100	0000392	Various expenses	394.77
		Total budget head:	881,216.00

A part of the activities of the Office of the Commissioner for Human Rights has been financed by voluntary contributions made by the Governments of Belgium, Finland, Luxembourg, Poland, Switzerland and the United Kingdom.

MEMBERS OF THE OFFICE*

1. PERMANENT AND TEMPORARY STAFF

Director of the Office

Mr Ekkehart MÜLLER-RAPPARD	up to 28 February
Mr Christos GIAKOUMOPOULOS	as from 1 April

Deputy to the Director

Mrs Caroline RAVAUD	up to 1 June
Mr Markus JAEGER	as from 4 June

Legal Officer

Mr Alexandre GUESSEL

Documentalist

Mrs Muriel DABIRI

Personal assistants

Ms Marina DILLON	up to 13 September
Mrs Christine GIGANT	

2. SECONDED STAFF (Administrators)

Mr Fernando MORA
Seconded by the Swiss Government

Mr John DALHUISEN
Seconded by the United Kingdom Government

Mr Gregory MATHIEU
Seconded by the Belgian Government — as from 1 April

Ms Satu SUIKKARI
Seconded by the Finnish Government — as from 2 September

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* Ms. Huguette Lambs (September-December) and Mrs. Firuza Tariverdiyeva (November-December) were recruited as short-term temporary assistants.
Mr. Elie Renard, Ms. Renata Siva, Ms. Anna Suchenek, Ms. Wiebke Trumm, Ms. Nigar Huseynova, Mr. Nino Karamaoun, Ms. Marie-Louise Tougas, Ms. Anja Snellman and Ms. Cristina Palazzo worked as trainees.

V. APPENDICES

APPENDIX I

REPORTS AND RECOMMENDATIONS

CommDH(2003)7

REPORT BY
MR ALVARO GIL-ROBLES,
COMMISSIONER FOR HUMAN RIGHTS

ON HIS VISIT TO THE HELLENIC REPUBLIC

2- 5 JUNE 2002

for the attention of the Committee of Ministers and the Parliamentary Assembly

[CommDH(2002)5]

Introduction

In accordance with Article 3 e) of Resolution (99) 50 of the Committee of Ministers on the Council of Europe Commissioner for Human Rights, I accepted the invitation addressed by the Foreign Affairs Minister for an official visit from the 2nd to the 5th of June 2002 and travelled to Athens with the Director of my Office, Mr C. Giakoumopoulos and Mr G. Mathieu, a member of my staff. Thanks are due firstly to the Minister for Foreign Affairs Mr George Papandreou and his colleague the Alternate Minister for Foreign Affairs Mr Tassos Giannitsis, as well as the Secretary General for European Affairs, M. Ilias Plaskovitis, for the kind reception, the openmind attitude and the arrangements made to ensure the success of my visit.

During my visit, I was given the opportunity to meet the Speaker of the Parliament, the Alternate Minister for Foreign Affairs, the Ministers of Justice and Public Order, the Secretary General of the Ministry of National Education responsible for religious affairs, the Secretary General of the Interior Ministry, the President of the Court of Cassation, the President of the Council of State, the Ombudsman, the Chairperson of the National Commission for Human Rights, the representative of the United Nations High Commission for Refugees, representatives of civil society and many dignitaries and representatives of religious groups. In addition to these contacts, I went on my own initiative to the Roma/Gypsy district of Aspropyrgos on the outskirts of Athens and made a point of visiting the premises of the Attica General Police Directorate in Alexandras Avenue where unsuccessful foreigners awaiting expulsion are detained on the 7th floor.

General remarks

1. Greece joined the Council of Europe very shortly after it was founded, on 9 August 1949. On 28 November 1950 it signed the Convention for the Protection of Human Rights and Fundamental Freedoms which it promptly ratified. It has signed and ratified Protocols Nos.1 and 7 together with the Protocol No.6 (abolition of capital punishment), and has signed Protocols Nos.12 (non-discrimination) and 13 (abolition of capital punishment in all circumstances). Greece, a European Union Member State since 1981 which will assume the Presidency of the European Union for the third time in January 2003, has embarked on major economic and institutional reforms in recent years, particularly with the revision of its Constitution in 2001.

2. After my visit, I came to the conclusion that certain areas deserve particular attention in the context of this report: justice and the prison system (I), religious freedom (II), the situation of minority or vulnerable groups (III) and immigration (IV).

3. For several years in fact, owing in particular to a heavy migration flow, the composition of the resident population has changed in such a way as to shatter the traditional conception of a very homogeneous Greek state. Political and social players have all gradually taken into account the various aspects of this diversification, the resultant challenges and the possible repercussions of this process on the human rights situation in Greece.

4. In this respect, the diagnosis and proposed solutions put forward by the institution of the Ombudsman and by the National Commission for Human Rights are significant by their objectiveness and accuracy and moreover apt to

have a vitalising effect on the inertia linked with a traditionalist view of society. This is to be welcomed, trusting that the authorities will be able to use the diagnosis and proposed solutions for everybody's benefit.

I. Justice and prison system

5. I discussed these issues with the presiding Judges of the Council of State, M. Christos Yeraris, and Court of Cassation, M. Stephanos Matthias and with M. Philippos Petsalnikos, the Minister of Justice. The recent constitutional reform introduced two new provisions (Articles 94 and 95 of the Constitution) making it possible to resort to coercive execution against state institutions and to apply a penalty for delay in executing judgements. The draft laws putting the new constitutional provisions into effect are in preparation and their tabling in Parliament is expected very soon, at all events before the end of the year. The concurrent reform to the administrative litigation system, providing for extension of the jurisdiction of administrative courts of first instance and appeal, should relieve the grossly overloaded case-list of the Council of State. Generally speaking, these reforms are additions to the list of new regulations which include Article 525 para.5 of the Code of Criminal Procedure, providing for review of proceedings and deletion of convictions from a person's criminal record where a violation of the European Convention on Human Rights has been found by the Strasbourg Court. In the short and medium term, these reforms should increase the effectiveness of the judicial system.

6. Regarding the problem of overpopulation in prisons, the Minister of Justice explained to me that the number of inmates had doubled in ten years. Moreover, the current prison population was 44% foreign. These two aspects raise new problems. The Minister told me of a scheme to build 17 new prisons but reported some local opposition. This is a situation already encountered by several European governments. I appeal to a dialogue between the Government and the elected representatives to ensure that the necessary construction of new prisons is effective as soon as possible. I am confident of the Justice Minister's determination to remedy the distressing situation currently being experienced in Greek prisons and to implement the full scheme as aforementioned.

II. Freedom of thought, conscience and religion

7. The authorities and certain representatives of religious minorities admitted that for several years the situation in this respect has shown important improvement. The case-law of the European Court of Human Rights has steered this trend towards conformity to the relevant European standards. The way in which the delicate question of mentioning the religion on identity cards was handled bears witness to this.

8. Over 97% of the population belong to the Greek Orthodox Church, headed by His Beatitude Archbishop Christodoulos with whom I conferred at length, is professed by. The Greek Constitution grants the Orthodox Church the status of "prevailing religion", which is not in itself incompatible with Council of

Europe standards as the phrase is construed by the high Greek courts to mean that the Greek Orthodox faith is the religion of the bulk of the population. According to the Constitution, this must in no circumstances lead to restrictions on the effective observance and full enjoyment of rights and fundamental freedoms secured to other non-Orthodox citizens.

9. Besides Archbishop Christodoulos, I met His Grace Nicolas Foscolos, Catholic Archbishop of Athens, His Eminence Mehmet Emin Sinikoglu, Mufti of Xanthi, representatives of the Jewish community in Greece and representatives of the Jehovah's Witnesses. I did not have the opportunity to meet representatives of other communities. The Church of Scientology handed me a file on its situation, referring in particular to the issue raised by a possible sect legislation.

10. My meeting with Mr Constantinis, Chairman of the Central Committee of Jewish Communities in Greece, left me with an impression of general satisfaction as to their position. He expressed the hope that his community would be able to benefit from the funds granted by the European Union and other bodies for heritage conservation such as old synagogues and old Jewish cemeteries. Lastly, Archbishop Foscolos put to me the problem of certain Catholic Church institutions having no legal personality, which was considered by the European Court of Human Rights in the Canea church case (Judgment Canea Catholic Church v. Greece). The Committee of Ministers held that law 2731 which came into force on 5 July 1999 should allow this question to be settled (Resolution DH (2000) 44 of 10 April 2000).

11. I raised several questions concerning religious freedom with the Secretary General for Religious Affairs, who showed a most receptive, understanding attitude. In his view, whatever solution the problems might receive, it must be applied necessarily in accordance with the spirit of the European Convention on Human Rights. In that regard, the continuation or commencement of liaison between representatives of the religious groups established in Greece and with the authorities should help settle any disagreements and perpetuate a climate of tolerance.

A. Proselytism

12. The first question relating to freedom of thought, conscience and religion relates to proselytism. Although the relevant legislation applies to everybody, Orthodox believers included, the former practice revealed some disproportion in prosecutions and convictions for proselytism to the disadvantage of minority groups. Since certain Court judgments were delivered (Kokkinakis v. Greece and Larissis v. Greece), prosecutions for proselytism has decreased markedly or even disappeared from the Greek judicial scene. The fact remains that proselytism is still subject to criminal sanction under laws 1363/1938 and 1672/1939 promulgated before World War II. I find that this puts needless pressure on religious or spiritual groups wishing to share their convictions in a law-abiding manner without recourse to subversive, coercive, deceptive or improper methods.

13. In my opinion, overt personal expression of belief is inherent in religious observance, everyone being entitled to display his convictions and try to win others over to them. Retention of criminal legislation in this respect seems outmoded and detrimental to respect for freedom of thought, conscience and faith. Here I support the proposal by the National Commission for Human Rights to have these provisions repealed. I would point out that repeal of these laws on proselytism does not signify that anything whatsoever should be permitted and tolerated on account of freedom of thought, conscience and religion, and this brings me to the issue of sects.

14. During our conversation with the Secretary General for Religious Affairs, the issue of a possible draft on sect legislation was raised. I told him that, as a matter of principle, such legislation should be thoroughly considered before it is actually tabled, since in my opinion a Penal Code with clearly defined offences should suffice to counter all criminal attempts carried out on the pretext of religious, esoteric or spiritual activities. The Council of Europe Parliamentary Assembly in Recommendation 1412 (1999) expressed its misgivings about legislation "based on value judgement concerning beliefs".

B. Places of worship

15. A second question, highlighted inter alia by the Manoussakis case before the European Court of Human Rights, a case whose upshot is being considered by the Committee of Ministers, relates to the legislation on places of worship. Under the aforementioned 1939 laws, the building of any non-Orthodox place of worship is subject to approval by the Ministry of National Education and Religious Affairs. As far as I am informed, refusals are very rare. There was one recently for the Scientological community. It is more disturbing, at first glance, that the Ministry invariably requests an opinion, albeit not binding, from the local Orthodox Bishop who must reply within 20 days. The foundations for this consultative procedure, in a sphere that is strictly the responsibility of the state authorities, are not clearly discernible. It would be desirable to amend the relevant legislation. Accordingly, it might be proposed in future to vest the Secretary General for Religious Affairs with sole authority responsible for applying an administrative procedure which takes into account the demands of public policy, civil engineering or town planning attaching to schemes to set up any new place of worship, in which procedure a hearing would be granted within a specified time to all interested parties without exception including the local bishop, as part of a prior public enquiry.

16. A question related to that of places of worship is the lack of an official mosque in Athens where, apart from the Greek Muslims, several thousand Muslims of foreign origin live as a result of the heavy migration flow. At present these worshippers, according to the report which I received from several NGOs with official confirmation, meet in clearly unsuitable places such as flats, basements, garages and other private premises. When this question was raised, the Secretary General for Religious Affairs – as well as Archbishop Christodoulos - assured me that he had no objection to the building of a mosque, but invoked potential local resistance. I appeal to the

solidarity, spirit of tolerance and good will of all concerned to pick out a place readily accessible to worshippers on which to build a mosque for Muslims established in Athens District. Nor is there any special cemetery for Muslims wishing to bury their dead in accordance with their own religious traditions. Consequently, those wishing to bury their dead religiously may be compelled to perform the burial in Thrace, the region where the Muslim minority recognised by the 1923 Lausanne Treaty is concentrated, or in their country of origin. For these Muslims, the authorities including local government would be well advised to consider the matter and find a satisfactory solution for burial in a decent manner upholding their religious traditions.

C. Conscientious objectors

17. Another issue concerns conscientious objectors. The many improvements made for some time past are certainly to be welcomed, particularly the implementation of law 2510/1977 and the recognition, in the revised Constitution, of a right to conscientious objection (Interpretative Resolution of 6 April 2001 on Article 4.6 of the Constitution); this development cannot be unrelated to the Tsirlis and Kouloumpas judgments by the European Court of Human Rights. It is nevertheless appropriate to recall Recommendation (87) 8 of the Committee of Ministers on conscientious objection to compulsory military service. I understand that since the right to conscientious objection received constitutional recognition, the reservation entered by Greece concerning this Recommendation has become void and I recall that the Recommendation stipulates inter alia that alternative service shall not be of punitive nature and that its duration shall remain within reasonable limits by comparison with military service. I find, though, that an extra term of 18 months as currently prescribed in Greece constitutes a disproportionate measure in practice, especially in the light of my information that this alternative service is often performed in a hostile atmosphere. It would be advisable to reduce the duration of alternative service to an equitable term by comparison with military service and work along the lines of recommendations from the Greek Ombudsman in order to rectify the disproportionate character of the present legislation.

18. I was informed by the counsel for the accused of the case of seven Jehovah's Witnesses liable to receive prison sentences on account of administrative errors, which they allegedly were not allowed to remedy subsequently, in drawing up their conscientious objector's papers. Likewise, I was informed of criminal proceedings pending against a conscientious objector liable to a prison sentence of several years for insubordination. In general, a custodial sentence for technical defects seems disproportionate to me. In this connection, transfer of administrative responsibilities as regards granting conscientious objector status from the Ministry of Defence to an independent civilian department would doubtless be a step in the right direction.

III. Minority groups in Greece

A. The Muslim minority in Thrace

19. The status of the Muslim minority in Thrace is defined essentially by the 1923 Treaty of Lausanne. This minority is made up of Turkish speakers together with the Pomaks using Slavic languages and some Roma/Gypsies. Their common feature is the Islamic faith, which is the reason for their being defined as "Muslim" minority, the only officially recognised minority in Greece. According officials, the minority is composed by 50% of Turkish speakers, 35% of Pomaks and 15% of Roma/Gypsies.

20. When I visited the Parliament, a member of the minority sitting in the Parliament, Mr G. Galip explained to me that for several years the situation of the community evoluted positively. He raised the question of the appointment of muftis by the State when some members of the community demanded election by the minority without official intervention. It should be noted that the muftis discharge judicial functions in civil law (marriage, divorce, inheritance, custody and emancipation of minors, maintenance) and because of the discharge of these judicial functions, the State exercises a right of supervision over the appointment of muftis, to whom it delegates certain responsibilities. The European Court of Human Rights found a violation of article 9 of the Convention in the case of Serif v. Greece in that the applicant had been criminally convicted for usurpation of the powers of the Mufti. A recent Court of Cassation judgment acquitting another person prosecuted for the same charge brings the Greek high court's case-law into line with the aforementioned Strasbourg Court judgment. H.E. Mehmet Emin Sinokoglu, Mufti of Xanthi, confirmed as for him the existence of a general feeling of contentment.

B. The case of the Roma/Gypsy community

21. It was not possible to obtain any exact figure as to how many Roma/Gypsies are present in Greek territory. According to the General Secretariat for Adult Education, a public body, the Roma/Gypsy population amounted to 150,000-200,000 in 1998. Almost half the Roma/Gypsy population of Greece are thought to have become settled, principally in the Athens region, while the other half are nomadic.

22. The Greek authorities are increasingly aware of the need to improve conditions for Roma/Gypsies. Thus I was favourably impressed by the seven-year plan (2002-2008) worth 308.2 million euros for assisting Gypsies, reported to me by Mr Vassilis Valassopoulos, Secretary General of the Interior Ministry and Co-ordinator of the Joint Ministerial Committee for Roma Affairs. Under this programme, to be funded to a level of 208 million euros by Community funds (Community Support Framework) and the remainder from national resources, the priority areas will be accommodation and services

(education, health, employment, culture, sport). Over 61 million euros will be allocated to promoting the employment of 17,000 Gypsies. A sum of some 60 million euros was earmarked earlier for construction work in Northern Greece at Serres, Didymoteihon, Thessalonica, and at Patras and on Corfu in the West. It is important that this programme should be duly and fully implemented.

23. The fact remains that the Roma/Gypsy population of Greece is highly vulnerable and at a disadvantage in many areas such as access to health care, housing, employment or schooling. It is worrying to observe that the implementation of the action plan meets frequent resistance at local level; I received confirmation of this from Mr Valassopoulos. Local authorities are sometimes unwilling to take in members of this minority group and to accept money from the state for improving their circumstances. If the plan is to succeed, it is crucial to educate the public in tolerance and raise its awareness of the benefits of a multicultural society. It would appear that local elected representatives often show little eagerness to act upon the initiatives targeting the Roma/Gypsy population. While appreciating that the action plan cannot be carried through without support from the local institutions, it may be recalled that in the end it is up to the Greek government to implement official policy and thus to overcome any obstacles.

24. At a more practical level, I wished to visit a place where some 20 Roma/Gypsy families are settled on the outskirts of Athens at Aspropyrgos. Words fail me in saying that I am grateful to the families for their reception, as these people live under conditions very remote from what is demanded by respect for human dignity, in particular without running water supplies among other essential services. I referred the situation to the Secretary General of the Interior Ministry Mr Valassopoulos, verbally and in writing, and asked him to take urgent measures for these families. I am glad I can state that his reaction to my requests was immediate. In a letter on the 28th of June 2002, he reminded the mayor of Aspropyrgos that an important financial contribution, exclusively dedicated to improve public utilities and infrastructures of the Roma/Gypsies of his district, was at his disposal and that urgent measures for running water supplies of this community must be taken. I am confident that M. Valassopoulos personal's dedication to human rights will overcome all obstructiveness from whatever quarter. Of course I was only able to visit one spot, but urgent action could be necessary or desirable elsewhere than at Aspropyrgos.

25. At Aspropyrgos I was able to meet the sister of Mr Christopoulos, a young Roma/Gypsy killed by a policeman's bullet when refusing to obey in a vehicle check. The policeman was dismissed and a criminal proceedings are pending on this issue; during our conversation the Minister for Public Order Mr Chrysochoidis emphasised the policeman's thoughtless reaction.

26. Finally, an NGO, the *Organisation mondiale contre la torture* (OMCT), condemned the evictions of Roma communities from their dwellings in Athens ahead of the 2004 Olympic Games and criticised the International Olympic Committee (IOC) for its silence. I was assured by all my official contacts that it was quite untrue and that all families needing to be possibly moved because

of the Games would be relocated on state-owned land. Apparently however, use of the Olympic Games argument is made by certain local authorities for refusing to take in Roma/Gypsy communities or hasten their departure, according to the people I met at Aspropyrgos. A future site of the Olympic facilities is indeed hard to imagine out there, so far from the centre and bordering on the refuse tip. I ask the Olympic organising committee to publish the list of proposed sites in order to prevent pressure from being brought to bear on families settled or wishing to settle in areas supposedly set aside for the organisation of the Olympic Games.

C. Right to identify oneself as one sees fit

27. As already stated above, the only officially recognised minority in Greece is the Muslim minority in Thrace defined on the basis of religion. According to ECRI, members of the Turkish-speaking community in Thrace are prevented from designating themselves as they wish, and this is regarded as an impediment to their freedom of expression. It has been generally observed in the past that Greek citizens belonging to groups defined by linguistic or cultural criteria could meet difficulties in exercising their right to freedom of expression or association and to identify themselves as they wish, a right secured in Article 3 of the Framework Convention for the Protection of National Minorities signed by Greece on 22 September 1997 but not yet ratified. During my visit I met someone who had been sentenced by the trial court to a suspended prison sentence for distributing a brochure of the European Bureau for Lesser Used Languages on the ground of "disseminating false information" about minority languages in Greece. This conviction was set aside by a ruling of the Athens Court of Appeal delivered on 18 September 2001. The ruling has been hailed as indicating greater receptiveness by the Greek authorities to the phenomenon of diversity in the society. I wholeheartedly endorse this approach; it would be a constructive development if Greece continued on this course and ratified the Framework Convention for the Protection of National Minorities and signed and ratified the European Charter for Regional or Minority Languages.

IV. Situation of foreigners (refugees, asylum-seekers and immigrants)

28. I discussed this topic with most of my interlocutors. The authorities admit that Greece is confronted by a major immigration phenomenon with an obvious impact on the country's demographic balance as 10% of the population now consists of foreigners who have arrived during the last decade. The authorities, whose current estimate of the number of immigrants in Greece is 900,000, seem to have been taken unawares and the appropriate legislative framework for coping with the phenomenon is still under construction. In this regard one should commend the efforts of the courts, particularly the Council of State, which have addressed the complex problems of respect for human rights connected with the immigration phenomenon by building up a case-law based on the European Convention on Human Rights and its interpretation by the Strasbourg Court. I also perceived an obvious resolve on the part of the Greek authorities to get to grips with the immigration phenomenon. I was

informed that immigration would be a leading theme of the next Greek Presidency of the European Union. It was agreed with the Deputy Minister for Foreign Affairs, Mr Giannitsis, to organise a seminar on immigration in Greece to coincide with its Presidency.

29. I explained that this phenomenon had to be handled in unison by the countries affected and that aid to the economic development of the source countries should be among the priorities. I do not think that anyone leaves their country in this way just for fun, or that immigrants, even illegal ones, should be regarded as criminals.

A. Regularisation of illegal immigrants

30. In April 2001 the government secured the passage of law 2910 on the entry and residence of foreigners, with the aims of introducing a long-term immigration policy, integrating migrants into Greek society, enhancing their personal and social rights and strengthening statutory safeguards against discrimination. Undocumented immigrants will accordingly be given "a second chance" to put their situation in order and granted the right to enrol their children in state schools. Migrants' unwillingness to lodge an application for fear of making their illegal situation known may account for the limited success of the regularisation process. The Ombudsman has recommended certain measures for better administrative management of the procedure, criticised as very laborious due in particular to under staffing. On 17 April 2002 the Interior Ministry announced that six-months residence permits about to expire would be extended until 31 December 2002. In addition, law 3013 of 1 May 2002 has amended the regularisation procedure along the lines recommended by the Ombudsman. The Secretary General of the Interior Ministry informed me of a four-year government programme for improving the conditions of migrants' reception and integration, and I consider its conscientious implementation a priority.

B. Measures to prevent violence against foreigners

31. According to several reports by various NGOs, police officers are regularly accused of making disproportionate use of force, usually against foreign residents; a news report on television which I watched during my stay told of a person identified as Albanian and who reportedly resisted his arrest being forcibly taken away in the boot of a police vehicle. The Minister for Public Order, M. Michalis Chryssochoidis, assured me that such cases were isolated. Nonetheless, the need to continue deploying educational programmes at all levels remains, particularly for instructing security forces in proper regard for human rights. Besides which representatives of these vulnerable groups should be included in the security forces; I am gratified to be informed of a plan to recruit several hundred Roma/Gypsy fire brigade members. I also consider that racist and xenophobic acts should receive exemplary punishment, particularly where committed by public officers. Here, I support the ECRI Recommendation (2nd Report on Greece, from 10.12.1999, accessible for the public since th 27th of June 2000, point 6), according to which it is necessary to strengthen the range of criminal law measures against offences of a racist or

xenophobic character, and criminal sanctions should take account of the culprits' possible racist or xenophobic motives. Despite the existing legislation against discrimination (described in the response of the Greek government to the ECRI's report) racist offences are not specifically defined and it is not expressly stipulated that a racist motive constitutes an aggravating circumstance. Thought should therefore be given to introducing appropriate statutory provisions.

C. Asylum seekers

32. Greece is on the itinerary of numerous asylum-seekers, and this requires the authorities to make special efforts to secure their rights as far as possible, particularly on arrival at the border. I am troubled by information originating chiefly from the Greek Council for Refugees concerning cases where entry was instantly refused without those concerned being given the opportunity to request asylum. The Ombudsman pointed out some cases of difficult access to the procedures defining the status of refugee in his Annual report 2001. The National Commission for Human Rights published, the 6th of June 2002, a comprehensive and detailed report in which are made concrete proposals to improve the reception of asylum seekers and to guarantee their right of access to the procedures defining the status of refugee. I join myself to this initiative and I draw attention to the content of my Recommendation concerning the rights of aliens wishing to enter a Council of Europe member state and the enforcement of expulsion orders. I would also recall the terms of Recommendation R(99)12 of the Committee of Ministers on the return of rejected asylum seekers.

33. I made a request, granted immediately, to visit the premises of the Attica General Police Directorate in Alexandras Avenue where some tens of aliens detained pending expulsion are held. They are detained in a place that is clearly unsuitable having regard to their number and to the length of their detention often extending over several weeks and even months, not more than three according to the legislation in force. However, the case has been brought to my attention of a person held there since March 2001, plainly an unreasonable length for a detention founded solely on administrative dictates. I was able to visually determine an obvious shortage of space, the lack of any facility for physical activities and outdoor exercise, and very precarious conditions of sanitation, leading up to the conclusion that in my view the conditions under which these people are detained amount to a breach of the obligation to prevent degrading treatments.

34. Pending the construction of new modern centres, as announced to me by the Minister for Public Order Mr Chryssochoidis, I put to him an oral and written request to take action that would speedily ensure living conditions more in keeping with European standards for persons awaiting expulsion and held on these premises.

35. The Minister for Public Order responded to my request by informing me in a letter dated 27 June 2002 of urgent measures in hand, such as the construction of prefabricated buildings. As to the conditions in the Alexandras detention centre, I also received the assurance that it was to be decongested forthwith, that the sanitation conditions would be tangibly improved, and that it would no longer be used to detain aliens in the process of expulsion.

36. I welcome this action, as it is my deep conviction that asylum seekers and migrants, whether awaiting expulsion or a decision on their application, should be offered conditions of accommodation in accordance with human dignity. I rely on the Ministers whom I met and found particularly alert to the immigration issue to ensure that this is achieved at an early date.

FINAL REMARKS AND RECOMMENDATIONS

37. Greece is fully entitled to rate as a country with a long-standing commitment to the values of human rights observance and the Greek authorities are aware of the fundamental role of human rights in the building of Europe today. The exchange of view I had during my stay with the Speaker of the Parliament, M. Apostolos Kaklamanis, and with other Greek officials convinced me that the challenges which Greek society faces today are being resolutely met by the authorities. In order to assist them in their action, and in accordance with Article 8 of Resolution (99)50, the Commissioner recommends :

    1) continuing efforts in order to apply in its entirety the scheme for the 17 new prisons;

    2) accepting the proposal by the National Commission for Human Rights to repeal the applicable provisions in force on proselytism (laws 1363/1938 and 1672/1939);

    3) amending the legislation in force concerning permission to set up places of worship and speeding the procedure to build a mosque and attributing a cemetery reserved for the Athens Muslims worshippers;

    4) amending the legislation on alternative civilian service in order to remedy to the disproportionate character of the legislation and considering the possibility to transfer the competences for granting conscientious objector status from the Defence Ministry to a civilian department;

    5) continuing the implementation forthwith the programme of the Joint Ministerial Committee for Roma/Gypsies with the dual priority of ensuring conditions consistent with human dignity in localities such as Aspropyrgos and ensuring that the Roma/Gypsies families possibly moved are going to be relocated properly;

6) ratifying the Framework Convention for the Protection of National Minorities, and signing and ratifying of the European Charter for Regional or Minority Languages;

7) implementing the 2002-2006 government programme to improve the conditions of immigrants' reception and integration and taking legislative measures in order to define as an aggravating circumstance the possible racist or xenophobe motivation of an offence;

8) discontinuing use of the detention facilities of the Attica General Police Directorate for long-term detention of aliens awaiting expulsion; in more general terms, giving a positive follow up to the proposals of the National Commission for Human Rights regarding the reception of asylum seekers and forfully enforcing Recommendation (2001)1 of the Commissioner for Human Rights concerning the rights of aliens wishing to enter a Council of Europe member state, and Recommendation (99)12 of the Committee of Ministers on the return of rejected asylum seekers.

38. In accordance with Article 3.f of Resolution (99)50, this report is addressed to the Committee of Ministers and to the Parliamentary Assembly.

ADDITIONAL COMMENTS

39. This report has been presented to the Committee of delegated Ministers of the Council of Europe, on September 11, 2002. At the end of this presentation and in the light of the comments brought by the permanent representative of Greece, the Commissioner decided to add the following precise details concerning the measures taken by the Greek authorities following his visit:

- The State authorities have taken all the necessary measures for the construction of a Mosque in Athens. The Mosque will be built at Paeania, near Athens, and the government has granted a large lot to this end;

- The Commissioner's proposal for an Islamic cemetery will be considered by the governmental authorities. In the meantime, it is clarified that the dead Muslims as well as dead people of any religion can be buried in the existing cemeteries which are under the jurisdiction of the municipal authorities;

- The question of the term of alternative military service is considered by the State authorities in the framework of the governmental reforms that are being discussed for the structure of the armed forces;

- All necessary measures have been taken in order that the Roma/Gypsy settlement of Aspropyrgos is provided with all public facilities;

- 20 Roma/Gypsy families residing in a site near the Olympic stadium belonging to others have been asked to leave this place because the 2004 Olympic Games Committee has decided to extend the Olympic installation into that area. The

authorities have assured the families that special measures have been take for their re- settlement. In fact, an agreement was signed between the Maire of Amaroussia and a representative of a Roma/Gypsy association (Elpida) under which the local municipality has undertaken the following:

1. provisional re-settlement in apartments belonging to the municipality
2. subsequent permanent settlement in houses to be built by the municipality
3. economic assistance between 440-1150 Euros (depending on the number of family members)
4. special assistance in clothing and food
5. a special plan has been elaborated by the municipality of Amaroussia for their integration in the local society

40. The Commissioner take note with satisfaction of those developments.

Alvaro GIL-ROBLES
Commissioner for Human Rights

CommDH(2003)7

REPORT
BY MR ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS,

ON HIS VISIT TO HUNGARY

11-14 JUNE 2002

for the Committee of Ministers and the Parliamentary Assembly

[CommDH(2002)6]

CommDH(2003)7

Introduction

In accordance with Article 3(e) of Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, I was pleased to accept the invitation extended by Mr Laszlo Kovacs, Hungarian Minister of Foreign Affairs, to pay an official visit to Hungary. I would like to thank the Minister for his invitation and for the resources he placed at my disposal throughout the visit to Budapest and Göd, from 11-14 June 2002. During this time, I was accompanied by Mr Zoltan Pecze, from the Directorate of Human Rights at the Ministry of Foreign Affairs and Ms Caroline Ravaud and Mr Fernando Mora, members of my Office. I should also like to thank the staff of the Hungarian Permanent Representation to the Council of Europe for their excellent co-operation and readiness to help before and during this visit. Finally, I should like to thank the Hungarian authorities for their openness and transparency. As well as for all the documents they provided before, during and after this official visit.

The visit began with a long meeting with representatives of Hungarian non-governmental organisations (NGOs), held at the premises of the European Youth Centre in Budapest. I also had an opportunity to meet Ms Monika Lamperth, Interior Minister; Mr Péter Barandy, Minister of Justice; Mr Laszlo Kovacs, Minister of Foreign Affairs; Mr Andras Barsony, Political State Secretary of the Ministry of Foreign Affairs; Dr Ibolya David, Deputy Speaker of Parliament; members of the parliamentary Committee on Human rights, Minorities and Religious Affairs; the Ombudsmen; Ms Kinga Göncz, State Secretary for Health, Social Affairs and the Family; the Presidents of the Minority self-government, and representatives of the Roma/Gypsy minority. I also visited the detention centre for foreigners at Budapest airport, the TOPhAZ hospital for children suffering from mental disabilities in Göd, the District VIII by foot and a Refuge Foundation hostel located in the same District.

General observations

1. Hungary was one of the first countries to benefit from the special guest status created by the Parliamentary Assembly in June 1989 for the parliaments of central and Eastern Europe. Following its accession to the European Cultural Convention (November 1989) and the country's first free elections (in March 1990), Hungary became the first country from central and Eastern Europe to join the Council of Europe, on 6 November 1990. Now an applicant state to the European Union, Hungary is pursuing EU membership negotiations with a view to their completion by the end of 2002 and EU membership from 1 January 2004. At national level, this is reflected in far-reaching institutional changes and a willingness to conform to existing EU legislation.

2. As regards respect for human rights, Hungary has signed and ratified the European Convention on Human Rights and its Protocols N° 1, 4, 6 and 7; it has signed Protocols N°12 and 13; it has also signed and ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, the European Charter for Regional or Minority Languages, the Framework Convention for the Protection of National Minorities and, in 1999, the European Social Charter. Generally speaking, Hungary has made significant progress in a very short time, and this fact deserves to be highlighted. This report is based on the Hungarian Government's stated wish to improve the situation further. It was in this spirit that I found it essential it consider further in this report certain issues raised during my meetings with parliamentarians, members of the government, local

authorities and non-governmental organisations (NGOs), as well as certain observations made during visits on the ground. These concern the rights of minorities and of the Roma/Gypsy community (I); protection of certain vulnerable groups (II); the rights of detained persons (III) and of foreigners and asylum seekers (IV); finally, certain questions relating to freedom of association (V).

3. The major reforms undertaken in the economic and institutional fields in recent years have been reflected in considerable progress in Hungarian society. Nonetheless, the speed of these reforms has left certain disadvantaged groups behind, and they have borne the brunt of the economic crisis. The authorities are aware of the challenges now posed to Hungarian society by this two-tier development and are resolved to meet them head-on. I am confident that their work will produce the expected results.

I. Rights of minorities and of the Roma/Gypsy community

Rights of minorities

4. The legislative and institutional framework for the protection of minorities in Hungary is particularly well developed. During my visit, I had an opportunity to meet members of the 13 minority self-governments, which are officially recognised in Hungary. I was able to exchange views with representatives of the German, Slovak, Bulgarian, Ukrainian, Slovenian, Greek and Croat minorities, who informed me of their opinions and concerns. All acknowledged that the 1993 Law on National Minorities had helped considerably in resolving the discrimination and integration problems faced by minority communities in Hungarian society, but also indicated that certain problems persisted.

5. One problem mentioned by all the representatives concerns appropriate representation of minorities in Parliament. Parliamentary representation of minorities, provided for in the Constitution, was to have been introduced via implementing legislation, something the Constitutional Court pointed out as far back as 1992. Even now, however, this constitutional requirement has still not been matched by appropriate legislative action. At the same time, political representation of minorities does exist at local level; but here too, the minority representatives expressed their concern that representatives are not elected solely by members of each minority, but by the electorate as a whole; this concern was again expressed by representatives of Roma/Gypsy organisations whom I had occasion to meet during the visit I carried out to District VIII in Budapest. The Deputy Speaker of Parliament and the members of the Parliamentary Committee on Human Rights, Minorities and Religious Affairs, to whom I conveyed these reservations, acknowledged that it is time to analyse the effects of the 1993 Law and, if necessary, amend it.

6. We also discussed a draft law on the fight against discrimination. Ms Lamperth, Interior Minister, expressed an interest in receiving my opinion on this draft law, which has been presented by the Ombudsman for minorities. Needless to say, I am prepared to examine the draft law in question as soon as it is finalised and when the Minister considers it timely to contact me.

7. Finally, the national minorities are also calling for greater resources so as to develop their programmes, and a better co-operation policy with the local administrative authorities.

The Roma/Gypsy community

8. The Hungarian authorities have been making considerable efforts to improve this community's situation for some time. Indeed, it is clear that the Roma/Gypsy community in Hungary includes an intellectual elite and is fighting for its rights, with tangible objectives. By including Roma/Gypsy candidates on the electoral lists of national parties, the Roma/Gypsy community has succeeded in obtaining a number of seats in Parliament. In addition, the various representatives and leaders of the Roma/Gypsy community whom I personally met are perfectly conscious of the nature and scale of the problems they must tackle. They are also ready to act in a determined and organised way. For my part, I must pay tribute to their lucidity, resolve and willingness to fight at all levels of public life to ensure that their rights are fully recognised, in particular through exercise of their civil rights in the various electoral processes. To a certain extent, this situation is also due to the authorities' official policy, and I hope that this will continue. I was informed that the Prime Minister intends to establish a post of deputy State Secretary with responsibility for Roma/Gypsy affairs, within his office, in the very near future, and this is a particularly positive move. Indeed, I met the Roma Member of Parliament who, in theory, is to be appointed to this post, and had an opportunity to speak to him, particularly during my visit to Budapest's District VIII.

9. Following the visit to District VIII, the Roma/Gypsy community organised, at my request, a meeting with leaders from Hungary's various regions at the premises of Radio C, a Roma/Gypsy radio-station based in this District. Several NGOs and Roma/Gypsy organisations were present and we had a long discussion that was both very cordial and productive on the problems encountered by the community.

10. The Roma/Gypsy community is undoubtedly the group most directly affected by the adverse impact of Hungarian society's transition to a market economy. Its members must now deal with difficult situations arising, *inter alias*, from job insecurity, discrimination in access to education and the lack of decent housing.

11. In terms of access to employment, there is no doubt that Roma/Gypsies were the first to lose their jobs when the market economy was introduced. Frequently less technically qualified than other employees, they were – and still are - the first to be made redundant. In addition, the prejudices to which they are often subject mean that they face considerable difficulties in maintaining or re-finding employment. According to information I received from community representatives, more than 60% of Roma/Gypsies would appear to be currently unemployed.

I know that governmental employment programmes exist already at county level with a view to ensure training assistance for unemployed individuals and that the government has the strong intention to improve the situation in this field. I welcome this stand.

12. Unemployment has an immediate impact on access to housing, and the situation is scarcely better for those who do have accommodation. Frequently, the latter can no longer pay rent or maintenance costs, and landlords take advantage of this situation to evict them, demolish substandard buildings and subsequently erect new buildings in which flats are offered at rates that they cannot afford. Many Roma/Gypsy families thus find themselves homeless or in run-down and unsanitary housing, as I saw for myself when visiting Budapest's District VIII; according to various sources, this district is not in fact the city's most dilapidated. The same phenomenon, or even worse, is to be found in other regions of Hungary, particularly in the east of the country, where living conditions for all citizens, and Roma/Gypsies in particular, are especially difficult and the unemployment rate is highest.

13. The community's representatives called for the immediate adoption of an assistance plan. Such a plan would be targeted at fighting discrimination as regards employment, through the adoption of a legislative text and particularly the introduction of tangible measures to encourage the creation of small enterprises. More specifically, it would appear necessary to envisage measures that would facilitate access to loans by Roma/Gypsies, e.g. by making provision for direct financial assistance and/or providing partial government guarantees for loans contracted between Roma/Gypsy enterprises and banking institutions. Consideration might also be given to granting tax breaks for entrepreneurs who employ Roma/Gypsies.

14. At the same time, it is necessary to set up vocational training programmes for the community, so that those individuals who are unemployed because of insufficient qualifications can find work.

15. The Roma/Gypsy community's third cause for concern is access to education. The absence of good-quality education may indeed be a factor in current and future discrimination against this community. I took note that particular emphasis was put by the Hungarian authorities on scholarships to Roma/Gypsy students by increasing the total scholarship amount by 16 in the last 5 years. For the school year 2001-2002, for example, the number of scholarships announced is 12777.

16. According to the information I received from the community representatives and my other speakers, Roma/Gypsy children are systematically placed in so-called special, or "C", classes; these classes are also said to receive children from underprivileged backgrounds, who suffer from a social handicap as a result, and the academic level is consequently lower. About 70% of the pupils in "C" classes are said to be Roma/Gypsy children and follow a simplified curriculum, without experienced teachers and with poor facilities. Thus, poverty and Roma/Gypsy origin are allegedly a fat of discrimination in access to education, and this inevitably makes it highly likely that inequalities and social discrimination will be perpetuated. It is clear that this situation must end as soon as possible: the "C" classes must disappear and the State must instead provide resources for academic support and assistance to the most disadvantaged children, so that this flagrant discrimination is halted.

II. The situation of certain vulnerable groups

17. The situation of certain particularly vulnerable groups was mentioned during my meetings with NGOs and the Hungarian authorities. The latter informed me of the measures they intend to take and the programmes that they wish to develop.

Domestic violence against women and children

18. According to the information received, domestic violence is common, and women would appear not to receive adequate protection from the police, who are often the first authority to be contacted by them. Apparently, the concept of inviolability of the marital home means that, where assault occurs, the police allegedly often do no more than inform the female victim of her right to begin formal proceedings.

19. The other problem raised was the lack of reception facilities for battered women. Very few such centres currently exist, and most of these are run by private humanitarian organisations. In fact, the state subsidies that were granted in the past have been cut or have even disappeared, with the result that many centres have had to close their doors.

20. With regard to child victims of sexual violence, the main problem is that proceedings sometimes last for more than two years: there are no appropriate centres where child victims can stay during this time and the child would remain within the circle that abuse of him. This shortcoming could be particularly serious in cases where the presumed aggressors are family members.

21. The Interior Minister, to whom I conveyed my observations, was sensitive to these problems and aware of the need to analyse the phenomenon of domestic violence in depth and take tangible measures to tackle it, beginning with more intensive training for police officers in the area of protection for women and children. I found the same awareness at the Ministry for Health, Social Affairs and the Family, together with a wish to tackle this social scourge with appropriate and urgent measures, according to the Junior Minister.

Children suffering from mental disability

22. I visited the TOPhAZ centre for children suffering from mental disability in Göd (about 30km from Budapest). 220 children, aged from one to eighteen have been placed here (although I thought that I could spot several who were clearly older). Some of them are very badly ill. I observed the considerable pedagogical efforts being made by the staff, and their devotion and tenderness towards the patients, some of whom have been bed-ridden for several years on account of illness.

The building, opened in 1977, is showing its age, resources are uncertain but suitable and there is a clear need for additional space, particularly to enable the centre to accept patients in the 3-4 year age-group, who remain on waiting lists for at least six months to a year. According to the Director, there is an acute shortage of such institutions and those that do exist require additional resources if they are to fulfil their role properly.

23. These establishments must immediately be provided with the necessary material and human resources, as appropriate, as well as financial resources corresponding to their needs.

Homeless persons

24. I believe it is essential to mention the situation of one particularly vulnerable section of society: homeless persons.

25. In Budapest alone, which has a population of two million, there are allegedly about 6000 homeless persons, according to estimates provided by the Refuge Foundation; this figure does not include individuals who have not been identified as homeless because they have not requested assistance or contacted a refuge. In calculating the number of homeless persons, it is now necessary to include pensioners, who, on account of the closure of "workers' hostels" (at prices they could afford), are said to be unable to afford moderately priced accommodation and end up on the street.

26. Budapest has 60 night shelters and three hostels for homeless people. I was able to visit the Refuge Foundation's centre in Budapest's District VIII, where I observed for myself the scale of the problem and noted that the homeless population includes not only elderly people, but also individuals of about 45-50 years who had lost their jobs. When I asked whether many members of the Roma/Gypsy community used these centres, I was told that this did occur, but not frequently, on account of the tradition of family solidarity within that community.

27. This experience leads me to emphasise the need to establish protection programmes for the most disadvantaged groups in society, who have been hit by the economic crisis and who cannot be reintegrated into the labour market on account of their age or physical or mental health. Accordingly, it is essential to create suitable establishments and allocate sufficient resources for running them, or to consider partnerships with non-profit private organisations that are willing to co-operate in ending this worsening situation.

The homosexual community

28. With regard to the homosexual community, the two main issues raided by NGO representatives are, firstly, the continuing difference in treatment between homosexuals and heterosexuals as regards the age of consent for sexual relations, as set out in Article 199 of the Criminal Code. This article has recently been abolished by the Constitutional Court. The Justice Minister's opinion in this matter is that the question should be resolved by legislative means rather than through the courts.

29. The second problem concerns the exclusion of homosexuals from military service, solely on the basis of their sexual orientation, on the grounds that they are allegedly suffering from mental illness, which is obviously unacceptable.

III. The rights of detained persons

30. This heading will cover certain issues concerning arrest, police detention, custody and prison conditions, as well as various questions concerning committal to psychiatric units.

Arrest, police violence

31. The Hungarian police has been subject to frequent and numerous criticisms in recent years, including that made by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) in its reports on visits in 1994 and 1999 (particularly the report on the visit from 5-16 December 1999, para. 14 onwards). In particular, this criticism has focused on the severity, even brutality, which the police has allegedly shown towards Hungarian citizens, especially members of the Roma/Gypsy minority (a matter also raised by the European Commission against Racism and Intolerance (ECRI) in its 2nd Report on Hungary, adopted on 18 June 1999). Although the situation has now improved, certain grievances persist. According to human rights organisations, 1,200 complaints are lodged annually against the police for ill treatment, but on average few are successful on the grounds that the majority are allegedly based on unreliable testimony.

32. Criticism is also heard of the police's inability to protect citizens effectively, especially the vulnerable groups in society.

33. During my visit to the police station in Budapest District III, I met the heads of the municipal police, who assured me they were aware of the problem; however, they claimed that the police cannot respond fully to citizens' expectations, firstly because of a lack of suitable staff training and, secondly, because of inadequate financial and staff resources. Specifically, they believe there are currently 10,000 police officers working in Budapest, and that an additional 1000 police officers were needed, 600 of whom are needed for road safety duties alone.

34. I discussed this situation with Ms Monika Lamperth, the Interior Minister, who informed me of the measures she had taken. She had already begun by appointing a new Director General of Police, and she expected that new measures would be adopted rapidly in order to eliminate such behaviour. In particular, Ms Lamperth informed me of her intention to integrate members of the Roma/Gypsy community into the police force, a move that would certainly facilitate better relations between the police force and this community.

Detention conditions in prisons

35. According to data provided by Mr Istvan Bökönyi, National Director of the Prison Administration, there are 32 prisons in Hungary, 14 of which are exclusively for convicted adults prisoners, the remainder being for persons in pre-trial detention and minors (562 youths, aged 14-18). In total, there were said to be 11,011 places available and on the day of my visit to the Budapest District Prison, the prison population was 17,823 detainees. 4122 people were seemingly in pre-trial detention,

and about 13,000 persons had been sentenced to imprisonment. There were said to be 1082 women prisoners, 288 of whom were being held in pre-trial detention. Finally, there were allegedly 853 foreigners being held in the Hungarian prison system.

36. These figures reveal a serious problem of prison overcrowding (60% more prisoners than places). The authorities are aware of the problem, especially the Minister of Justice, who told me that new prisons are being built. However, these measures will not be sufficient to resolve the problem completely. At best, the rate of prison overcrowding would fall by 20% or 30%. This situation raises questions about the reasons for the size of the prison population and the possible use of alternative forms of punishment for minor offences, rather than prison sentences. The Minister himself suggested that this solution be looked into.

37. I observed the problem of prison overcrowding when visiting a prison establishment in Budapest's District V, used exclusively for receiving and redistributing detainees (in transit) from other regions or towns; consequently, this establishment is not used as a detention centre for prisoners serving sentences. In the course of various meetings and individual conversations with prisoners, I heard no allegations of ill treatment within the prison, but there were criticisms of the clear lack of space and absence of activities for prisoners (apart from the daily one-hour walk).

Pre-trial detention in police stations

38. The question of persons held in pre-trial detention in police stations deserves particular mention. In order to understand the experience of these detainees more clearly, I asked to carry out an unscheduled visit to a police station in which persons in pre-trial detention are held. The visit took place in District III of Budapest, and I must thank Ms Monika Lamperth, the Minister, for her co-operation in arranging this.

39. This police station had eleven cells, in which up to three persons were held. In one cell there were three women; in another, two minors. Six of the detainees had been held for more than 150 days; they were on the fourth floor, and could go out for only one hour per day to a very small courtyard. The detainees with whom I spoke did not report ill treatment: on the other hand, they did complain about the length of time they had been held in such conditions and the total lack of contact with the duty lawyers.

40. However, this problem is widespread, since approximately a third of persons in pre-trial detention are held in unacceptable conditions in police stations for many months at a time, a fact the CPT had already highlighted in the above-mentioned 1999 report (para. 42-44 of the CPT report, ibid).

41. The authorities confirmed that although some police stations had been closed because of their dilapidated state, there were apparently between 400 and 500 persons currently still detained (under police arrest or in pre-trial detention) in 13 district police stations in Budapest, which would appear not to have appropriate facilities for detention of this kind.

42. Conscious of this situation, Parliament has established a maximum period of two months for pre-trial detention in the Code of Criminal Procedure. However, the entry into force of this reform, essential for protecting detainees' human rights, has been postponed until 2003.

43. It is now urgent that this reform enter into force as rapidly as possible, so that pre-trial detention occurs in prison establishments that have been designed for this purpose and that meet the required criteria, which police-stations clearly do not.

Committal to psychiatric establishments

44. Committal of an individual is an extremely sensitive issue: it is the state authorities' duty to surround the procedure with a maximum number of practical and legal guarantees in order to avoid any form of abuse. In the case of Hungary, placement of patients suffering from mental illness in psychiatric hospitals is governed by recent legislation and requires a medical report within three days of the patient's admittance.

45. With regard to the living conditions in these establishments, the CPT had criticised the use of caged beds and net-beds in its report on Hungary. During my meeting with the NGOs, they drew my attention to the existence of such net-beds in eight of the 52 establishments included in a recent study. Following my conversations with the Ombudsmen on this subject, they said that this had indeed been the case until very recently, but that these beds had now practically disappeared. The State Secretary for Health, Social Affairs and the Family, and the Justice Minister, referred to the 1991 Law, which clearly prohibited the use of caged beds; there are still net-beds, but their number is very small and the procedure was gradually disappearing as progress was made in providing more staff for psychiatric establishments. The Minister and the State Secretary believe that the problem lies not so much at legal level as in the fact that the law is not always respected in everyday practice. I call on the relevant authorities to ensure that these procedures are totally abandoned and that both legislation and practice guarantee effective and ongoing supervision of any decision regarding committal to psychiatric units.

46. The question of placing certain patients suffering from mental illness in "welfare hostels" raises other problems. Those welfare hostels are intended for elderly people and, consequently, do not have the appropriate resources to provide medical care for people suffering from mental illness; equally, since they are not classified as internment centres, there is no medical or judicial framework for these persons' placement.

47. I drew the authorities' attention to the risk of abuse inherent in this situation, particularly on the part of unscrupulous families, who could take advantage of a family member's temporary or permanent disability. The Junior Minister for Health, Social Affairs and the Family indicated that she was in agreement with ending placements in these establishments and substituting more suitable forms of care for persons suffering from mental illness persons.

IV. Foreigners and asylum-seekers

48. Its geographical location makes Hungary a transit country for economic migration, and it is consequently subject to the pressure of illegal immigration flows towards European Union countries. The authorities are fully aware of this situation, and show a genuine desire to control the phenomenon whilst simultaneously respecting human rights. Considerable progress has been made in the area of right to asylum, and the situation of asylum-seekers has improved substantially. The 1997 Law on Asylum allows asylum seekers to obtain legal aid and assistance. It further gives the UNHCR representatives the possibility to take part in the process that determines the status of refugee.

49. However, out of a total number of 9000 asylum-seekers in 2001, only 174 obtained refugee status; in addition, it appears that in most cases insufficient reasons were given for decisions rejecting asylum applications. In my meetings with the Interior Minister, I emphasised the need to guarantee all asylum seekers effective access to the procedures for deciding on refugee status, including the right to have a lawyer and to appeal should one's application be rejected. While noting that Hungary's average acceptance rate for asylum applications was higher than that in European Union countries, Ms Lamperth informed me of her intention to call a meeting of specialised NGOs in the near future so that they could discuss arrangements for co-operation. I can only support this initiative.

50. In addition, it seems that very few measures have so far been taken to facilitate the integration of those receiving refugee status or persons whose entitlement to temporary protection has been recognised. I am aware that the government is in the process of setting up an integration programme for such individuals in Debrecen, a region that has been badly affected by the economic crisis and is relatively poor; according to local NGOs, it offers few opportunities for successful integration. I conveyed this concern to the Interior Minister, emphasising the need for a policy that will avoid the creation of ghettos. I am sure that she is monitoring this affair very closely.

51. As for the detention of foreigners who enter the territory illegally and are threatened with expulsion, the period of detention should in principle be limited to 30 days; after this period, foreigners should be transferred to open establishments where they could be at large until such time as they are repatriated.

52. Finally, I should like to congratulate the immigration service at Budapest airport on all the measures it has taken to provide an appropriate transit area and reception centre where the rights of persons arriving on Hungarian territory illegally or without papers are respected.

V. Freedom of association

53. The right to set up and belong to a trade union organisation is not only recognised by Article 11 of the European Convention on Human Rights and guaranteed in the European Social Charter, but is also one of the essential pillars of

any democracy. In Hungary, this right is also recognised in the Constitution. It is exercised through legally constituted trade unions; I met the representatives of these organisations.

54. The Hungarian trade unions condemned the resistance, not to say obstruction, put in the way of exercise of freedom of association, particularly by foreign-capital companies that have entered the Hungarian market and primarily hypermarkets and supermarkets. Although the presence of foreign investors is of prime importance for economic development, in a democratic society this goes hand-in-hand with fundamental social rights, such as freedom of association, the right to respect for employees' dignity, the right to have a salary commensurate with one's experience and professional skills, and non-discrimination in access to employment. Prime responsibility for ensuring that these rights are respected lies with the authorities; without these rights, prosperity would be short-lived. Bearing in mind the unemployment figures, the difficulties in access to employment experienced by women (between 45-50) and disadvantaged groups, such as the Roma/Gypsies, and the fact that the lowest wages are taxed, the social divide between those with resources to survive and those without them is likely to widen. Experience shows that trade unions are aware of social unease before it is too late and tend to propose solutions. In the ministries, I met people who are willing to take tangible measures. For this reason, I believe it is important that dialogue continue between both sides of industry or be introduced where it is lacking. Management and labour can only benefit from such a move.

FINAL COMMENTS AND RECOMMENDATIONS

55. Human rights are respected in Hungary. Having successfully taken up the challenge of consolidating democratic institutions and moving to a market economy, the country is now facing the challenge of joining the European Union. The authorities are conscious of the advantages and disadvantages entailed by the rapid development of Hungarian society. In order to assist and encourage them in their task, and in accordance with Article 8 of Resolution (99) 50, the Commissioner recommends that Hungary:

1. adopt legislation that would allow for representation of minorities within Parliament, as provided for in the Constitution, and analyse the effects of the 1993 Law with a view to amending it if necessary;

2. pursue the already existing employment programmes and provide an assistance plan for the Roma/Gypsy community, with a view to combating the discrimination they face in access to employment, through legislative measures and targeted financial help;

3. increase the number and improve the quality of vocational training programmes for the Roma/Gypsy community, and provide their children with high-quality and non-discriminatory education;

4. analyse the phenomenon of intra-family violence and draw up a programme of specific measures to tackle it, beginning with more targeted training for police officers in the area of protection for women and children;

5. establish care programmes for elderly people and persons suffering from mental illness, including the opening and/or rehabilitation of suitable establishments to which sufficient funds are allocated;

6. develop further training programmes for police officers, particularly in order to eliminate potential police violence, and ensure that adequate procedures exist in cases of abuse;

7. put into effect the revised provisions of the Code of Criminal Procedure concerning pre-trial detention, and simultaneously take urgent measures to

   ensure that pre-trial detention occurs in prison establishments intended for this purpose;

8. ensure that both legislation and practice guarantee effective and ongoing supervision of any decision regarding committal to psychiatric establishments;

9. consider the possibility of cooperating with the specialised NGOs in the reception process for foreigners and asylum-seekers;

10. ensure that freedom of association is scrupulously respected by all interested parties in Hungary and that social dialogue is instituted where absent.

56. In accordance with Article 3(f) of Resolution (99) 50, this report is addressed to the Committee of Ministers and the Parliamentary Assembly.

ADDITIONAL COMMENTS

57. This report has been presented to the Committee of delegated Ministers of the Council of Europe, on September 11, 2002. At the end of this presentation and in the light of the comments brought by the permanent representative of Hungary, the Commissioner decided to add the following precise details concerning the measures taken by the Hungarians authorities following his visit:

I. Measures in relation to the Roma/Gypsy community

- Within the Prime Minister's Office under the authority of Political State Secretary Mr. László Teleki, a State Secretariat in charge of Roma affairs was established during the recent administrative changes. For the improvement of coordination within the administration, special ministerial commissioners responsible for Roma issues are being appointed in the ministries concerned.

- Within the Ministry of Employment Policy and Labour a Directorate General for Equal Opportunities was created this summer. One of the main tasks of this Directorate General is to facilitate the integration of the Roma community in the field of employment. The Directorate General also intends to reduce the inequality of opportunities hitting disabled persons and women. Simultaneously the Ministry of Employment and Labour has launched a programme for equal opportunities which aims at overcoming social and regional disadvantages.
- In August 2002 within the Ministry of Education a ministerial commissioner responsible for the disadvantaged and Roma children's rights was appointed. The task of the commissioner is to ensure equal access to education, and to establish integrated education.
- The draft Law on the National Housing Fund is under preparation. This piece of draft legislation aims at improving the housing conditions of the disadvantaged families with low income. The government supports the social housing programme, and with the involvement of local authorities has launched a programme directed at assisting families living in unsanitary conditions.
- The new comprehensive anti-discrimination act, which is likely to be adopted during the course of next year, will be a milestone in the fight against discrimination in general, and also in particular in the struggle against the discrimination of the Roma community in access to employment and education, and police misbehavior. The draft law is being prepared with the involvement of a wide-range of non-governmental organizations.
- Professional conciliation on the amendment of the Criminal Code had started at the beginning of August 2002. According to this draft, hate-speech will be considered as a crime, and will be punished with imprisonment up-to three years.

I. Measures taken concerning asylum-seekers and refugees

According to the recent (2002) amendment of the 1998. Government Decree on the provision and assistance of asylum seekers and refugees the Office of Immigration and Nationality may launch programmes targeted at facilitating the social integration of refugees. The first such pilot project will be launched in September 2002.

II. Reform of the criminal procedure

Act No. 19 of 1998 on Criminal Procedure will enter into force on the 1st of January 2003. Its provisions substantially amending the institution of detention on remand will enter into force on the 1st of January 2005.

III. Steps taken with respect to income policy

As of 1 September 2002, the minimal wage is exempt from taxation.

58. The Commissioner takes note with satisfaction of those developments.

Alvaro Gil-Robles
Commissioner for Human Rights

CommDH(2003)7

REPORT
BY MR ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS,

ON HIS VISIT TO ROMANIA

5-9 OCTOBER 2002

for the Committee of Ministers and the Parliamentary Assembly

[CommDH(2002)13]

CommDH(2003)7

Introduction

In accordance with Article 3 e) of the Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, I accepted the invitation addressed to me by the Romanian Minister of Foreign Affairs, Mr Mircea Geona, to make an official visit to Romania, from 5 to 9 October 2002 in Bucharest. I was accompanied on this visit by the Director of my Office, Mr Christos Giakoumopoulos, and by two members of my Office, Mr Fernando Mora and Ms Satu Suikkari; Mr Nino Karamaoun helped us with its planning. Above all, I should like to thank the Minister Mr Geona for his invitation and the resources which he made available throughout the visit, as well as the President of the Republic Mr Ion Iliescu and the Prime Minister Mr Adrian Nastase, with whom I had an opportunity to speak during my stay in Bucharest. I should also like to thank the Permanent Representation of Romania at the Council of Europe and the authorities in Romania for their valuable co-operation in the preparation and accomplishment of this visit. Lastly, I wish to stress the openness, availability and accessibility of the various Romanian government authorities, without whom such an ambitious programme would not have been possible.

I was thus able to meet the Minister of Justice, the Minister of Labour and Social Solidarity, the Secretary of State of the Ministry of Health and the Family, the General Prosecutor, the President of the National Council for Combating Discrimination, the People's Advocate (Ombudsman), the Secretary of State for Child Protection and Adoption, the Secretary of State of the Ministry of the Interior, Under-Secretaries of State from the Department of Interethnic Relations of the Ministry of Public Information, members of the Chamber of Deputies Commission for Human Rights, Religious Affairs and National Minorities, members of the Senate Commission for Human and Minority, members of the Parliamentary Group of National Minorities, representatives of the main Romanian trade unions, and representatives of civil society. I also spoke with the Minister of Education and Research during his visit to Strasbourg on 16 October of this year. In addition to these meetings, visits were organised, at my initiative, to the Roma/gypsy district of Ferentari, the Codlea prison, the Codlea orphanage, the Giurcani centre for children with mental disorders, the Ghimbav and Luminita children's placement centres, the Urlati Neuropsychic Rehabilitation and Recovery Centre, the Iasi Community Safety and Mediation Centre, a shelter in Bucharest for victims of trafficking in human beings as well as shelter for victims of domestic violence.

General observations

1. After joining the Council of Europe on 7 October 1993, Romania ratified the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention) and its first, fourth, sixth and seventh protocols on 20 June 1994; it has signed Protocol No. 12 (prohibiting discrimination) and No. 13 (abolishing the death penalty in all circumstances). Romania also signed and ratified the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment in 1994, the Framework Convention for the Protection of National Minorities in 1995, and, in 1999, the European Social Charter (revised).

2. The process of transition from a totalitarian State to a democracy is not without its hitches. It generally entails a period of uncertainty and a feeling of helplessness that afflicts all sections of the population; some evoke the image of going through a tunnel to describe it. In Romania's case, the latter image may be thought all the more striking and appropriate given the oppressive legacy of the communist system. Over thirty years of dictatorship had the effect of instilling an ideology based on systematic rejection and exclusion of difference and on marginalisation of elements considered out of line with the existing system.

3. Since then, far-reaching structural reforms – economic, legislative and institutional – have been undertaken, with accession to the European Union resolutely at the heart of political and civic action in Romania. The efforts being made reflect the support of the Romanian authorities and people for today's European values: democracy and respect for human rights.

4. This report is therefore intended as a tool to support the Romanian authorities' firm determination to combat social exclusion and promote respect for human dignity and tolerance. It will successively examine, (I) the judiciary and police, (II) the situation of certain vulnerable groups, (III) the problems of minorities and the Roma/gypsy community, together with some questions relating to (IV) the Ombudsman, (V) freedom of expression, (VI) work and social solidarity and (VII) co-operation with civil society.

I. JUDICIARY AND POLICE

5. The Romanian government has introduced an ambitious programme of legislative reform for the judiciary and for the demilitarisation of police. Judicial reform includes revision of the Criminal Code and Code of Criminal Procedure, covering matters such as arrest and pre-trial detention, enforcement of sentences, and witness protection. Furthermore, demilitarisation of the prison service has entered its final stage with a bill being considered by Parliament. It emerged from my meetings that the adoption and effective implementation of these reforms was one of the main priorities of Mrs Rodica Stanoiu, the Minister of Justice, and of the Secretary of State for the Interior, Mr Pavel Abraham. However, some questions remain concerning the powers of the General Prosecutor, prison overcrowding and police behavior.

The General Prosecutor

6. An area of concern relates to the extensive powers of the General Prosecutor to bring extraordinary appeals against judicial decisions**,** notably in civil matters. The General Prosecutor has the power to seek nullification of final or non-final judgments on a number of grounds, including that the court in question has exceeded its jurisdiction.

7. In a number of civil cases, the European Court of Human Rights has found the manner in which this power was exercised to be in contrary to Article 6.1 of the European Convention. In all these cases, the Romanian Supreme Court of Justice, had set aside a final and irreversible decision of a court, compromising the

principle of legal certainty. The first judgment on this matter was the *Brumarescu case* rendered by the European Court in 1999, the latest judgments were given in summer 2002.

8. The modifications introduced to the Section 330 of the Code of Civil Procedure remain insufficient. I regret that new grounds have indeed been introduced to the law by an emergency ordinance adopted in 2001, for instance 'obviously ungrounded judicial decisions' - which makes the exercise of this power even more discretionary than before. I note that this ordinance also extends the time limit for requesting reopening from 6 months to one year. This prolongation is regrettable.

9. I raised this issue with the General Prosecutor, M. Tanase Joita. He would be in favour of further modifications in the law, and even that such a power be transferred from the General Prosecutor to another body. He felt, however, that this power cannot not be abrogated altogether, since there are lot of final judgments that would have been taken in violation of the law.

10. I would like to underline the need to ensure that the Romanian legislation be promptly changed so as to limit the presently excessive possibilities of reopening final civil judgments. Even before further modifications to the law are introduced, efforts have to be undertaken to ensure that the current law is interpreted and applied in a very restrictive manner both by prosecutors and courts so that no further violations of Article 6.1 of the European Convention occur. In light hereof, I consider that renewed efforts should be made in order to reinforce the taking into account in Romanian Law of the European Convention and the judgments of the European Court.

Prisons

11. The Romanian prison service will soon be demilitarised, and training and rehabilitation programmes for juvenile prisoners are under way with assistance from the Council of Europe. These developments are particularly encouraging, and during my visit to Codlea prison I noted the authorities' efforts to improve prisoners' living conditions. However, the prison service is facing serious problems, in particular the dilapidation of many of the prisons and, above all, chronic overcrowding. According to information from the Ministry of Justice, there should be 37 143 regular places in prisons,[32] whereas the number of prisoners at the time of our visit totalled 50 886; the number of available beds was only 47 656. Thus the overall occupancy level for prisons is 137% and there is a manifest shortage of beds. My visit to Codlea prison, which has an occupancy level of 197% and where 25 prisoners are regularly held in cells designed for 15, clearly illustrated the situation. I was all the more concerned to learn that some prisons had even higher occupancy levels, rising to 353%.

12. Being aware of the problem, the authorities keep the highest rates of overcrowding for open prisons, where the prisoners work during the day and are therefore not continually faced with the acute lack of space. However, this solution cannot be other than very temporary. The fact that several prisoners received pardons during

[32] The number of available places is calculated on the basis of 6 m² per person.

my visit demonstrates that changes in prison policy are both possible and expected. Given that, for economic reasons, there are no plans to build new prisons at the moment I would urge the authorities to develop a system of alternative penalties, effective management of release on parole and a judicial policy requiring moderation in the use of detention. I welcome the efforts of the Ministry of Justice in this direction and invite it to complete these reforms as soon as possible. Furthermore, in this context, I encourage the authorities to publish the reports of the European Committee for the Prevention of Torture (CPT)[33].

Police

13. The two reports on Romania by the European Commission against Racism and Intolerance (ECRI)[34], together with the European Commission's 2001 and 2002 regular reports on Romania's progress towards accession[35], specifically deplore the behavior of the Romanian police. However, the number of complaints reporting police abuse, especially towards the Roma/gypsy minority, is steadily growing. These assertions were echoed by the NGOs I met on the spot that cited cases of unwarranted police raids, use of physical force during questioning, and illegal and disproportionate use of firearms. It is essential that thorough inquiries be led by the authorities against the public officers perpetrators of these reprehensible acts and, if need be, that appropriate sentences be rendered[36].

14. In addition, the training programmes launched by the authorities to change police officers' attitudes to vulnerable groups must be intensified. Closer collaboration with NGOs in preparing such programmes would be desirable. Similarly, I would encourage the Government to continue its co-operation with the Council of Europe, especially for preparing training programmes and manuals on police ethics.

II. SITUATION OF CERTAIN VULNERABLE GROUPS

Children

15. In the past, the Romanian system of child welfare was based on the theory of institutionalisation. It was intended to marginalize and exclude children (orphans and others) considered out of line with the system. Following the fall of the communist government in 1989, the competent authorities found themselves facing a considerable challenge: reforming a system that was rotten at the base. At the same time, a large number of international adoption agencies established themselves in Romania and succeeded, in a very short space of time, in bringing about a liberalisation of the adoption market. Given the serious problem of dilapidated and overcrowded orphanages, adoption, and especially international

[33] It has to be noted that the CPT carried out 3 visits in Romania, in 1999, 2001 and 2002.
[34] CRI(99)9 and CRI(2002)5
[35] SEC (2001) 1753; SEC (2002) 1409
[36] It is important to note a process of demilitarisation of police was undertaken in August 2002, transferring responsibility for investigation and prosecution to the civil authorities.

adoption, emerged as the preferred option for the authorities at that time. In June 2001, under the pressure of a European Union report that compared this practice to trafficking in human beings, the Romanian authorities imposed a moratorium on international adoption. Despite the laudable intentions behind the introduction of this moratorium, its enforcement has created a regrettable situation, since many children whose adoption procedures were interrupted found themselves in a precarious position, their fate being uncertain.

16. I wished to recall the complex and difficult situation faced by the Romanian authorities in the field of child welfare in order to emphasise more clearly the considerable efforts made over the past few months, and which I was able to observe during my stay in Bucharest. My discussions with the Secretary of State for Child Protection, Mrs Gabriela Coman, and the Prime Minister Mr Adrian Nastase, allow me to state that Romania is determined to improve, and indeed to resolve, the situation of abandoned children.

International adoption

17. International adoption of Romanian children has caused much ink to flow over the past few years. Before the imposition of the moratorium, some practices revealed that it might not respect children's rights and that it was not always in the child's best interests. Indeed, reports referred to the growth of a veritable market for international adoption with reprehensible commercial practices. I am thinking in particular of certain adoption agencies which went so far as to publish photos of children for adoption on their website. However, Romania was one of the first States to ratify the United Nations Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

18. These two Conventions state that placement of the child, in the case of adoption abroad, must not result in undue material profit for the persons responsible, approved bodies must be strictly non-profit-making. As the rapporteur of the Council of Europe Parliamentary Assembly has observed[37], a sentiment with which I concur, “The purpose of international adoption must be to provide children with a mother and a father in a way that respects their rights, not to enable foreign parents to satisfy their wish for a child at any price.” The belief in a right of adoption is erroneous and dangerous inasmuch as it tends to convert international adoption into a market governed by the laws of supply and demand.

19. As for the international adoption applications suspended by introduction of the moratorium, the figures that I was shown by the Secretary of State for Child Protection and Adoption indicate that implementation of the government decree passed in December 2001 is proceeding satisfactorily. As at 2 October 2002, 611 applications had been successful. Processing of applications must continue in order fully to resolve this unfortunate situation as soon as possible.

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[37] *International adoption: respecting children's rights*, Parliamentary Assembly Recommendation 1443 (2000)

20. During our meeting, the Secretary of State told me of the existence of four bills to establish a new legal framework for child welfare. They had been submitted to the European Commission for its opinion. She also informed me of problems encountered by the authorities in interpreting subparagraph 21b) of the United Nations Convention on the Rights of the Child and asked for my opinion on the matter.

Subparagraph 21b) establishes the principle of subsidiarity for international adoption, specifying that such adoption "may be considered as an alternative means of child's care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child's country of origin". The difficulty with this provision lies in determining the degree of subsidiarity specified for international adoption. Some claim that it implies total subsidiarity, and therefore a national solution must always be preferred, even if this means putting the child in an institution. The need not to uproot the child and the importance of preserving his/her cultural heritage is often advanced to support this argument. However, the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption, adopted four years after the United Nations Convention and also ratified by Romania, seems to invalidate this argument, since in the third paragraph of its preamble and in subparagraph 4b), it confirms and clarifies the principle of subsidiarity for international adoption. These provisions emphasise the advantage of offering a child a permanent and suitable family, without necessarily denying or ignoring other care options. They underline the importance of a permanent family life, without, however, laying down the rule that a child should always be placed in a family rather than in an institution or non-family environment.

Furthermore, two other factors seem to militate against the theory of total subsidiarity. On the one hand, according to the statistics that I was given, the average age of children being taken into international adoption is 10 months. This substantially weakens the assumption of cultural deracination. On the other hand, an excessively restrictive interpretation would run counter to the modern theory of social reintegration of disabled children and orphans, to which paragraph 23(3) of the *Convention on the Rights of the Child* makes specific reference. Consequently, I am of the opinion that the child's best interests require the idea of total subsidiarity to be dropped. However, it remains the case that national adoption must be preferred and encouraged, as well as, where appropriate, placement in specialised group homes. Moreover, given the considerable progress made by Romania in establishing decentralised childcare institutions, the option of caring for a child outside the family at the local level, provided that appropriate care is available and the child's development is encouraged, should not be categorically rejected in favour of international adoption. Conversely, the child's interests may require a foreign adoption procedure to be initiated even though a family exists inside the country, because, for example, he cannot receive nationally the care needed for the special handicap from which he is suffering. Since each case is an individual case with its own special features, the subsidiarity principle for international adoption must always answer the child's best interests.

21. I note with satisfaction that, in Section 3, the Romanian bill for a legal framework for adoption lays down guidelines applicable to all adoption decisions. The child's best interests, the importance of a family environment, and subsidiarity for international adoption thus have to be taken into consideration and are given the status of fundamental principles. That said, in view of the controversy surrounding international adoption, it would have been desirable for a ban on undue profits to have been expressly included in the wording. I am nevertheless persuaded that this principle is generally enforced by the competent authorities given the Romanian ratification of the Convention on the Rights of the Child and the Hague Convention on Protection of Children and Co-operation in respect of Intercountry Adoption.

Institutions for abandoned children

22. The government's 2001-2004 strategy for the protection of children in need makes provision for allocating large sums of money to restoring and, above all, closing large and dilapidated institutions (orphanages) from the Ceaucescu era, described by a number of NGOs as death-trap orphanages. At the same time, this strategy provides for the establishment of smaller foster homes and rehabilitation centres providing education and specialist care. Thus 31 establishments were closed during 2001 and 34 others were in the process of being so. The number of institutionalised children dropped from 50 000 in 2001 to 43 000 in 2002, while 40 000 others were placed in smaller foster homes. The reform to transfer orphanage management to local authorities has had encouraging results. The visits made confirmed this situation.

23. Visits were undertaken to the *Codlea* orphanage and the *Ghimbav* placement centre, both in the county of Brasov, and to the *Luminita* placement centre in Bucharest. The living conditions in these three establishments were more than adequate. The rooms were clean and comfortable, and the food served was of good quality. A range of activities, such as art, theatre and music courses, together with access to a computer room, were available to the children, including those suffering from mental disorders. Paediatricians, nurses, psychologists and other trained staff were present and available in sufficient number. Similarly, all the children attended school. In other words, these three institutions encouraged the children's harmonious growth and the development of their abilities. They are the fruit of substantial investment over the past few years and constant effort on the part of the Romanian authorities.

24. A visit was also made to the Camin Spital in Giurcani, in the county of Vaslui. Sixty-two children, forty boys and twenty-two girls, live in this institution near the border with Moldava, sharing eight dormitories between them. Its state of dilapidation is undeniable. The lack of heating in winter, the size of available beds and the lack of trained staff is worrying. Nevertheless, I believe that the material conditions, although far from ideal, are dignified in the main. This is partly attributable to the positive atmosphere reigning in the establishment since the appointment of a new director. Similarly, it must be pointed out that the relevant authorities told us that the orphanage was to be closed; the children will be transferred to smaller foster homes and two new rehabilitation centres. That said,

it is important that the process of closing dilapidated institutions should continue, whilst ensuring that supervisory programmes are established to promote the social integration of young people leaving such institutions, notably because they have reached their majority.

Preventing abandonment

25. The closure of obsolete orphanages, the humanisation of conditions in existing orphanages, the introduction of solutions other than institutionalisation and substantive reform of the legislation on international adoptions certainly constitute important advances in the field of respect for children's rights in Romania. Even so, I feel that further progress can and must be made by framing a genuine policy for preventing abandonment.

26. The frenzied birth-control policy of the Ceaucescu era and the communist system of assumption by the state of responsibility for unwanted children have institutionalised the abandonment of children, something that still afflicts Romania today. Side by side with the material and financial assistance to families provided for under the child-protection bill, I call on the government to develop an anti-abandonment awareness and education campaign. The anxieties expressed to me by Mr Radu Deac, State Secretary at the Ministry of Health and the Family, about the low birth rate must be reconciled with the requirement to combat child abandonment. Likewise, the possibility of setting up reception centres for mothers which, among other things, would support and advise the mothers of newborn babies must be carefully examined.

Victims of trafficking

27. Trafficking in human beings continues to be a serious problem in Romania, both as a country of origin and transit, and to some extent also a country of destination. The vast majority of victims are women and girls who are trafficked for sexual exploitation. Children, including children with disabilities, have been trafficked to work on streets as beggars or thieves.

28. Whilst no official estimates exist on the total number of victims of trafficking, the International Organization for Migration (IOM) estimated that as many as 20.000 women are trafficked from Romania each year[38]. According to the statistics of the Ministry of the Interior, a great demand market is developing in the Balkan countries[39]. Between January 2000 and August 2002, the IOM assisted 566 victims returning to Romania, the vast majority of whom had been trafficked to Bosnia-Herzegovina, "the former Yugoslav Republic of Macedonia", Albania and Kosovo. Trafficking in large numbers occurs towards several Western countries mainly for the purposes of prostitution or labour.

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[38] See *2002 Regular Report on Romania's Progress towards Accession*, Commission of the European Communities, SEC (2002) 1409, 9 October 2002.

[39] See report by the Ministry of the Interior: *Brief presentation of the latest developments in fighting against trafficking in human beings and tackling illegal immigration*, 2002.

29. I raised the issue of trafficking with the Prime Minister, Mr. Adrian Nastase, and the Secretary of State of the Ministry of the Interior, Mr. Pavel Abraham. The Government has indeed made putting an end to this tragedy a priority by notably adopting in December 2001 a law for combating trafficking in human beings. It criminalizes trafficking and notes that such activities constitute a violation of human rights and a violation of the dignity and integrity of a person. The law includes provisions on assistance and protection to the victims, and foresees a number of measures to prevent trafficking. However, It was reported to me that law enforcement officials in many cases still regard trafficked persons as offenders rather than victims. It is therefore important to intensify the training efforts for police officers, prosecutors and judges on the implementation of the new law. The fact that grounds on which victims of trafficking are exempted from criminal charges on prostitution are too limited in the new law also seems to be a concern.

30. I welcome the adoption of the National Plan for Combating the Trafficking in Human Beings of 2001 and the active involvement of the Government in regional and international efforts to combat trafficking.[40] Regional and international approaches are indeed of utmost importance to combat simultaneously the root-causes and the demand in the destination countries.

31. A visit was made to a shelter for victims of trafficking in Bucharest, which is a partnership between the Romanian Ministry of the Interior, the IOM and the Estuar foundation, a non-governmental organization commissioned for providing customized assistance to the victims of trafficking. The Centre provides assistance in voluntary return, transportation, shelter services, trauma counselling, job and life skills training, medical care and legal assistance. This being said, the lack of adequate shelters and recovery services, particularly with regard to long-term support in reintegration is still a concern. I would like to encourage local authorities to establish such shelters in partnership with local non-governmental organisations so that victims in all parts of the country would have access to the appropriate protection and assistance required in the new law.

32. My attention was drawn to the potentially negative effects of migration laws for victims of trafficking, in particular emergency ordinance No 112 of 2001 on sanctioning offences committed outside the Romanian territory by Romanian citizens or by stateless persons domiciled in Romania. A victim of trafficking who has illegally crossed the border of a transit or destination country, could be prosecuted in Romania on the basis of this law for such border-crossing. This would seem to be in contradiction with the victim approach upon which the law against trafficking is based.

Persons with mental disabilities

33. My conversations on the spot and the reports of the specialised NGOs in Romania appear to show that difficult living conditions in many psychiatric institutions hamper the development of their inmates. Most of these establishments are over-crowded; ideas of privacy and a private life are virtually non-existent. In

[40] The afore-mentioned report by the Ministry of the Interior includes detailed information on these measures.

addition, educational programmes designed to encourage inmates' independence are thin on the ground. All these problems appear to be due to under-financing. Here it is important to stress the important difference between the allocation of funds for the restructuring of child-protection institutions and that for adults with mental disabilities. The reform of child-protection institutions is subsidised from the central budget and by the European Union, the World Bank and the US Government[41], while much smaller resources are granted to institutions for adults with mental disabilities. This situation is regarded as worrying on the grounds that it could gradually cause the condition of such adults to be marginalized.

34. Despite this, the three visits I paid to institutions for persons with mental disabilities (namely the Giurcani, Judet and Urlati institutions) demonstrated to me that, generally speaking, the Romanian authorities have effected an important change of "attitude" in the way such persons are treated, particularly by taking better account of their need for education, integration and privacy. The State Secretary for the Handicapped, Mr Constantin Stoenescu, informed me of a national strategy for the protection and social integration of handicapped persons which has been drawn up in consultation with the NGOs. This strategy provides for, inter alia, the setting up of new programmes in co-operation with local and/or international NGOs.

35. Finally, although the right to work of persons with mental disabilities is recognised by the Romanian constitution, only very few support, research and work-training services are devoted to them (what was observed at Judet was a particularly good example of what can be done). The special allowance made by the Romanian Government for adults and children with mental disabilities [42] remains insufficient to live on. The authorities should try to ensure that persons who are to receive such an allowance can lead a life of dignity.

Victims of domestic violence

36. Domestic violence affects particularly women and children, but also the elderly. In addition to the physical and psychological consequences of such violence, it often renders its victims vulnerable to other human rights abuses[43].

37. I welcome that steps have been taken in recent years on the legislative front in order to combat domestic violence, as was informed to me by the Minister of Justice. Some of the most serious shortcomings in the past legislation were addressed by law No. 197/13 of November 2000, which modified and completed some dispositions of the Penal Code. It introduced stricter penalties for physical violence and rape when the victim is a family member, new penalties in relation to a sexual act with a minor and a prohibition of a convicted rapist to return back for

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[41] Inclusion Europe, *Human Rights of Persons with Intellectual Disability*, Country Report Romania, January 2002

[42] It should be stressed that the social-security system in Romania comes under three ministries: Ministry of Health, Ministry of Labour and Social Solidarity and the State Secretariat for Handicapped Persons

[43] According to a research conducted by the IOM, victims of abuse are among those most vulnerable to fall victim for trafficking.

a determined period in the family living place. It also abrogated the widely criticized provision which lifted penalties for a rapist who subsequently married his victim. The Minister of Justice informed me that during the first semester of 2002, 111 (100 men, 11 women) persons were sentenced on the basis of the provisions of domestic violence.

38. This being said, efforts are still needed in order to implement the new provisions of the Penal Code in a more efficient manner. It was brought to my attention that women do not always receive adequate protection from the police. Perception of domestic violence as a private matter still seems to be prevailing in many places, sometimes rendering police officers indifferent in the face of such violence. Training and awareness raising of the new provisions of the penal law are therefore of utmost importance. While such training already exist, it was brought to my attention that the efforts are not yet sufficient. The Government should have a structured training programme covering all regions of the country.

39. I was informed that the Parliament is currently discussing proposals for a law on the protection of victims of domestic violence. Such a law should be more detailed on various aspects relating to domestic violence, including stronger measures to protect the victims and to prevent future violations. I would like to urge for a prompt adoption of this law and I would welcome a strong involvement of non-governmental organisations in its preparation. I would also like to refer to the recent recommendations adopted by the Council of Europe on this issue, namely recommendation (2002) 5 of the Committee of Ministers on the Protection of women against violence and recommendation 1582 (2002) on Domestic violence against women adopted by the Parliamentary Assembly.

40. Finally, during the visit of the Community Safety and Mediation Centre in Iasi, it was reported to me that bringing a case of domestic violence is often very difficult in practice. For instance, it seems that medical professionals often apply different standards in determining the period needed for recovery depending on the professional status of the victim. Another problem raised was the inadequacy of shelters for victims of domestic violence. Few such centres currently exist, and there seem to be regional imbalances. There are centres for victims of domestic violence in all the six sectors of Bucharest, some of which also have a shelter, while the situation in other parts of the country is even bleaker. I would like to encourage more shelters to be established elsewhere in the country with the support of the Government.

III. MINORITIES AND THE SPECIAL SITUATION OF THE ROMA/GYPSY COMMUNITY

41. A number of Romanian national institutions concern themselves with the protection of the rights of minorities. They include the Secretariat for Inter-ethnic Relations at the Ministry of Public Information (with three directorates, for the Roma/Gypsies, the Hungarian minority and the German minority respectively), the Council for National Minorities composed of all the minorities with seats in Parliament and the Ombudsman. The Senate and the Chamber of Deputies each has a committee on human rights, [religion] and minorities. The National Council against Discrimination also plays an important part in this field. I was able to meet representatives of all these bodies during my visit.

42. On the basis of the result of the 1992 census[44], the Romanian Government considers 17 minorities to be covered by the framework convention on respect for national minorities, while 20 minority languages are recognised, with some of these minorities possessing schools. In addition, the Local Government Act authorises the official use of minority languages in areas where they are spoken by over 20% of the population. According to the Minister for Education and Research, Mrs Ecaterina Andronescu, great efforts are being made to ensure that minorities are taught their language and thus their culture and traditions. For example, in the north of the country there is a pilot project for the opening, in a village of 300 persons belonging to the Csango community[45], of a school providing teaching in the Hungarian language.

43. The representatives of minorities in Parliament have reported to me their anxieties about the way in which the traditional minorities and migrants are lumped together as regards the rights specific to each of them. I am however convinced that the national authorities will be able to find a solution to this problem and I invite them, in that aim, to keep up the dialogue with minorities and migrants. I also invite the Romanian authorities to ratify the European Charter for Regional or Minority Languages as well as to examine the possibility of ratifying Additional Protocol No 12 to the European Convention on Human Rights, which forbids any form of discrimination.

The special situation of the Roma/Gypsy community

44. In 2001 Romania adopted a governmental strategy for improving the conditions of Roma/Gypsies[46] under its action plan to eradicate discrimination. This strategy has resulted in the setting up of a joint committee for application and follow-up, ministerial commissions and county offices and in the appointment of local experts; all these bodies and individuals work exclusively on Roma/Gypsy matters. A State Secretary has also been appointed; a member of that community currently fills this position.

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[44] The results of the 2002 census are still provisional

[45] A working party is currently examining the situation of this community in order to establish its status – community, minority – at national level

[46] The Government of Romania, Ministry of Public Information, *Strategy of the government for improving the condition of the Roma*, Bucharest 2001

45. On the occasion of the meeting with the NGOs and of my visit to Ferentari, a Roma/Gypsy area of Bucharest, I had an opportunity to talk to Roma/Gypsy representatives and to observe the deplorable living and hygiene conditions afflicting part of that community. Refuse is dumped more or less anywhere, in particular near houses. This is a serious public-health problem. The measures that need to be taken seem to me to be simple and realistic. Nevertheless, it is imperative for town hall and local residents to work together; otherwise any solution is doomed to failure. It was also reported to me that heating and hot-water supplies had been cut off in a number of local properties because of unpaid bills left by previous occupants. I learned that many of the existing residents of those properties were rigging up dangerous electrical connections in response to this situation. All this poses undeniable risks of fire and electrocution, with their consequent potential for high costs, and I call on the authorities to take the proper steps as soon as possible.

46. I also visited a neighbourhood school. During my chats with teachers and pupils, I was told that no distinctions were made on the school premises in the treatment of pupils, all of whom were regarded as Romanian. There is little doubt that this approach is the best, namely to have a single school for all Romanian children regardless of origin.

47. The Roma/Gypsy community suffers greatly from poverty, unemployment, lack of schooling, lack of access to health care and justice and discrimination in all its forms. Likewise, according to Roma/Gypsy organisations, one of this community's growing concerns is the "anti-Roma/Gypsy phenomenon", which is gaining ground both in Romania and in Europe.

48. It is important that Roma/Gypsy leaders become fully aware both of the problems confronted daily by their community and of its real needs. To this end, closer collaboration and the maintenance of a dialogue with the new generations of Roma/Gypsies[47] must be encouraged in order to ensure that specific actions and suitable policies are proposed.

Access to health care

49. Several members of that community informed me of the great difficulties encountered in access to health care. For example, hospitals have refused care to sick children. They have been admitted to the emergency department only when their condition has deteriorated. Most of these irregularities appear to be due to the fact that Roma/Gypsies do not have the identity documents required for access to health care. Although it is essential that the community take the necessary steps to obtain such documents, the authorities should make the process easier, for example by reducing the costs connected with the issue of birth certificates, which in the view of many Roma/Gypsies are exorbitant.

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[47] It is important to stress that the rising generations appear to be dissatisfied with certain leaders of the community who, in their ignorance, are helping to perpetuate various stereotypes with respect to the Roma/Gypsies. Report on the Human Rights Situation as regards Roma in Romania, Aven Amentza, Centre for Public Policies.

Employment

50. Although the whole Romanian population of working age is affected by unemployment, the Roma/Gypsy community remains the most affected by it. According to the NGOs, this situation is worsened by the failure to apply equal-opportunity legislation in practice. Legal proceedings should be taken against employers who explicitly state in their job advertisements that no Roma/Gypsies need apply, and against the newspaper publishers who publish such advertisements.

51. I remain convinced that, with the development of the national strategy for Roma/Gypsies, reintegration policies will enable members of that community possessing qualifications to find jobs and those without them to take part in training activities. It is also important to join with the private sector in establishing programmes to encourage the recruitment of Roma/Gypsies. I appeal to the authorities to continue their policy on behalf of that community and to allocate the necessary resources.

The National Council against Discrimination

52. This council's function is to give practical everyday expression to the principle of equality laid down in the 1991 Romanian Constitution, under which all citizens are equal regardless of their race, nationality, ethnic origin, religion, gender, opinion, political allegiance or social origin. It is also required to institute information and prevention programmes and to impose fines for behaviour found to be discriminatory, even when the latter results from a public authority. The Council enjoys full financial autonomy until 2006 and its president is named for a period of 7 years in order to insure continuity in the policies brought forward. It also appears that the procedure of appointment and dismissal of the president is well defined by the law in order to shield it from undue political pressure. With regards to the actual absence of representatives of vulnerable groups on this body, the authorities informed me that the Council was presently studying the advisability of hiring members of the Roma/Gypsy community.

53. I learned from my interview with Mr Cristian Jura, the president of the Council, that since this institution started operation in August 2002 it has examined 200 complaints covering a wide range of different questions, including access to schooling, recognition of qualifications and sexual equality on the labour market. It is too early to report in detail on the activities of this body but I encourage it to remain independent and effective in the exercise of its powers.

IV. THE OMBUDSMAN

54. During our meeting, the People’s Advocate – “Avocatul Poporului”- Mr Ioan Muraru informed me that he was continuing to deal with complaints lodged by persons whose civil rights and freedoms had been abused by the public authorities. He stressed that the vast majority of complaints concerned wrongful actions by the

police, domestic violence, restoration of ownership, and the right to a decent standard of living and social assistance. He nevertheless deplored the fact that his recommendations were not heeded by the authorities.

55. It was moreover apparent that due to lack of adequate human and financial resources, the Ombudsman was not yet in a position to open other offices. Regarding his Bucharest office, it is located inside a governmental building that also houses police quarters, notably barracks. In my view, public access is difficult [48]. I therefore invite the Romanian authorities to assist the work of the People's Advocate by arranging an early removal to premises easily accessible to all.

V. FREEDOM OF EXPRESSION

56. When I met the NGOs, the provisions of the Romanian Penal Code that limit journalists' activities were spoken to me condemnation. I accordingly broached this subject in my talks with the Minister of Justice Ms Mihaela Rodica Stanoiu and with the Committee on Human Rights, Religious Affairs and National Minority Issues of the Chamber of Deputies.

57. Until very recently, Romanian legislation on libel and defamation prescribed heavy fines and also suspended or non-suspended prison sentences, which was in blatant contradiction with European standards. On 23 May 2002 an emergency ordinance was adopted, abolishing the offence of insult to the authorities and reducing the maximum prison sentences for libel against private individuals and officials. This revision of the Penal Code is a step in the right direction.

58. Nonetheless, certain matters of concern persist. For instance, considering that Article 10 of the European Convention establishes a presumption of freedom of expression, it is regrettable that in libel and defamation cases the burden of proof is placed firstly on the defendant who is compelled to prove the truth of his statements. However, in its Dalban judgment against Romania[49], the European Court considers it unacceptable for journalist to be debarred from expressing critical value judgements unless he or she can prove their truth. In addition, whereas the Court holds that the limits of acceptable criticism are wider for a politician than for a private individual, Romanian legislation still punishes the offence of libel more severely an official than when it concerns a private individual.

59. Having regard to the foregoing and to the continually growing number of charges of defamation and libel brought before the Romanian courts, a legislative reform is necessary: reversal of the burden of proof is essential; the journalist's good faith must have precedence and preference over the truth of the statements as a ground of defence; the possibility of punishing these offences with a prison sentence must be abolished; the principle of proportionality should guide any pecuniary penalty. Having pointed this out, I observe that the Minister of Justice is seriously looking into this matter, as demonstrated by the document handed to me, which draws comparisons between Romanian legislation on defamation and libel and similar

[48] For instance, the identity check at the entrance can act as a deterrent.

[49] Judgment in the case of *Dalban v. Romania*, 28 September 1999, application nº 28114/95.

provisions originating from certain Council of Europe member states. But I should like to recall that in this area the terms of Article 10 of the European Convention, and above all the construction placed on it by the Court, are the most suitable guides and absolutely must be central to any proposed reforms. The requirements deriving from the Court's case-law as regards freedom of expression represent no more than the minimum standard to be met, whereas a tendency towards decriminalisation of defamation and libel is starting to appear in Europe[50].

60. Finally, the latest ECRI report on Romania[51] condemned the attitude of the Romanian media, specifically the printed press, for their tendency to sensationalism. Likewise, it is clear that a number of journalists do not trouble to verify the soundness of their statements before making them public. Both these shortcomings mean that the journalistic profession's credibility and image are besmirched, and this debasement of the ethics of journalism furnishes arguments in favour of more stringent control over freedom of expression. In order to break the vicious circle, it is crucial to introduce proper self-regulation mechanism. The preparation of a code of professional conduct and the formation of an independent body responsible for its application would represent significant steps in that direction. I urge the Government to encourage and support such action.

VI. LABOUR AND SOCIAL SOLIDARITY

61. The Romanian Constitution secures the freedom to form and join trade unions, the right to work, the right to social security and the right to strike. The issues relating to social rights and trade unions were raised both with Mr Marian Sirbu, Minister of Labour and Social Solidarity, and with the representatives of the principal trade unions. The Minister told me of the new measures taken by the Government, such as the law on minimum income which enabled some 400 000 underprivileged families to receive a cash allowance. He also informed me that legislative proposals were afoot in order to guarantee the introduction of trade union branches and collective agreements in all enterprises employing over 21 wage-earners. This is a prospect which I welcome and encourage.

62. For their part, the union representatives informed me of cases of unfair dismissal of unionists and of the difficulties that they meet in exercising the freedom to engage in union activity, including the consultative functions assigned to them by Romanian and European law. These malfunctions are reported to be particularly apparent in highly privatised sectors such as tourism and banking.

63. What is more, the rapid progress towards a market economy, the growing presence of foreign enterprises and the process of integrating the "acquis communautaire" into the Romanian legal system pose new challenges, and demand adaptation of structures and targeted efforts. In fact the adoption of new standards in industrial relations entails consultation of labour and management

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[50] See for instance the *Conclusions of the Regional Conference on Defamation and Freedom of Expression*, Strasbourg, 17-18 October 2002.

[51] Second ECRI report on Romania, CRI (2002)5.

together with an administrative and judicial apparatus capable of enforcing these standards effectively. Yet in view of the urgency and the scale of the reforms in progress, labour-management dialogue does not seem to have the dominant role which could have been wished. In addition, the current delays of civil justice allegedly render the legal protection granted to employees and trade unions ineffective. For that reason, a justice system in closer contact with labour and management, and capable of reacting quickly to the problems raised by a labour market in the midst of change, seems to me necessary. I therefore encourage the Government to consider the possibility of setting up labour courts and giving them the necessary constitutional foundation. It would also be desirable for Romania to agree as soon as possible to be bound by the collective complaints procedure laid down by the revised European Social Charter.

VII. CO-OPERATION WITH CIVIL SOCIETY

64. The transition taking place in Romania as regards the participation of civil society in public life is at present having effects at different levels. First of all, during my stay and on the occasion of my field visits, I was aware of the presence of unease due to the constant proliferation of NGOs whose professionalism is considered deficient. Secondly, although dialogue between the NGOs and the Government is theoretically maintained, it still remains very haphazard in certain spheres. May I recall at this juncture the conclusions adopted this year in Ankara concerning "The role of civil society in the consolidation of modern democracy[52]" in which I stress the importance of maintaining genuine dialogue and true co-operation between the State and the non-governmental organisations. I accordingly urge the Romanian authorities to regard the NGOs as real partners in the democratic process, and the NGOs to organise themselves in such a way that their role is appropriate, recognised and respected. Finally, I consider that the Ombudsman institution would be a significant instrument, by virtue of its mediating role, for fostering co-operation between the authorities and the representatives of civil society.

FINAL REMARKS AND RECOMMENDATIONS

65. Romania is a democracy which upholds human rights. Very substantial progress was achieved since its accession to the Council of Europe in 1993 thanks to the strong determination of the authorities. In order to assist the authorities and encourage them in the pursuit of their goal**,** and in accordance with Article 8 of Resolution (99) 50, the Commissioner makes the following recommendations:

    1. With respect to the extensive powers of the General Prosecutor, limit, by additional legislative reforms, the excessive possibilities of reopening final civil judgments and ensure that the current law is interpreted and applied in a most restrictive manner both by prosecutors and courts so that no further violations of Article 6.1 of the European Convention occur;

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[52] See the conclusions by Mr Alvaro Gil-Robles, Commissioner for Human Rights, concerning the seminar on the role of civil society in the consolidation of modern democracy, Ankara, 6-7 May 2002

2. In order to face the overcrowding of prisons, devise a system of alternative penalties, efficient management of release on parole and a judicial policy invoking moderation in recourse to custodial sentences;

3. Ensure effectiveness of investigation and prosecution in respect of police force members who have committed abuses; intensify, through closer collaboration with the NGOs, the training programmes launched by the authorities for the purpose of altering the attitudes of police officers to vulnerable groups, in particular the Roma/Gypsy community, as well as victims of trafficking in human beings and domestic violence;

4. Concerning the abandoned children, ensure that as the process of closing obsolete institutions proceeds, care programmes are introduced to aid the social integration of the young people leaving them; frame a policy for preventing abandonment of children, to involve awareness-raising and education campaigns; examine the possibility of setting up reception centres for mothers;

5. Step up the programmes to assist and protect victims of trafficking in human beings, by insuring effective implementation of the new law and continuing regional and international efforts;

6. Develop further programmes aimed at adults suffering from mental disorders;

7. Insure greater protection and assistance to victims of domestic violence by the adoption of a new law, efficient implementation of the Penal Code provisions and the opening of shelters;

8. Allocate the necessary resources for developing the national strategy on behalf of Roma/Gypsies to foster improvement in their circumstances; reduce or eliminate charges for issuing a birth certificate; take up the necessary measures in order to remedy to the serious public-health problem afflicting the Ferentari area;

9. Assist the work of the People's Advocate by making it possible for this institution to be relocated as soon as possible in premises easily accessible to all;

10. Carry on the legislative reform concerning the offences of libel and defamation, by notably abolishing the provisions that make these offences punishable by a prison sentence and by giving the journalist's good faith precedence and preference over authenticity as a ground of defence, and that in accordance with the European Court for Human Rights' case-law;

11. Encourage the introduction of a self-regulation mechanism for journalists by drawing up a code of professional conduct and forming an independent body responsible for its application;

12. Look into the feasibility of setting up labour courts and giving them the necessary constitutional basis;

13. Ratify the European Charter for Regional or Minority Languages, and examine the possibility of ratifying Protocol n° 12 to the European Convention on Human Rights prohibiting all forms of discrimination;

14. Accept the collective complaints procedure prescribed by the revised European Social Charter.

66. In accordance with Article 3(f) of Resolution (99) 50, this report is addressed to the Committee of Ministers and the Parliamentary Assembly.

ADDITIONAL COMMENTS

67. This report has been presented to the meeting of the Ministers' Deputies of the Council of Europe, on November 27, 2002. At the end of this presentation and in the light of the comments brought by the permanent representative of Romania, the Commissioner decided to add the following precise details concerning the measures taken by the Romanian authorities following his visit:

- With regards to the penitentiary system, after the presentation of the present report, the Ministry of foreign Affairs will propose the government to publish the reports of the CPT visits.

- Concerning freedom of expression, the President of Romania sent back to the parliament the bill that was amending articles 205 and 206 of the Romanian Criminal code for the offences of libel and defamation.

- The Romanian authorities renewed their resolve to insure effective implementation of the measures introduced in 2001 to improve the condition of the Roma/Gypsy community in the health sector, namely the Partnership Protocol that regulates the collaboration between the Ministry of Health and Family and the Roma/Gypsy Social Democratic Party, the creation of a Ministerial Commission for the Roma/Gypsy and the Agreement instituting the position of sanitary mediator (a representative of the community chosen by it to channel contacts with the local authorities). With regards to the latter, the Government considers that, in the course of 2003, sanitary mediators will be established in all of Romania's counties.

Alvaro Gil-Robles
Commissioner for Human Rights

CommDH(2003)7

REPORT
OF THE COMMISSIONER FOR HUMAN RIGHTS , MR ALVARO GIL-ROBLES,

ON HIS VISIT TO POLAND

18 – 22 NOVEMBER 2002

for the Committee of Ministers and the Parliamentary Assembly

[CommDH(2003)4]

CommDH(2003)7

Introduction

In accordance with Article 3(e) of Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights, I was pleased to accept the invitation extended by Mr Włodzimierz Cimoszewicz, Polish Minister of Foreign Affairs, to pay an official visit to Poland on 18-22 November 2002. I would like to thank the Minister for his invitation and for the resources he placed at my disposal throughout the visit, as well as Mr Jakub Wołąsiewicz and Ms Renata Kowalska for the arrangements they made during my visit. I visited Warsaw, Katowice and Krakow, and was accompanied by Mr Christos Giakoumopoulos, Director of my Office and Ms Satu Suikkari, member of the Office. Ms Anja Snellman assisted in the preparations of the visit. I would also like to thank the Permanent Representative of Poland to the Council of Europe and members of the Representation for their co-operation and assistance. I am grateful for the support of Dr. Hanna Machinska, Director of the Council of Europe Information and Communication Centre in Warsaw and members of the Centre, who provided valuable assistance in organising the visit, in particular the meeting with non-governmental organisations.

During the visit I met with the Minister for Foreign Affairs, Minister of Justice, vice-Minister of Justice, vice-Minister of Defence, vice-Minister of Internal Affairs and Administration, the Government Plenipotentiary for Equality between Women and Men, representatives of the Prime Minister's office, the Commissioner for Civil Rights, the Ombudsman for Children, the President's advisor on human rights, the President of the Constitutional Tribunal, members of the Parliamentary Commission on human rights and justice, the voivode of Silesia, the voivode of Małopolska and the plenipotentiary of Nowy Targ on minorities. Due to the fact that the NATO summit in Prague coincided to a certain extent with my visit, I was unfortunately not able to discuss certain concerns directly with the relevant interlocutors such as the Prime Minister and the Minister of Internal Affairs and Administration. I also met with representatives of the Polish Bar Association, NGOs and trade unions. I visited the Warszawa-Białołęka Detention Centre, the Women's Rights Centre in Warsaw, the centre for refugees Dębak-Podkowa Leśna, a remand centre for children in Katowice and Auschwitz-Birkenau. My team visited a Roma community in Nowy Targ.

GENERAL OBSERVATIONS

1. Poland joined the Council of Europe on 26 November 1991 and ratified the European Convention on Human Rights on 19 January 1993. Poland has also ratified Protocols 1, 4, 6 and 7 to the Convention and signed Protocol 13, which prohibits death penalty in all circumstances, but has not yet signed Protocol 12, which provides for a general prohibition of discrimination. Poland has ratified the Framework Convention for the Protection of National Minorities and the European Social Charter. However, the European Charter for Regional or Minority Languages and the Revised European Social Charter have not yet been signed by Poland.

2. Several reforms have taken place in the context of Poland's adhesion to the European Union, which is scheduled to take place in 2004. Poland has had a successful transition from communism to a society based on democracy, rule of law and the respect for human rights. However, a number of concerns still remain, that

would need to be addressed in a prompt manner. In the past decade, new challenges have emerged in relation to issues such as women's rights, xenophobia and trafficking in human beings.

3. This report will address some of the issues that were raised during the discussions I had with national and local authorities, non-governmental organisations, institutions for human rights protection, parliamentarians and representatives of labour unions. These issues are related to (I) The judicial system, the police and the army; (II) Non-discrimination and the situation of minorities; (III) Women and children; (IV) Trafficking in human beings; (V) Refugees and asylum-seekers, (VI) Labour and social rights and (VII) Freedom of expression and freedom of media.

I. JUDICIAL SYSTEM, THE POLICE AND THE ARMY

Excessive length of judicial proceedings

4. Excessively lengthy judicial proceedings significantly undermine the rule of law. The denial of the prompt enforcement of rights may in addition lead to negative knock-on effects in a wide range of cases, including a number covered in this report. Lengthy proceedings in domestic violence cases can, for instance, result in victims of abuse having to continue to live with their abusive partners while awaiting trial. Children are kept in remand homes longer than intended awaiting a decision to place them elsewhere.[53] Persons in pre-trial detention might be deprived of their liberty for excessively long periods of time while awaiting their trial, which is an attaint to the fundamental right of liberty of person. Litigation is also negatively affected in labour and social cases, such as cases concerning the non-payment of salaries, contesting dismissals, withdrawals of social benefits and evictions, such as to consistently favour the well-off and the well-placed over the more vulnerable, who are denied the necessary judicial protection. Slow justice is, in short, often tantamount to no justice.

5. The Polish judicial system is suffering from a significant backlog of cases, most notably in the Warsaw area. According to information provided by the government, the average length of proceedings at first instance in criminal cases has been as high as 28,6 months in district court for Warsaw-Srodmiescie, while in other parts of the country the average length is approximately 5,4 months in district courts and 6 months in regional courts. In civil matters, the average length for district courts is 5,4 months and 6,8 months for regional courts. However, in Warsaw there is a significant caseload of civil proceedings, which have lasted more than 5 years.

6. The Polish government fully acknowledges the extent of this problem and I discussed it at length with the vice-Minister of Justice, Mr Sylweriusz Królak. The problems with lengthy proceedings are most often attributed to insufficient resources but also to poor administration, the cumbersome structure of the judicial system and the insufficient number of judges and prosecutors.

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[53] See below the chapter on Women and Children and "Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America" by the *International Helsinki Federation for Human Rights*, 2002, p. 251.

7. The problem is also reflected in the Polish cases before the European Court of Human Rights, where most judgments declaring a violation of the Convention by Poland relate to the right to a fair trial within a reasonable time (length of proceeding cases) (article 6). A significant number of cases also deal with the right to liberty and security, more specifically excessive length of pre-trial detentions (article 5). As a response to the multiple violations found by the European Court of Human Rights, the Government has embarked on several steps to remedy the situation by restructuring the court system in order to streamline and accelerate the legal process. These measures include

- a simplification of court procedures through draft amendments of relevant laws such as the Code of Misdemeanour Procedure, the Code of Criminal Procedure and the Code of Civil Procedure;

- structural changes of the organisation of common courts of justice such as the creation of borough courts handling petty civil and criminal cases and adjusting territorial jurisdictions of courts;

- an increase of judicial staff ;

- increased budget allocations;

- strengthening of the administrative supervision over the courts through regular inspections of common courts to control inter alia the process of planning the court sessions;

- changes to the judicial enforcement procedure; creation of separate administrative sections within the courts to relieve the judges of administrative tasks;

- computerisation of the justice system;

- special measures are being taken to improve the situation in Warsaw, particularly by addressing the poor working conditions in the current courthouse. New buildings are being acquired and once there is sufficient space, the district court of Warsaw-Praga as well as the Regional court in Warsaw will be divided into separate units.

8. The comprehensive nature of these reforms can be expected to reduce the length of proceedings in the coming years. They will, however, have to be implemented effectively and with the necessary budgetary allocations. At the same time, the wide scope of the measures has led to some confusion among persons involved in judicial proceedings, and I would like to encourage the Government to ensure that sufficient information and training is provided on the reform measures.

9. As regards the creation of effective domestic remedies in cases of excessively long judicial proceedings, following the Kudla v Poland judgement[54], a working group was established with a view to preparing legislation to remedy the situation. In the meantime, the Polish Constitutional Court in a judgment of 4 December 2001[55] interpreted article 417 of the Civil Code as allowing domestic courts to find a violation of this article, concerning the responsibility of a public officials (including courts) for damages caused by them in the course of performing their professional duties, and award compensation without the need to establish the fault of the public official. According to the Polish government, this landmark decision ought to allow individuals and legal persons to claim damages in respect of excessive length of judicial proceedings and length of detention. However, according to the case-law of the Court and the practice of the Committee of Ministers when supervising the execution of judgments, the possibility of obtaining damages represents a sufficient remedy primarily in cases where the domestic proceedings have ended. Where the proceedings are still pending, the most appropriate remedy is, in addition to the awarding of damages, the acceleration of the proceedings in question. This possibility, which today exists in many of the member states, should also be part of the new remedy, which is being envisaged by the Polish authorities.

10. I would also like to suggest that serious consideration be given to finding a friendly settlement at the national level in cases where there is an evident violation of article 6 of the Convention. The Commissioner for Civil Rights of Poland could play an important role in such a process. For cases already before the European Court of Human Rights, I encourage the Government and the applicants, together with the Court, to make effective use of the friendly settlement procedure provided for by articles 38 and 39 of the European Convention on Human Rights.

11. Finally, in this respect, it must be emphasised that lengthy proceedings lead to legal uncertainty, thereby denying an essential aspect of rule of law. In view of these concerns and the time which has passed since these problems were first established by the Court, the Polish authorities should urgently address the inefficiencies of the justice system in a committed and focussed way.

The prison system

12. In the past few years, there has been a steady increase in the number of prisoners. Since the year 2000, the number of prisoners has exceeded the capacity of the prisons.[56] I discussed this issue with representatives of the Ministry of Justice who informed me that certain improvements had taken place with regard to the financing of and legislation concerning the prison service.[57] A program has been developed to

[54] Judgment No. 30210/96 by the Grand Chamber of the European Court for Human Rights of 26/10/2000.

[55] Case no. SK 18/2000, published in the Official Journal on 18 December 2001 (no. 145, Item 1638)

[56] On 31 May 2002 the number of places in prisons were 69.067 whilst the number of prisoners was 81.050. The problem with overcrowding of the prisons was also raised in the report on the visit to Poland by the European Committee for the Prevention of Torture (CPT) in 2000, doc. CPT/Inf(2002)9.

[57] The budget of the prison service is increased every year. In 1999 the budget was of 1.086.156 thousand PLN, in the draft budget of 2003 it was 1.449.570 thousand PLN. Compared to the previous

increase the number of places in prisons and remand prisons that is mainly focussing on reconstructing and expanding already existing facilities. There is an urgent need for more prisons, but they will take several years to construct. The emergence of organised crime had caused demands for stricter penalties for serious crimes but I would like to stress the importance of not letting this demand influence the overall approach to penalties. Instead, alternative penalties to imprisonment ought to be used more often, especially for young people and perpetrators of minor crimes, both as a measure to decrease the prison population and to reduce recidivism through their positive reintegration in society.

13. I visited the Warszawa-Białołęka remand prison, which currently hosts approximately 1700 prisoners, while the official capacity is 1200. In most standard cells there were still six beds, whilst the Committee for the Prevention of Torture (CPT) had recommended that there be maximum four beds in each cell. Several measures have been taken at the prison to implement the recommendations made by the CPT in its reports on Poland in 2000 and 1996, particularly in relation to the refurbishment of the prison and developing a programme of activities for the prisoners. Plans are under way to implement the remaining recommendations in the near future.

14. A number of detainees complained to me about inadequate access to lawyers. They informed me that private lawyers come when requested but that that most prisoners cannot afford to hire them. The officially appointed lawyers were said rarely to visit their clients. This is a serious issue. Moreover, similar concerns were brought to my attention in the child remand centre I visited in Katowice. Though it was suggested to me in my meetings with the representatives of bar associations that such failures were not systematic, I would encourage the bar associations and the Ministry of Justice to examine this issue in greater detail, and, depending on the results, to take the appropriate action. The expertise of the Council of Europe in this area may be of help.

The police and the army

15. Cases of ill-treatment, even deaths of persons in police custody, have been reported.[58] It would appear that those most frequently suffering from indifference or ill-treatment by the police are prostitutes, Roma and victims of trafficking.[59] There is some suggestion that police violence frequently goes unreported as victims are said to fear that they themselves will be prosecuted. There is a further concern that incidents of police violence are not always impartially investigated and rarely reach the courts.

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year, the budget for 2000 increased by 3.9%, that of 2001 by 7.5%, that of 2002 by 12.9% and that of the draft budget by 5.6%.

[58] See 'Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America' 2002 (events 2001) by the International Helsinki Federation for Human Rights, chapter on Poland, p. 250.

[59] See *e.g.* 'European Roma Rights Centre Statement to the 2002 Organization for Security and Co-operation in Europe (OSCE) implementation meeting on human dimension issues,' September 11, 2002.

16. In this context, I noted with some satisfaction that the project "Strengthening anti-discrimination policy", financed by the European Union-run Phare programme, to be implemented in 2003-2004, includes a training component for representatives of the judiciary and the police.

17. Whilst they were aware of isolated incidents, both the Civil Rights Commissioner, Mr Andrzej Zoll, and the vice-Minister of Internal Affairs and Administration, Mr Zenon Kosiniak-Kamysz, denied the existence of systematic police brutality, but given the frequency of such allegations, it is imperative that the Government ensures that these cases are promptly and correctly investigated.

18. With the vice-Minister of Defence, Mr Piotr Urbankowski I raised the issue of the practice of hazing, or *fala*, in the army.[60] Hazing is a practice whereby new recruits are subjected to abuse and humiliation by older recruits.[61] The Polish Penal Code criminalises the act of humiliating or insulting a subordinate recruit with imprisonment.[62] Nonetheless, every year several hundreds of cases are reported[63] and many more can be assumed to remain unreported.

19. Ministry of Defence officials acknowledged that hazing was a well-known problem and informed of several concrete measures that had been introduced to address the problem. Training, psychological counselling and increased surveillance were among the measures introduced by the Ministry of Defence. A confidential military telephone has been established where victims can talk about their situation or that of others. If an urgent case is revealed the information is passed to the gendarmerie for immediate intervention. These measures have already contributed to a slight decrease in the number of cases.

20. However, it is difficult to combat the problem because the practice is largely accepted among recruits and a sense of solidarity among the recruits makes prosecutions difficult. I strongly support the actions taken by the Ministry of Defence in this matter and I urge the Government to continue its efforts. Hazing represents a particularly pernicious abuse of authority and the Government bears the ultimate responsibility for addressing this problem. At the same time, the media could also play an important role in eradicating the acceptance of *fala* among the general public, present and future recruits and all levels of defence staff.

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[60] This practice was also a concern with the United Nations Committee Against Torture in its Concluding Observations and Recommendations on Poland, May 2000, doc. A/55/44, paras 82-95. For examples of hazing in the Polish army see 'Human Rights in the OSCE Region: the Balkans, the Caucasus, Europe, Central Asia and North America' by International Helsinki Federation for Human Rights 2002 (events 2001) p. 251.

[61] Amnesty International has for instance reported incidents where older recruits have set fire on a younger recruit, pressured new recruits to try to hang themselves and forced them to jump of a speeding truck. There have also been cases of economic extortion. As a result of hazing some cases of suicide have been recorded in Poland.

[62] Physical or psychological ill-treatment can result in up to five years imprisonment, or up to 10 years if the perpetrator had acted with particular cruelty. If the ill-treatment prompted the victim to attempt to take his life the sentence could be extended to 12 years imprisonment.

[63] 300 cases of hazing were reported in 2000 and 255 in 2001.

II. NON-DISCRIMINATION AND THE SITUATION OF MINORITIES

Non-discrimination

21. The Constitution of Poland includes a general equality clause and prohibits discrimination in political, social or economic life 'for any reason whatsoever'.[64] The Constitution guarantees equal rights for men and women, and the Polish Labour Code contains a prohibition of discrimination in employment. Poland has not yet signed Protocol N° 12 to the European Convention on Human Rights relating to the general prohibition of discrimination, and though it is currently being considered, no indication was given to me as to when a decision on ratification might be taken.[65] Representatives of the Ministry of Justice noted that the Government might wish to wait for some jurisprudence from the European Court on Human Rights in order to fully assess the implications of the Protocol. However, I would like to encourage the Government to consider signing and ratifying the Protocol in a timely manner particularly as the Constitution of Poland prohibits all forms of discrimination.

22. Despite the wide anti-discrimination clause in the Constitution, Poland has very little specific anti-discrimination legislation, in such areas as housing, contractual relations between individuals and access to public places. The need for more specific legislative provisions in such areas has already been identified by the European Commission against Racism and Intolerance. [66] I welcome the fact that the Parliament is considering a draft law amending the Labour Code, which would introduce a ban of any direct and indirect discrimination not only on the grounds of gender (which has been in force since 2001), but also on the grounds of race and ethnic origin, religion and belief, disability, age and sexual orientation, as well as provide specific regulations against sexual harassment at work. I encourage the Parliament to adopt this draft law in a timely manner.

23. Representatives of the civil society called my attention to specific instances of discrimination, both on the part of public authorities and private actors, on such grounds as gender, sexual orientation, disability or HIV/AIDS. I was informed about the occurrence of hate crimes against homosexuals, who do not always receive adequate protection from the police. There have also been cases where homosexuals have been denied medical care because of fear that they might have HIV/AIDS. It would appear that the treatment of HIV-positive patients is not always appropriate; it is, for instance, sometimes difficult to get treatment because of fear of transmitting the virus. It was noted that issues such as access to education, employment, retirement benefits and housing for persons with disabilities are still insufficiently addressed.

24. I was pleased to note that the Government has recently taken steps to strengthen the fight against discrimination, such as the establishment of a Plenipotentiary for Equal Status of Women and Men in November 2001, and the recent decision by the Parliament to ratify the Optional Protocol to the Convention on the Elimination of all forms of discrimination against women, which allows individual

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[64] Article 32 of the Constitution of Poland.

[65] As of 24 February 2003, 27 member states have signed the Protocol and three have ratified it.

[66] See 'Second report on Poland' by ECRI, doc. CRI(2000)34. See also the '2002 Regular Report on Poland's accession to the European Union', which noted that the transposition of the principle of non-discrimination into legislation, including the anti-discrimination *acquis* has been limited.

women, or groups of women, to submit claims of violations of rights protected under the Convention to the Committee monitoring its implementation. Plans are under way to draft a law on the Equal Status of Women and Men. By a Government Ordinance of June 2002, the mandate of the Plenipotentiary was expanded to cover issues of non-discrimination generally, pending the establishment of a new anti-discrimination body. The Plenipotentiary has already initiated important measures within her extended mandate, and I would like to urge the government and the parliament to seriously consider these initiatives. The Plenipotentiary, who was assigned as a body responsible for making arrangements for the establishment of the new anti-discrimination institution, submitted a draft law on the establishment of a General Inspector for the Prevention of Discrimination that is currently being considered.

The situation of minorities

25. Poland ratified the Framework Convention for the Protection of National Minorities on 20 December 2000 and it entered into force on 1 April 2001. Poland submitted its initial report on the implementation of the Convention to the Advisory Committee on 10 July 2002. The monitoring of the implementation of the Framework Convention by Poland has therefore started and I encourage the Polish authorities to continue a dialogue with the Advisory Committee on the Framework Convention. Poland has not signed nor ratified the European Charter on Regional and Minority Languages.

26. According to this initial report, Poland hosts 13 national and ethnic minorities, whose population is estimated to be approximately 1 million people.[67] During my visit, representatives of minorities stated that xenophobia, anti-Semitism and negatives stereotypes of minorities were common, and stressed the need to promote tolerance, starting with programs at schools. Other concerns identified by some minorities included difficulties in preserving their own culture and language, access to the media and disadvantaged social situations in areas such as housing and employment.

27. While the Constitution of Poland and other laws contain provisions for the protection of minorities, the absence of more detailed legislative provisions in certain questions was confirmed to be a major concern by representatives of minorities. For instance, the right to use minority languages in relations with administrative authorities is not provided for by the law. At present, the status of minorities is mainly regulated by bilateral agreements on good neighbourliness and friendly co-operation with other countries, which do not cover all minorities. As a result, the legal foundation for the protection of minorities lacks coherence.

28. The establishment of a new government agency for the protection of minorities is foreseen in a draft Law on National and Ethnic Minorities in the Republic of Poland, which is currently under discussion by the Parliament. The Polish authorities have asked me to provide an opinion on the functions and

[67] The report submitted by Poland pursuant to Article 25, paragraph 1 of the Framework Convention for the Protection of National Minorities of 10 July 2002 (ACFC/SR (2002) 2) lists the following minorities: Belarussians, Czechs, Karaites, Lithuanians, Lemks, Germans, Armenians, Gypsies, Russians, Slovaks, Tatars, Ukrainians and Jews.

structures of the proposed new institutions in the field on non-discrimination and protection of minorities. I welcome the efforts to strengthen the institutional framework, and would like to encourage the Parliament to carefully consider the relations between the proposed institutions as the issues are closely interlinked. I shall be glad to engage in dialogue with the Government on these important initiatives in the near future and will reserve further comments until this time.

The particular situation of Roma/Gypsies

29. According to Poland's report to the Framework Convention, the Roma/Gypsy population in Poland is estimated to be between 20.000 and 30.000. Thousands of Roma/Gypsies in the territory of pre-war Poland were killed during the holocaust by the Nazis, according to some estimations up to ¾ of the Roma/Gypsy population.

30. It is widely acknowledged that discrimination against Roma/Gypsies occurs in many areas, especially with regard to education and employment.[68] In respect of the former, the practice of so-called 'Roma classes' is of concern since they tend to further isolate Roma children from others and education provided in these classes was reportedly often of lower quality. I support the views of the Ombudsman for Children who noted that efforts should be strengthened to ensure that all Roma children could attend integrated classes, instead of special Roma classes. Contacts with the police, prosecutors and judges were reportedly often problematic and the authorities did not always react seriously towards acts of violence against the Roma. I was informed about a case in 2001 where a police officer had shot and killed a Roma man who was suspected for stealing. I would like to urge the authorities to conclude the investigations into this case.

31. A pilot project was launched in 2000 in Malopolska province in southern Poland with the aim of achieving full participation of the Roma and equal levels of development in areas such as education, employment, health, hygiene, and accommodation. The pilot project had indeed been functioning well, and the authorities were evidently committed to implementing it.[69] This project, however, only benefits a relatively small number of Roma, and I would encourage the government to urgently address the problems of the Roma population throughout the country and to allocate sufficient resources to this end, and consider duplicating the

[68] See ECRI's 2000 report on Poland, which states that 'disadvantage on the labour market is also frequently attributable to direct discrimination and prejudice as well as to previous discrimination in access to education and social equality'.

[69] Members of my office visited the Bialka Tatrzanska village in Nowy Targ where this pilot project had been implemented. Houses had been repaired and new houses had been built. Infrastructure improvements had taken place, such as construction of a canalisation and a waste management system, and improvement of the heating system. A few houses in the village, as well as in another nearby village were still in a dangerous condition especially in the winter, as the weight to snow might make the roofs to collapse. The Plenipotentiary of the *voivodshp,* informed that these houses were going to be demolished next spring and replaced by new houses. A small nursery school had been established for children of 4-5 years of age to prepare them for regular school. Language problems have been cited to be among the major causes for Roma children to attend special classes in the past, and in order to overcome such problems, classes in the nursery school were given in Polish. School assistants had been appointed for Roma children to smooth the transition from Roma classes to regular classes.

Malopolska project elsewhere in the country. The Government is working on a national programme for the Roma, in cooperation with provincial governors, Roma activists and NGOs, which is scheduled to be finalized in 2004.[70] Developing the national programme for the Roma is a matter of priority and I would like to urge the Government to take all measures to ensure its timely finalisation.

III. WOMEN AND CHILDREN

Ombudsman for children

32. A law on the institution of an Ombudsman for Children was adopted in 2000[71]. During my meeting with Mr. Pawel Jaros, the Ombudsman for Children, he noted that the fight against violence, ill-treatment and the commercial and sexual exploitation of children were among his priorities. Measures had been taken to stop violence, such as the appointment of specialists in different regions and the opening of a telephone hotline for the victims. The Ombudsman had submitted to the President of Poland a motion to take legislative initiatives aimed at creating a comprehensive system for counteracting violence. In addition, the Ombudsman had drawn the attention of the authorities to issues such as limited access to education of children in rural areas and problems in realising the right of each child to have his/her views taken into account. Many of the priority areas set up by the Ombudsman coincide with the matters, which the UN Committee on the Rights of the Child raised in its recent report on Poland.[72] All these matters are of significant concern and I call upon the Government and the Parliament to give their support to the initiatives aimed at tackling these problems.

Visit to a children's remand centre

33. I visited a children's remand centre in Katowice, which hosts about 400 children each year, between the age of 13 and 18 (in exceptional cases up to 21 years). Approximately 90 percent of the children were boys, but there was also a section for girls. This centre hosts children only temporarily, pending a possible decision by a court to transfer them to another institution, such as a correction centre or a juvenile prison. Recreational and some educational activities were organised, but the children did not have a chance to attend school classes since they were meant to stay in the centre only for a few days. However, the centre authorities informed that in exceptional cases children stayed for a few weeks due to the length of court proceedings.

34. Despite the fact that the material conditions were quite good and the personnel managed to create a caring atmosphere, there were, however, issues that I found concerning. I was informed that lawyers could only meet with the children when accompanied by a police, and in practice they rarely visited the children (see above

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[70] Also, a Consultative Commission for the Roma comprising government representatives and representatives of 20 Roma NGOs has been established, and it held its first meeting on 12 November 2002.

[71] In the same year, Poland ratified the European Convention on the Exercise of the Rights of the Child.

[72] See 'Concluding Comments of the Committee on the Rights of the Child: Poland', United Nations, doc. CRC/C/5/Add.194, 30.10.2002.

'prison system'). Bearing in mind that some of the children stay in the centre for several weeks, it would undoubtedly be important to introduce more educational activities for them, as part of the reintegration efforts.

Reproductive rights

35. In its recent Concluding Observations on Poland[73], the UN Committee on Economic, Social and Cultural Rights expressed its concern at inadequate family planning services and sexual and reproductive health education, lack of access to affordable contraception, as well as the restrictive abortion legislation, which has resulted in a large number of women risking their health when they resort to clandestine abortionists. Under the current Polish legislation, termination of pregnancy is allowed if the pregnancy causes a threat to the life or health of the mother; if there is a high probability of severe and irreversible damage to the fetus or of an incurable disease, life-threatening of a child; and if there is a confirmed suspicion that the pregnancy is a result of a criminal act. [74]

36. I was informed about cases where women or girls had, however, been refused abortion even on the grounds stipulated under this law. Women had also been denied pre-natal examinations, as it had been seen as an attempt to get an abortion. The difficulties in obtaining legal abortion in public hospitals[75] has led some women to undergo risky illegal abortions or attempt to induce abortions themselves, which sometimes lead to fatal consequences.[76] My attention was drawn to a case where a 16-year old girl had died after taking an overdose of laxatives in an attempt to self-induce an abortion. I would like to express my concern at the manner in which the current Act has been implemented, leading to severe obstacles of the enjoyment of the right to health and right to life of pregnant women and girls.

37. Compulsory education on sexual health was removed from the school curricula in 1999 and replaced in secondary schools by programmes on preparation for family life. These programmes should promote an adequate knowledge of reproductive health.[77] Such education is essential for the realisation of the right to health, since it decreases the vulnerability to HIV/AIDS and sexually transmitted diseases.

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[73] See doc. E/C.12/1/Add.82 of 29 November 2002. Also the UN Human Rights Committee noted in its 1999 Concluding Observations on Poland with concern the strict laws on abortion, which led to high numbers of clandestine abortions with attendant risks to life and health of women, doc. CCPR/C/79/Add.110 of 29.7.1999.

[74] A decision by the Constitutional Court in 1997 declared that the liberalisation of abortion was unconstitutional.

[75] The Medical Profession Act of 1996 provides for a doctor the right to use a clause of conscience to refuse terminating a pregnancy. The doctor is, however, obliged to refer the patient to another doctor or to a hospital where the abortion can be performed. According to information given to me, neither hospitals nor doctors do this in practice. See 'The Anti-Abortion Law in Poland – The functioning, social effects, attitudes and behaviours', by *the Federation for Women and Family Planning*, September 2000.

[76] See 'Women in Poland: Sexual and reproductive health and rights', independent report submitted to the UN Committee on Economic, Social and Cultural Rights by the *Polish Federation for Women and Family Planning, Women's Rights Center and La Strada Foundation*, October 2002.

[77] In its Concluding Observations of 30.10.2002 on Poland, the UN Committee on the rights of the child recommended that Poland institute health education and awareness programmes specifically for adolescents on, for instance, sexual and reproductive health, doc. CRC/C/15/Add.194.

Domestic violence

38. According to information based on national surveys, an estimated 18 percent of married Polish women are victims of domestic violence[78], and 41 percent of divorced women reported that they had been often beaten up by their spouse The Plenipotentiary for Equality between Women and Men and the Women's Rights Centre noted that domestic violence had long been an issue surrounded by taboo and silence, but that it has recently become more publicly discussed and condemned. Domestic violence, both physical and psychological is criminalized in Polish legislation.[79]

39. The authorities have taken some measures to address domestic violence.[80] In 1999, a Victim's Rights Charter was developed by the Ministry of Justice, which aims at promoting the rights of victims and perpetrators in judicial proceedings. A "blue cards" system was introduced in 1998 by the national police authorities with the aim of simplifying and standardising the procedure when intervening in situations of domestic violence. It provides for guidelines on the gathering and documenting of evidence as well as information on the victims' rights and contact details for institutions that provide assistance. This "blue cards" system is an interesting initiative to tackle domestic violence. Nonetheless, some weak points have also been identified which should be addressed swiftly to improve the implementation of the system. Apparently it is not applied conformably in the whole country, the cards are not always used, or used only at the request of the victim, and the follow-up of the information gathered is inadequate.[81]

40. The dire economic situation of the victims and their families is an obstacle for women who want to leave abusive relationships. According to the Plenipotentiary for Equality between Women and Men, the family itself has to pay for the emergency treatment of its alcoholic member at the emergency sobering centres, which creates a significant financial burden. The long-term treatment at specialised centres is free of charge. In addition to financial obstacles, the NGOs dealing with women's rights strongly stressed the need for more shelters that can accommodate the women and

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[78] This information is based on surveys conducted in 1993 and 1996 by the Public Opinion Research Centre with 1087 adult women. The number of all women who are victims of domestic violence is likely to be even higher – according to some estimates 25 to 30 percent – since these numbers did not cover unmarried women living with a partner.

[79] Article 207 of the Penal Code.

[80] Government response to domestic violence is coordinated by the State Agency for Prevention of Alcohol Related Problems. This is criticised by NGOs who state that alcoholism may contribute to but does not cause domestic violence. See 'Women in Poland: Sexual and reproductive health and rights', independent report submitted to the UN Committee on Economic, Social and Cultural Rights by the *Polish Federation for Women and Family Planning, Women's Rights Center and La Strada Foundation*, October 2002, and 'A report on domestic violence in Poland', by *Minnesota Advocates for Human Rights, Women's Rights Centre and International Women's Human Rights Clinic at Georgetown University Law Centre*, July 2002.

[81] A fear has been expressed that, as one of the cards is entitled 'request for help', police are reluctant to investigate and prosecute potential abuses unless the card has been signed by the victim. However, as domestic violence is a publicly prosecutable offence, a request from the victim ought not to be needed to commence proceedings.

children who have to flee their homes. In Warsaw there are only two shelters (40 places). In some regions of Poland there are no shelters at all. It has been reported that the quality of the existing shelters is undermined by the inadequate training and competence.[82]

41. It seems that police and prosecutors often still see domestic violence as a private matter and that cases of domestic violence are sometimes dismissed with the argument that the injuries inflicted upon the women were not serious enough. It must be stressed that stronger actions are needed by the Polish authorities to ensure that domestic violence is not treated as a private affair. Introducing compulsory training, with the participation of the NGOs, would be an effective way to raise the awareness of the police force, prosecutors and judges in these matters.

42. There is a need to remedy certain gaps in the existing legislation. The lack of the possibility of imposing restraining orders is particularly evident in this respect. Other protection and assistance related issues might also be more comprehensively addressed in new legislation. Useful guidance on this issue can be found in the recent Council of Europe recommendations.[83]

IV. TRAFFICKING IN HUMAN BEINGS

43. In recent years, Poland has become a country of origin, transit, and destination with regard to trafficking in human beings. Victims are primarily women and girls, but to some extent also boys. Polish women and children are trafficked to several western European countries mainly for sexual exploitation. Women and children are trafficked into Poland from countries such as Ukraine, Bulgaria, Romania, Belarus and Russia. Several reports describe the dire circumstances under which the victims of trafficking are living. With no identity documents, the victims are kept under the control of the traffickers through intimidation and violence.[84]

44. The Polish Criminal Code of 1997 criminalizes trafficking in persons[85], and Poland has recently ratified the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime. However, there is an evident need to introduce further legislative and other measures to strengthen assistance to the victims. I understood that at present, victim assistance is left largely to non-governmental organisations, with some financial assistance from the Government. I

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[82] See reports cited ibid, in footnote 80.

[83] Recommendation (2002) 5 of the Committee of Ministers of the Council of Europe on the Protection of women against violence and Recommendation 1582 (2002) on Domestic violence against women adopted by the Parliamentary Assembly.

[84] *La Strada*, an organisation actively involved in fight against trafficking, reported of several cases where victims of trafficking were provided with practically no protection from the authorities, exposing them to additional risks.

[85] Trafficking in human beings, as well as inciting a person to prostitution or facilitating prostitution is penalised with imprisonment of up to three years, with stricter penalties if the victim is a minor, or the perpetrator has enticed or abducted a person into prostitution abroad.

encourage the government to establish more shelters and to ensure that the victims are provided with social assistance, health care, counselling and legal advice. Recent improvements in witness protection are to be welcomed and further developments encouraged.

45. Victims of trafficking were often deported from Poland on the basis of the law on foreigners, with little regard given to their vulnerable situation. I was informed of several cases where the expelled victims were met by traffickers at the border who provided them with new travel documents and returned them back to the country. Measures must be taken to ensure that victims of trafficking are not expelled in a manner which renders them vulnerable to further abuses. The establishment of appropriate repatriation processes is of utmost importance, with due regard given to the safety and reintegration of the victims upon return. Moreover, I would encourage the authorities to grant temporary residence permits to the victims so as to allow them to stabilize their situation, to better prepare for an eventual return and to assist in legal proceedings against the traffickers.

46. Training to the border guards, the police, prosecutors, the judiciary and other authorities is essential to ensure effective action against the traffickers and protection of the victims. At present such training is provided by non-governmental organisations, such as La Strada and Helsinki Foundation. I urge the government to assume its responsibilities in this respect, in cooperation with the NGOs.

47. The problem of trafficking in human beings must be tackled in comprehensive manner, and I was pleased to learn that a national action plan against trafficking is under preparation. Regional cooperation is crucial, both with the countries of origin and the countries of destination to tackle the root-causes of this problem.

V. REFUGEES AND ASYLUM-SEEKERS

48. According to information given by the Ministry of Interior, a total of 4.513 persons applied for refugee status in Poland in 2001. In the same year, 282 persons were granted refugee status, of whom 206 were from Chechnya. Since 1999, there has been a significant increase of Russian asylum seekers, originating from the Republic of Chechnya.

49. I visited the Debak-Podkowa Lesna refugee reception centre outside Warsaw. The centre was for temporary stay,[86] pending the relocation of the refugees to a more permanent refugee centre. Majority of the refugees were Chechens, but also many came from Afghanistan, Iraq, African countries and countries of the former Soviet Union. Some of the Chechen refugees I had actually met previously in a camp in Ingushetia, but they had left because of the dire circumstances at the camp. They had faced no problems from the Russian authorities when leaving the country. The Commissioner for Civil Rights noted that there had recently been cases of refoulement of Chechen asylum-seekers at the border, which the UNHCR also confirmed. Women and children had been among those who were denied entry into

[86] Some refugees had, however, been in the centre for more than a year.

the country on grounds of national security. I raised the issue with the representatives of the Prime Minister's office who informed me that they were aware of these problems and were currently examining the issue. I urge the authorities to ensure that the principle of *non-refoulement* is respected in all circumstances.

50. There was a separate section for unaccompanied refugee children in the centre which hosted 23 minors at that moment. There was a school in the area, and Polish language classes were organised at the centre. Medical personnel were present at the centre. The centre authorities said that each of them had been appointed a legal guardian.

51. Concerns have, however, been raised by the Office of the United Nations High Commissioner for Refugees and the Ombudsman for Children about the situation of separated refugee children in Poland.[87] Authorities of the Ministry of the Interior informed that measures have been taken to address these concerns. In June 2002, the Minister of Interior issued an ordinance on measures to be taken in relation to unaccompanied minors during the asylum procedures, which covers issues such as accommodation of unaccompanied minors, professional qualifications of the administrative staff, and measures to be taken in cases of expulsion of a minor to ensure that his rights are safeguarded in the recipient country.[88]

52. The issue of legal guardianship was a particular concern. I was informed that a new article 46 concerning the *de facto* protection of unaccompanied minors has been introduced to the draft Act on the assistance granted to non-nationals within the territory of the Republic of Poland.[89] Under this article, a *de facto* guardian would be appointed for an unaccompanied minor after the procedures for granting him refugee status have been established. The entry into force of the Act has been planned for 1 May 2003. I would strongly suggest that a legal guardian be appointed to all separated children, irrespective of whether he or she is seeking asylum. Every separated child needs a guardian who will act in the best interest of the child, and take the views of the child into account. In this regard, I would like to draw the attention of the Polish authorities to a report recently adopted by the Parliamentary Assembly of the Council of Europe on the situation of young migrants in Europe which includes recommendations on the appointment of a legal guardian.[90] Important guidance is also provided by *A Statement of Good Practice* of the Separated Children in Europe Programme of the UNHCR and Save the Children.

53. The Civil Rights Commissioner drew my attention to the problematic situation of those who had not been granted refugee status, but who couldn't return to their home countries since they had no travel documents and their embassies refused to issue new ones. These persons have no access to any social services, including health care. The Ombudsman is currently discussing with the Ministry of the Interior

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[87] Also the UN Committee on the Rights of Child recommended in October 2002 that a legal guardian be appointed for every unaccompanied refugee child in Poland., doc. CRC/C/15/Add. 194.

[88] Journal of Laws of 2002, No. 91, item 813.

[89] The Ministry of the Interior noted that in many cases it is not possible to appoint a *de jure* guardian for such children, in particular if their parents are not known, but it cannot be established whether they are alive or entitled to exercise their parental rights. The authorities have therefore introduced the notion of a *de facto* guardian who would assume the same responsibilities.

[90] Report doc. 9645 and Recommendation 1596(2003) of the Parliamentary Assembly of the Council of Europe.

possible ways of finding a solution to the problems of these persons. I encourage the government to issue identity documents to these people that would entitle them to access to basic social services pending a permanent solution to their situation.

VI. LABOUR AND SOCIAL RIGHTS

54. I visited Katowice in the province of Silesia at a time when a considerable number of workers had been threatened with unemployment due to the restructuring of the local mine industry. As many as 35.000 persons risk loosing their jobs in the near future and the mine industry in the region had already diminished considerably in the past years from 400.000 to current 140.000. It has been reported that many unemployed former mine workers continued to mine illegally under extremely risky conditions and with no access to social security.

55. The representatives of trade unions with whom I met in Katowice raised a number of problems relating to workers' rights. The number of complaints by employees to the National Inspectorate of Labour was growing each year. A considerable number of complaints related to non-payment of salaries, working time and dissolving of labour contracts. There are employers who repeatedly start new businesses, let them go bankrupt and leave no salaries for the employees. It seems clear that the systems currently in place do not provide for sufficient protection of the rights of employees. A more effective system of sanctions for non-payment of salaries should be established, and its implementation should be monitored. As noted above, the length of employment litigations discourages individuals from enforcing their rights through judicial mechanisms, thereby considerably weakening their hands before the malpractices of their employers.

56. Trade union representatives informed me that in the private sector, activities of trade unions had sometimes been limited or even prevented, and there were cases where the employers intervened in the internal matters of trade unions despite the fact that the Constitution of Poland ensures the freedom of association in trade unions. Such limitations had taken place for instance in multinational super market chains. This is a very serious matter, and I would urge the government to effectively monitor the respect for trade union rights. I would also urge the multinational companies to assume their responsibilities in ensuring that labour rights are respected in their affiliates.

57. More efforts must be directed towards ensuring the full respect for economic and social rights, which often tend to be undermined when a country is going through a difficult transitional economic period. I encourage Poland to sign and ratify the Revised European Social Charter and the Additional Protocol relating to the collective complaints procedure.

VII . FREEDOM OF EXPRESSION AND FREEDOM OF MEDIA

58. The 1997 Constitution of Poland includes extensive regulations on the freedom of expression and on the right to information, as well as on the freedom of press and mass media. There are, however, concerns relating to the law and practice.

59. Whereas the European Court for Human Rights holds that the limits of acceptable criticism are wider for a politician than for a private individual, the Polish Penal Code of 1997 punishes the offence of insult more severely in respect of officials than when it concerns private individuals. [91] The Supreme Court of Justice has recognised that a person discharging public functions is exposed to public opinion and must take into account the criticism of his or her behaviour, which is a positive development. However, I would recommend a reform of the provisions of the Penal Code, in light of the jurisprudence by the European Court of Human Rights and the Supreme Court. Moreover, the fact that the Penal Code provides for the penalty of imprisonment for insult is a concern, and I strongly encourage the abolishment of the possibility of a prison sentence for such crimes.[92]

60. Concerns about the independence and impartiality of the Polish media have been brought to my attention,[93] particularly relating to the National Council of Radio Broadcasting and Television (KRRTV). I would like to take this opportunity to draw the attention of the Polish authorities to the recent recommendation by the Parliamentary Assembly[94], which provides recommendations and guidelines for member states on how to ensure the freedom of expression in the media.

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[91] According to article 216.1 of the Penal Code 'whoever insults another person in his presence, or in his absence but in public, or with the intention that the insult shall reach such a person, shall be subject to a fine, restriction of liberty, or deprivation of liberty of up to one year.' However, a person who publicly insults the President of the Republic of Poland shall be subject to the penalty of deprivation of liberty of for up to three years (art. 135.2) and a person who insulting a constitutional authority of the Republic of Poland is penalised by a fine, the penalty of restriction of liberty or the penalty of deprivation of liberty for up to 2 years (art. 226.3). Insult of a public official or a person called upon to assist him, in the course of and in connection with the performance of official duties is penalised with the penalty of a fine, penalty of restriction of liberty or the penalty of deprivation of liberty for up to one year (art. 226.1). See also 2002 Regular Report on Poland's Progress towards Accession, Commission of the European Communities, COM (2002), p. 30.

[92] In the year 2000, four persons were sentenced to deprivation of liberty for insulting a constitutional authority (in two cases with the suspended execution thereof) and 441 persons were sentenced to deprivation of liberty for insulting a public official.

[93] See for instance '2001 World Press Freedom Review' by *International Press Institute* (Austria); 'Report on Freedom of Expression in the Media in Europe' by the *Committee on Culture, Science and Education of the Parliamentary Assembly* (Doc 9640) and 'Country Report on Human Rights Practices 2001 – Poland', by *US State Department*, March 2002.

[94] Rec1589(2003) by the Parliamentary Assembly of the Council of Europe of 31 January 2003.

FINAL REMARKS AND RECOMMENDATIONS

61. The stability of the Polish democracy is evidenced by the commitment of successive governments to upholding human rights and the rule of law. The authorities display a general and genuine willingness to combat many of the problems raised in this report. In order to assist the authorities in addressing these concerns**,** and in accordance with Article 8 of Resolution (99) 50, the Commissioner makes the following recommendations:

1. Implement in a timely manner the reforms aimed at reducing the length of court proceedings and ensure adequate funding to this effect; explore the possibility of introducing at the national level a process to settle disputes relating to lengthy proceedings, and make effective use of the friendly settlement procedure provided for by the European Convention on Human Rights in relation to cases already brought before the Court;

2. Intensify efforts to eradicate cases of police brutality through training, effective investigation and prosecution of such cases; develop training programmes for the purpose of sensitising the police officers towards problems relating to trafficking in human beings and domestic violence;

3. Further develop the system of alternative penalties and ensure sufficient funding for construction of prisons in order to tackle the overpopulation of prisons;

4. Examine, in cooperation with bar associations, the frequency of contacts of state appointed lawyers with their clients, and take appropriate action in respect of any shortcomings identified;

5. Intensify measures to combat xenophobia, anti-Semitism and discrimination, through inter alia promoting tolerance and strengthening anti-discrimination legislation; ratify the European Charter for Regional or Minority Languages, and examine the possibility of ratifying Protocol n° 12 to the European Convention on Human Rights prohibiting all forms of discrimination;

6. Ensure adequate funding for the Malopolska pilot project for the Roma/Gypsy community and expand similar activities to other parts of the country, particularly in the field of education, employment, health and housing, and ensure a timely finalisation of the national action plan for the Roma/Gypsies;

7. Ensure that children in rural areas have access to quality education;

8. Ensure greater protection and assistance to victims of domestic violence and victims of trafficking through legislative and other measures;

9. Promote an adequate knowledge of reproductive health through school curricula; and ensure that the provisions under which termination of pregnancy is allowed under the current law, are respected by medical professionals, the police and prosecutors;

10. Continue the measures aimed at protecting separated refugee children and ensure full respect for the principle of non-refoulement for all asylum-seekers;

11. Strengthen the protection of labour rights, including by ensuring timely payment of salaries through introducing a more effective system for legal sanctions for non-payment and the execution of such sanctions; ensure that the right to association is fully respected for the activities of trade unions by all sectors, including the private sector;

12. Sign and ratify the Revised European Social Charter and the Additional Protocol relating to the collective complaints procedure;

13. Carry on a legislative reform concerning the offence of insult, by notably abolishing the provisions that make this offence punishable by a prison sentence;

In accordance with Article 3(f) of Resolution (99) 50, this report is addressed to the Committee of Ministers and the Parliamentary Assembly.

ADDITIONAL COMMENTS

This report was presented to the Committee of Ministers of the Council of Europe on 19 March 2003. In light of the comments made by the Permanent Representative of Poland following the Commissioner's presentation, the Commissioner decided to annex to his report, the written comments presented by the Government of Poland.

Alvaro Gil-Robles
Commissioner for Human Rights

A N N E X

Comments by the Government of Poland
(Warsaw, 4 April 2003)

The invitation to Poland of Mr. Alvaro Gil-Robles, Commissioner for Human Rights, (November 18-22, 2002), reflects the appreciation of the Government of Poland of the role played by the Council of Europe in further promotion of human rights in Europe. The visit was hosted by Mr. Wlodzimierz Cimoszewicz, Minister of Foreign Affairs of the Republic of Poland.

The Government of Poland takes note of the assessment included in the Report with great appreciation and thanks the Commissioner for Human Rights for his objective and unbiased approach. The Government also declares its will to continue co-operation with the Commissioner for Human Rights, in particular in implementing the recommendations included in the Report.

In reply to the Commissioner's observations, the Government of Poland has a pleasure to provide below some comments in regard to a number of selected issues examined by the Report.

JUDICIAL SYSTEM, PRISONS AND THE POLICE

Judicial system (Re: sections 4-11)

1. Excessive length of procedures

Appreciating the importance of the effectiveness and efficiency of the judicial system for the respect for human rights (in particular, in view of excessive length of court proceedings and formal guarantees associated with the institution of pre-trial detention), the Government of Poland declares firm will to take steps to improve the present situation. The explanation below concerning Sections 4- 11 illustrates the scale of the problem in Poland and the directions taken to seek ways to solve the problem.

The reform of the Polish administration of justice has a complex character and embraces a number of legislative, organisational and financial measures. Nevertheless it is worth to mention that the existing system of the staff training for the administration of justice be changed towards its centralisation, what should result in unification as well as augmentation of the professional level of judges and other court employees in the all-country dimension. A decision determining the directions of changes in the existing training system, which especially foresees establishment of a central unit responsible for training of staff of the administration of justice was taken in August 2002 and is in the course of implementation (in November a separate unit within the Ministry of Justice – named Centre for Staff Training - was established).

It should be considered that the undertaken measures aiming at improvement of functioning the administration of justice might only produce measurable effects after a longer period of time.

A. Facts and figures:

In 2001 further growth in the number of cases submitted to all common courts of law was noted.
The total of 8,273,227 cases was submitted to courts in 2001, i.e. by 11.7% more than in 2000. In absolute figures the said growth amounted to 869,637 cases.

To compare, in 1991 the total of 2,588,300 cases was submitted to the common courts of la w, which means that over ten years their number grew by almost 320%.

In 2001 the average length of proceedings in the most serious penal cases considered in the first instance before the district courts was 6.1 months, i.e. shorter than in 2000 when it was 6.5 months. As regards cases considered by the regional courts the same ratio was 5.4 months and it improved as well compared to 2000 when it was 5.8 months. In case of district courts the worst proceeding length ratios were in the District Court in Lublin (11.2) and the District Court in Warsaw (10.2), whereas in case of local courts – in the Regional Court for the Capital City of Warsaw (24.3) and the Regional Court for Warszawa Sródmiescie (28.6).

As at the end of 2001 the number of the so-called “old” cases i.e. the ones pending for over 5 years amounted to 4.456 in the whole country, including 4.117 cases in regional courts and 339 cases in the district ones. The worst situation was in the regional courts for Warsaw district (it refers mainly to the Regional Court for the Capital City of Warsaw and the Regional Court for Warszawa Sródmiescie) with 2,999 cases pending over 5 years i.e. 74.5% of the total number of “old” cases. As regards district courts the worst situation in the aforementioned scope was in the District Court in Warsaw where the number of cases pending over 5 years amounted to 126 i.e. 37.2% of the total number of “old” cases in the country.

In regard to civil suits heard at the district courts, the average length of proceedings was 6.8 months in 2001, i.e. the same as in 2000. In the local courts the said ratio was 5.3 months and it deteriorated compared to 2000 when it amounted to 4.3. As at 30th June 2001 the number of civil suits pending over five years amounted to 1,373 in the district courts and 1.483 in the regional courts.

As far as commercial cases are concerned, in 2001 the average length of proceedings in the said cases was 6.7 months in the district courts, i.e. it deteriorated compared to 2000 when it was 5.6 months. In the regional courts the said ratio was 5.7 months and also in this case it deteriorated compared to 2000 when it was 4.5 months.

Family matters considered by the district courts under lawsuits lasted 2.6 months on the average, i.e. as long as in the previous year. The family and juvenile divisions received 129.414 cases referring to juveniles who committed punishable acts, and there were no reservations as to the average length of the said proceedings.

The measure of the house of correction without stay of execution was adjudicated by the said courts towards 564 juveniles (compared to 571 in 2000), whereas the said measure with conditional stay of execution was adjudicated towards 934 juveniles (compared to 938 in 2000).

The cases concerning land and mortgage register, related to openings of and entries into the said register, lasted on the average 3.4 months in 2001, which was by 0.1 months longer than in 2000.

As at the end of 2001 the number of all persons kept in pre-trial detention (i.e. remaining both at the disposal of the courts and public prosecutor's offices) amounted to 22,730. Out of this number there were 15,507 persons remaining at the disposal of the courts, i.e. at the stage after bringing the accusation (including 4,447 persons arrested for the period of up to 3 months, 4,247 persons arrested for the period from 3 up to 6 months, 4,776 persons arrested for the period from 6 up to 12 months, 1,869 persons arrested for the period from 12 months up to 2 years and 168 persons arrested for over 2 years).

In regard to convictions the total of 240,290 persons were convicted under criminal and fiscal offence proceedings by the district courts in 2001. Out of the said number 182,529 persons were sentenced to imprisonment, including 149,216 with the stay of penalty execution. The penalty of sole fine for offences, including fiscal ones, was adjudicated in 37,295 cases, i.e. in 15.52% of the total convictions.

In the common courts of law the total of 11,014 persons were convicted, including 36 persons for life imprisonment and 10,869 for imprisonment. Out of the latter, 6,943 persons were convicted for unconditional imprisonment, whereas in case of 3,926 the execution of the penalty was conditionally suspended.

The decisions on ruling the execution of conditionally suspended penalties of imprisonment were passed in district courts towards 128 persons and in the regional courts – towards 17,993 persons.

In 1996-2002 the European Court of Human Rights delivered a total of 153 decisions on the "Polish" cases. In 57 cases the Court found the violation of the Convention (37% of the judgements) and in 62 cases – no violation (41% of the judgements), whereas 34 cases were struck out of the list.

Approximately 90% of the judgements on the violation of the Convention referred to the complaint against the length of the proceedings (mainly the civil ones).

B. Activities taken to enhance the effectiveness of the judiciary:

Intensification of the administrative supervision over the courts:

The courts are visited and inspected on an ongoing basis for the purpose of verifying the correctness of session planning and effectiveness of judges at trials. The *pensum* (standards for numbers of cases that should be "handled") was developed for judges adjudicating in particular divisions of courts of each rank. The draft of a new

regulation on administrative supervision over the courts is being prepared, which will strengthen the authority of the Minister of Justice and the presidents of the courts in the said scope.

Gradual simplification of court procedures:

The new Code of Misdemeanour Proceedings (Act dated 23rd August 2001, Journal of Laws no. 106 item 1148) has been in force since October 2001. The Government submitted a draft revision to the said Act, aimed at further simplification and acceleration of the procedure applied in case of misdemeanours, to the Parliament. The first reading of the said revision was held at the Parliament on 23rd November 2002.

Legislative activities referring to amendments to the Code of Criminal Proceedings are carried out as well. Changes to the penal procedure were adopted in January 2003. A relevant Act on amending the Act – Code of Criminal Proceedings, the Act – Introductory provisions to the Code of Criminal Proceedings, the Act on the crown witness and the Act on classified information protection was adopted by the Parliament on 10th January 2003 and signed by the President on 21st January 2003. The said Act will become effective on 1st July 2003.

The Government also developed and submitted to the Parliament, at the beginning of October 2002, the draft revision to the Code of Civil Proceedings, aimed mainly at improving the enforcement proceedings.

Changes in the organisational structure of the common courts of law system:

The expansion of the network of magistrate courts – judicial units of the lowest rank,
considering petty civil and penal cases under simplified procedure (target number: approx. 400 units).
As at the end of 2001 there were 314 operational magistrate courts. Presently their number has grown up to 329.

The process of further adaptation of areas of territorial jurisdiction is being continued in order to make the courts closer to the citizens.

Change in the model of court judgement execution:

For several years the work has been carried out aimed at changing the hitherto model of execution of court judgements, which would result in enhancing the effectiveness of the enforcement proceedings.

The first and the most important effect of the said works was the Act dated 29th August 1997 on law enforcement officers and execution (Journal of Laws no. 133 item 662 as amended) which, among others:

- substantially changed the status of the law enforcement officers by making them public officials and not court officers, as it has been so far;

- related the remuneration of the law enforcement officers to the effectiveness of execution carried out by them;

- permitted creditors to choose a law enforcement officer (a creditor may always submit a motion on instituting and performing the execution to the law enforcement officer of territorial jurisdiction and the said officer may not refuse the same; however, the creditor may also move to another law enforcement officer selected by him/her).

The next stage was the revision of the said Act on law enforcement officers and execution made with the Act dated 18th September 2001, which became effective on 1st January 2002. Pursuant to the said revision, the law enforcement officer acts on his own account and is no longer – even to a minimum extend – financed by the State. His income is composed solely of enforcement fees, which depend fully on the effectiveness of the execution performed by him.

The said revision resulted also in the reduction of enforcement proceeding costs. Pursuant to it the relative fee amounts to 15% of the value of the executed claim (prior 20%) and is charged to the debtor. It is not obligatory to charge a part of the relative fee to the creditor before launching the execution and the relevant decision was left at the discretion of the law enforcement officer.

Presently the aforementioned works are being carried out aimed at complex revision of the regulations on enforcement proceedings included in the Code of Civil Procedures.

Change in the organisational model of the court

In the appeal and district courts independent administration branches were separated and are managed by the court directors. They release court presidents and division heads from administrative, organisational and financial matters.

In 2002 all positions of the directors of courts of appeal were filled in as well as 37 out of 41 positions of the directors of district courts.

Computerisation of the judiciary

IT projects, aimed at providing support to the courts and public prosecutor's offices through the application of modern technologies, are being consequently implemented by:

- providing the courts with the access to electronic law databases containing the European legislation: all courts hold licenses for LEX Omega database, which includes the key European law provisions;
- providing all the courts and public prosecutor's offices of the district, regional and appeal instance with the access to the CORS-NET (VPN) IT telecommunication system. This way the courts and public prosecutor's offices will get access to the data contained in the central data bases being at the disposal of the Ministry of Justice.
This year another 49 units have been connected to the system, so the process is almost completed (there are only 3 local public prosecutor's office left for connection);
- implementing the IT recording system. Last year the system (*Tabula* for criminal cases) has been implemented in the indicated courtrooms of 8 district courts. In 2003 the implementation will cover another 11 district and local courts. Therefore, at the end of this year the system will be operational in all district courts;

- gradual computerisation of the land and mortgage registers. The project provides for the pilot implementation of the system in 6 units (the system is already operational there) and then for gradual implementation in other locations – first in 24 selected land and mortgage register divisions under PHARE 2000 and then in another 34 divisions under PHARE 2001.

Additional human resources for the judicial units.

Work is carried out over developing a regulation, which will enable to employ assistants to the judge. The above-mentioned draft is to be signed till the end of November 2002.

The number of full-time adjudicative and administrative officers in the courts is growing systematically. In 2002 the courts were granted additional full-time posts for 230 judges, 50 junior judges, 80 division officials and almost 350 administrative officers. The budget of the common courts of law for 2003, approved on 23rd November 2002, provides for even bigger increase in the number of full-time posts over this year (368 judges, 82 junior judges and 700 officers).

Increase in the financial expenditure for the judiciary

The volume of the budgetary funds allocated to the judiciary is increasing year by year.

The budgetary Act for 2002 allocated the amount of PLN 2,560,317,000 for the expenditure of the common courts of law system, which was by 15.41% more than the actual execution of the budget of the judiciary in 2001. The investment expenditure contained in the said amount totaled PLN 71,336,000, i.e. by 20.55% more than the actual execution of the budget in 2001.

The budgetary Act for 2003 provides for further growth in the expenditure for the common courts of law system (up to the amount of PLN 3,408,365,000).

C. Situation in Warsaw courts and activities taken to improve the said situation:

Approximately 10% of all cases registered in the Polish courts are submitted to the District Court in Warsaw and four Warsaw district courts. The said courts have the worst efficiency results (length of the proceedings) in Poland as regards all categories of cases. The worst situation is noted in regard to criminal cases considered in the local courts where the average proceeding duration is several times longer than in other local courts.

The Warsaw courts operate in exceptionally difficult conditions. The main courthouse at Aleja Solidarnosci, built in 1939, does not fulfill basic office conditions for the premises of the state office.

Each small room hosts over ten judges and officers. Part of the house is at risk of collapse. The Ministry of Justice carries out numerous activities aimed at improving the said situation. Therefore a new building was acquired, which would house the Local Court for Warszawa-Praga, presently located at Aleja Solidarnosci Upon moving to the new seat the said court would be divided into two smaller units.

The premises in Warsaw that could be used as the seat of other local courts are also searched for.

It should be noted that a difficult situation of the Warsaw courts has a negative impact on the image of the Polish judiciary as a whole. Based on the difficulties faced by the said courts the general opinion of the Polish judiciary is formed. This is an unfair opinion as the majority of the district and regional courts are not in arrears with considering cases and the problem of proceeding prescription is practically not known there.

D. Substantive penal law:

The works of the Parliament over the revision of the Penal Code (presently carried out in the parliamentary Extraordinary Commission for changes in codification) are not connected with the implementation of the judgement by the European Court of Human Rights on the case of *Kudla v. Poland*. The acceleration and improvement of court proceedings as well as introduction of efficient appellate procedures cannot be obtained by way of amendments to the substantive penal law as the said law regulates only the principles of penal lia bility and not the procedures, which enforce the same.

E. Procedural penal law:

The acceleration and simplification of the criminal proceedings, significant in the context of the aforementioned judgement on the case of *Kudla*, is facilitated by the changes in the penal procedure, effected in January 2003. A relevant Act on amending the Act – Code of Criminal Proceedings, the Act – Introductory provisions to the Code of Criminal Proceedings, the Act on the key witness and the Act on classified information protection was adopted by the Parliament on 10th January 2003 and signed by the President on 21st January 2003. The said Act will become effective on 1st July 2003. The key solutions facilitating improvement of the penal proceedings are as follows:

1) new solutions referring to the procedures and jurisdiction of the courts

- expanding the catalogue of cases considered under a simplified procedure by covering all cases in which the investigation has been carried out (Art. 469) and canceling the ban on considering cases under a simplified procedure with regard to the defendant who is imprisoned or who is a juvenile, deaf, dumb or blind, with regard to whom there is a justified doubt as to his/her accountability, or who does not have a command of the Polish language;

- introducing the so-called transferable jurisdiction of the courts, consisting in the possibility of handing over the case on each and every crime – due to its extraordinary weight or complexity (Art. 25 § 2) – for the consideration of the district court as the court of first instance;

new solutions referring to the preparatory proceedings:

- entrusting with the police of most of the inquiries (Art. 311 § 1) – presently the inquiries are carried out by the public prosecutor;

- expanding the catalogue of crimes in which an investigation, and not a more formalised inquiry (Art. 325 b), is carried out, e.g. including – into the said catalogue

– the crimes penalised with up to 5 years of imprisonment and in case of crimes against property – the crimes with the subject matter of the crime or the damage caused or liable of the value up to PLN 50,000;

- introducing the possibility of quick discontinuance of the investigation and entering the case into the register of crimes when the activities under the investigation carried out for at least 5 days do not give sufficient grounds for finding the perpetrator in the course of further activities under the legal proceeding (Art. 325 f) – the discontinued proceeding may be each time reopened if the existence of new circumstances is revealed;

- introducing a common Report from oral information about the crime, from the hearing of the informant acting as a witness and from accepting a motion on prosecution (Art. 304 a) – presently each of the said activities should be included in a separate Report;

- withdrawing from the necessity to develop a decision on bringing forward a charge and issuing a decision on closing the investigation (Art. 325 g);

- limiting the investigation scope to establishing whether there are grounds for bringing an accusation or for any other closing of the proceeding, hearing the suspect and the injured person as well as performing the activities, which could not be repeated, in the Reports. Introduction of the possibility to record other evidencing activities in the form of a Report limited to the key statements of the persons participating in the said activity (Art. 325 h);

new solutions referring to the committal proceedings:

- expanding the possibility of voluntary submittal to penalty (Art. 387) by the defendant, the socalled summary trial, by allowing for submitting the motion on bringing in a verdict of guilt and inflicting a relevant penalty to the defendant accused of a petty offence – presently such trial may be applied only towards the defendant accused of a petty offence penalised with up to 8 years of imprisonment. The consent by the public prosecutor and the injured person, being the necessary condition for the summary trial, was replaced with the lack of objection for such way of closing the proceeding;

- expanding the possibility of the conviction without a trial (Art. 335) over all cases of crimes penalised with up to 10 years of imprisonment – presently up to 8 years;

- leaving the decision on continuance of the trial after 35 days of adjournment at the court's discretion (Art. 404 § 2) – presently the court is obliged to carry out the adjourned case from the very beginning, i.e. after 35-day break;

new solution referring to the evidence proceedings:

- expanding the possibility of the court's using of the evidence collected under a preparatory proceeding or in any other proceeding provided for by the Act, by allowing to read the Reports or other documents or to deem the same as having been read (Arts. 389 and 391-394);

- enabling the courts to dismiss the motions on evidence aimed at "obvious prolongation of the trials" (Art. 170 § 1 item 4), allowing for the distance hearing of the witness with the use of relevant technical means (Art. 177 § 1 a);

- allowing for serving letters through fax or electronic mail (Art. 132 § 3);

- expanding the scope of using regulations referring to the delivery of the subject-matter, search and control of conversations over IT systems, IT data carriers and e-mail messages (Art. 236 a and 241);

- possibility to take blood or secretion samples from a suspect without his/her consent (Art. 74 § 3)

– presently such a consent is required;

other:

- expanding the possibility of carrying out mediation proceedings on initiative or upon consent of the injured person and the defendant by enabling the submittal of the case by the court, and under the preparatory proceedings – by the public prosecutor, to a trustworthy institution or person (Art. 23 a).

F. Possibility of introducing of an effective appellate measure against the length of the court proceedings (Re: Section 9)

One should share the observation that the excessive length of proceedings is also a problem in Poland. However it has to be stressed that this phenomenon does not exceed the dimension known in other countries of the so-called „old democracies". A good proof for it is a number of violations of Article 6 of the Convention by Poland, which were adjudicated by the Court in Strasbourg. Globally, by the half of February 2003 the Court issued 39 judgements against Poland relating to violations of Article 6 of the Convention. In 35 cases the Court found a violation.

The work over the possibility to introduce an effective appellate measure (effective remedy) against length of the court proceedings into the Polish legislation, which would fulfil the requirements of the Convention, pursuant to the interpretation of the European Court of Human Rights in its judgement of 26th October 2000 on the case of *Kudla v. Poland*, were launched immediately upon the announcement of the said judgement.

A special working group composed of the representatives of the ministries of justice and foreign affairs, developed a draft of a separate act on legal measures against violating the right to have the case considered without unjustified delay and on amending the Act – the Code of Civil Proceedings.

The draft provided for the possibility to submit a separate complaint to the court by every person who deems that the proceeding on his/her case lasts longer that it is necessary to clarify all circumstances substantial for the settlement of the said case. The authorised person would be able to claim relevant compensation under the complaint.

The complaint was to be considered by the court of appeal which, in case of finding an unjustified delay in the proceedings, could commission taking up relevant actions in the assigned terms to the competent court and, moreover, could adjudicate relevant compensation in case of finding that the complainant was harmed due to the violation of his/her right to have the case considered in a reasonable time.

In the course of the intra- and interdepartmental consultations the draft faced severe criticism. Apart from the fact that some solutions contradicted the Constitution, the draft was criticised mainly for imposing additional burden on the courts and disorganising the activities of the same, instead of shortening the length of the proceedings. The work over the said draft is continued.

At the turn of the last and this year the work over the new draft of the act, which would introduce a legal measure against the length of the court proceedings, have been reopened, but this time by the Civil Law Codification Commission at the Ministry of Justice. At the preliminary stage of the work the Commission reviewed three concepts:

- introduction of a complaint against the length of the proceeding, which would be considered by the common court of law of higher instance under the penal, civil or administrative proceedings.
While allowing the complaint the court would state only that the proceeding was too lengthy and could adjudicate relevant compensation;

- acceptance of a model based on the so-called *Pinto* Act. The party complaining about the length of the proceeding could claim compensation for the lengthy (or prolonged) examination of his/her case before the court of higher instance and the proof of the length would constitute a premise for the recognition of a claim;

- use of the constitutional complaint for finding the excessive length of the court proceedings. In case of passing such a judgement by the Constitutional Tribunal, the party could claim compensation before the common court of law.

The latest discussions of the Commission show that it evolves towards the second concept. It is possible that in 2003 the Commission will present a preliminary version of new solutions. The draft was included in the plan of the Ministerial Committee for 2003.

With reference to the suggestion that measures other than a remedy of a compensatory character should be introduced, it should be stressed that creating a purely preventive measure, not affecting simultaneously the sphere of judicial independence, seems to be extremely difficult. Furthermore, it needs to be noted that even the adjudication of the compensation (indemnity) might also have a certain

preventive result. Therefore, it may not be prejudged that a compensatory remedy could not – by its nature – be effective also for pending judicial proceedings (for instance, compensation for excessive length of proceedings, may redress, at least partly, a damage resulting from the excessive length).

G. Friendly settlement (Re: Sections 10 and 59.1)

Friendly settlement of a case concerning excessive length of proceedings should certainly be taken into consideration even if it is only within the limits of judicial compensation proceedings.
According to general principles, such a practice may be pursued, e.g., in the proceedings carried on basis of the provisions, which are now a subject of the Codification Commission's work. It is difficult to imagine a situation in which a friendly settlement of a case related to excessive length of proceedings is negotiated in non-judicial proceedings and with the participation of third parties, such as the Ombudsman. For system's sake and due to the fact that in such cases an independent court would be *de facto* one of the parties to a dispute, such a solution seems impossible. However, a suggestion that in cases under examination by the Court in Strasbourg a friendly settlement should be sought is pertinent.

2. Other issues

Pre-trial detention (Re: Section 7)

A general observation that persons in pre-trial detention might be deprived of liberty for excessively long periods of time while awaiting trial is not justified. It is to note that according to Article 250 § 1 of the Code of Criminal Proceedings the pre-trial detention may only be imposed on the basis of an order of the court. Ordering this kind of preventive measure is also limited in time.
According to Article 263 § 1 of the Code of Criminal Proceedings in the course of proceedings, the court applying pre-trial detention shall fix a period not exceeding three months. If in view of the special circumstances of the case, the preparatory proceedings cannot be completed within the timelimit specified in § 1, pre-trial detention while the investigation is pending may be extended on a motion from the public prosecutor by the court having jurisdiction over the case for up to six months or by a court of a higher level than that having jurisdiction over the case for an additional prescribed period, necessary for the completion of the preparatory proceedings, which may not, however, exceed twelve months (Art. 263 § 2 Code of Criminal Proceedings). The total period for applying pre-trial detention preceding the first sentence by the court of the first instance may not exceed two years. The extension of applying pre-trial detention over the periods of respectively 12 months or 2 years specified above, may be made only by the Court of Appeal, in which circuit the proceedings is pending, and in the preparatory proceedings on a motion from the Appellate Public Prosecutor – but only in extraordinary circumstances exhaustively listed in this provision (Art. 263 § 4 Code of Criminal Proceedings). If there is a need to apply pre-trial detention after issuing the sentence by the first instance court each prolongation may not be longer than 3 months (Art. 263 § 7 Code of Criminal Proceedings).

Access to justice

One may not share the general suggestion that access to justice is possible for the well-off and well-placed people. In particular, in the mentioned labour and social security cases such a situation does not exist at all since these two categories of cases are always free of court fees by virtue of the law. In other categories of cases there are also possibilities to obtain exemption from court fees for poor people as well as to get *pro-bono* lawyers. It should be stressed that the relevant provisions of the Code of Criminal Proceedings and Code of Civil Proceedings, which regulates the issue of legal aid, are not "on paper" only but are implemented with success in practice. A reflection of the scale of resort to the *pro-bono* lawyers may be the amount of the expenditures of the State budget for this purpose, namely: expenditures for *pro-bono* lawyers (for impoverished and handicapped people) reached in 2001 the level of 54,577,000 PLN.

Prison system (Re: Sections 12-14 and 59.3)

A general statement in the Report on the programme of improvement of the situation in the Polish prison service needs to be specified in more details. It should be noted that the programme elaborated by the Prison Service Central Administration provides for the increase in the capacity of penal establishments and remand prisons by 20.000 within five years. It provides for the establishment of new divisions in already existing penal establishments or re-establishment of divisions, which are not used at present for various reasons. The implementation of this programme is underway.

There is no doubt that apart from the imprisonment other penalties should also exist and be applied. There is already a number of alternative penalties of this kind in the Polish criminal law system. This refers both to the Penal Code and the Act on Proceedings in juvenile cases. In particular, the latter one, in Article 6 provides for as many as 11 measures, yet only 2 of them involve deprivation of liberty. It is worth mentioning that courts, depending on circumstances of a given case, apply frequently alternative penalties. Yet, it is not the prisons' overpopulation that should determine or even exert influence upon the choice of penalty in a given case.

Remand prison in Bialoleka (Re: Section 13)

It is true that in the Remand Prison in Bialoleka there are instances of placing 6 prisoners in cells for 4 persons, although the CPT recommended that this number should not exceed 4. As it has been explained in the Reply by the Government of Poland to the CPT's Report, such a situation is a result of the fact of overcrowding the prison since November 1999, which is difficult to reduce even though the capacity of the unit have been doubled, some premises have been adapted, and some changes in the allocation of prisoners introduced.

Access to lawyers (Re: Section 14 and 59.4)

Complaints addressed to the Minister of Justice by detainees do not reveal any problems with contacting *pro-bono* lawyers. Complaints of this kind constitute a marginal number of all the complaints received from remand prisons. Regardless of this fact, it should be added that bodies of the bar self-government regularly supervise whether their members comply with the provisions and principles of professional conduct, and are obliged to apply the appropriate disciplinary measures in cases of infringements.

Police violence (Re: Section 15)

With respect to the information on cases of ill-treatment and killing of members of the Roma ethnic minority in prisons, the Government of Poland would like to declare that no such cases have been recorded to date. The Commissioner for Human Rights refers to the Report by the European Roma Rights Centre. However, representatives of the Roma community in Poland (with whom the Ministry of Internal Affairs and Administration maintains permanent contacts) have never reported a single case of this kind. Moreover, any information on a criminal act against members of the Roma community is subject to scrutiny. The National Police Headquarters reports to the Ministry of Internal Affairs and Administration on any such acts on a monthly basis, and, if justified, additional investigations are conducted. Police officers working in the Roma community also receive appropriate training.

The Government of Poland cannot agree with the opinion on the police treatment of individuals under temporary police custody. The submission about police violence against detainees is not corroborated by statistics or explanatory proceedings. The Government wishes to emphasise that the police attach special importance to procedures of proper treatment of both offenders and victims, thus implementing all the rules referring to human rights.

NON-DISCRIMINATION AND THE SITUATION OF MINORITIES

Non-discrimination in labour legislation (Re: Section 21)

Article 11 of the Labour Code, in force since June 26, 1974 (as amended) contains an antidiscrimination clause providing that *"any direct or indirect discrimination in employment, in particular based on sex, age, disability, race, nationality, beliefs, especially political or religious, or union membership shall be prohibited"*. However, the Code lacks provisions that would impose an obligation of equal treatment regardless of sexual orientation and provisions banning sexual harassment. These questions are addressed in yet another draft amendment to the Labour Code. Article 18, Section 1 of the draft provides that *"Employees, in particular regardless of sex, age, disability, racial or ethnic origin, religion, denomination, or sexual orientation, shall be treated equally in connection with the establishment and termination of employment, terms of employment, promotion, and access to training to improve professional qualifications"*. Article 18, Section 4 of the

draft includes the following definition of sexual harassment: *"discrimination based on sex shall also include any unacceptable behaviour of sexual nature or behaviour with reference to the employee's sex aimed at or resulting in the violation of the employee's dignity, or denigration, or humiliation of the employee. Such behaviour may include elements of physical, verbal, or non-verbal nature."*

After the first reading in the Lower Chamber of the Polish Parliament (*Sejm*) on January 9, 2003, the draft was sent to the Sejm Extraordinary Committee for Legislative Amendments.
At the meeting on January 22, 2003, the Committee established a subcommittee (chaired by Ms. M. Winiarczyk-Kossakowska) to examine the proposed amendments. The first sitting of the committee was held on February 25, 2003.

Legislative work on non-discrimination (Re: Section 23)

The *Sejm* has not yet examined the draft Law on the General Inspector for the Prevention of Discrimination. So far, the draft Law has been subject to consultations between ministries, as a result of which the need of establishing a separate anti-discrimination office was questioned. At present the draft Law awaits a decision by the Cabinet to determine the nature and status of the institution responsible for implementing the state anti-discrimination policy.

At present the draft law is examined by the Parliament. Consultations between the ministries have not been completed, and, based on the discussions held to date, it seems that the majority of ministers are against the establishment of the institution of the General Inspector for the Prevention of Discrimination.

Minorities rights (Re: Sections 24-30)

A. National legislation and international instruments

With reference to the comments on ratification by Poland of the Council of Europe Framework Convention for the Protection of National Minorities, it must be noted that sending to the Secretary General of a report on Poland's implementation of the provisions of the Convention did not close a debate on the document with representatives of minorities. Organisations of national and ethnic minorities were also involved in the preparation of the Report itself.

The Polish side invoked the provisions of bilateral treaties only in cases where they substantially supplemented domestic legislation. The principles enshrined in the Convention, which are not reflected in domestic Polish legislation, can be promoted on the basis of bilateral treaties. In this case, bilateral treaties suffice for enjoyment of the rights mentioned in the question. This is connected with Article 87 of the Constitution of the Republic of Poland, according to which the sources of laws that apply to all citizens of the Republic of Poland include ratified international agreements.

However, not all the principles set forth in the Convention are reflected in bilateral treaties. Moreover, the provisions of these treaties may differ from each other. For example, the "minority clauses" in the *Treaty between the Republic of Poland and the*

Federal Republic of Germany on Good Neighbourliness and Friendly Co -operation dated 17 June 1991 and in the *Treaty between the Republic of Poland and the Republic of Lithuania on Friendly Relations and Neighbourly Co -operation* dated 26 April 1994 are longer and more detailed than similar clauses in the *Treaty between the Republic of Poland and the Czech and Slovakian Federation Republic on Good Neighbourliness, Solidarity and Friendly Co -operation* dated 6 October 1991 and the *Treaty between the Republic of Poland and the Russian Federation on Neighbourly and Friendly Co-operation* dated 22 May 1992.

As mentioned above, Article 87 of the Constitution of the Republic of Poland states that bilateral treaties are a source of law in Poland and, if self-executing, may be directly applicable. Every natural or legal person (including associations of national minorities and individuals belonging to national minorities) may thus adduce the provisions included therein before a domestic authority. In practice, organisations of national minorities or their representatives, when presenting demands upon the Polish government authorities sometimes refer to the provisions of bilateral treaties. The number of such cases, however, is relatively small, which attests to the fact that bilateral treaties are respected.

The draft *Act on National and Ethnic Minorities in the Republic of Poland* is currently in a Special Sub-Committee of the Sejm established to review the bill. The sub-committee consists of members of three regular parliamentary committees: National and Ethnic Minorities, Administration and Internal Affairs and Education, Science and Youth Committee. Due to the fact that the subcommittee has not yet completed its work on the bill, it is premature to furnish the latest version at this time. However, it appears that the text of the Act will differ substantially from the version first read by the Speaker of Parliament on 11 January 2002. According to its schedule, the Committee on National and Ethnic Minorities plans to review the Report in April 2003. It is worth mentioning that the Council of Ministers has adopted the *Government's Position on the draft National and Ethnic Minorities in the Republic of Poland Act*, in which it has underlined the need to enact this legislation.

Polish law does not provide for the procedures concerning the recognition of a given group as a national or ethnic minority. Nor has the concept of "national minority" been defined in international law (e.g. there is no such definition in the *Framework Convention of the Council of Europe for the Protection of National Minorities*). The interpretative declaration submitted together with the instrument of ratification, defines this term as follows: "Taking into account the fact that the *Framework Convention of the Council of Europe for the Protection of National Minorities* does not contain a definition of national minority, the Republic of Poland declares that it understands this term to mean national minorities who inhabit Poland whose members are Polish citizens." In the explanation to the draft *National and Ethnic Minorities in the Republic of Poland Act*, national minorities are defined as minorities who identify themselves with nations organised in their own states, and ethnic minorities as stateless minorities. The national minorities mentioned are:
Belarussian, Czech, Lithuanian, German, Armenian, Russian, Slovak, Ukrainian and Jewish; the ethnic minorities are: Karaites, Lemks, Romany (Gypsies) and Tatars. (It should be pointed out that in general this list does not generate objections among historians, sociologists, cultural anthropologists or linguists). To recapitulate, the

parliament of Poland should list the country's minorities in the *National and Ethnic Minorities in the Republic of Poland Act* or the explanation to it. However, in the absence of this law, the courts can settle the matter in the event a dispute arises.

In the *Interpretative Declaration to the Framework Convention of the Council of Europe for the Protection of National Minorities*, the Republic of Poland has declared that the term "national minority" means only those minorities whose members are Polish citizens. Thus, foreigners and immigrants cannot be considered as persons belonging to national minorities, which means they do not enjoy the protection provided by the *Framework Convention of the Council of Europe for theProtection of National Minorities*. Nevertheless, their rights are safeguarded by the provisions of the Constitution, and in particular its Article 37 § 1 which states that "whoever is under the authority of the Republic of Poland shall enjoy rights and freedoms ensured in the Constitution". The specific regulations that apply to foreigners in Poland are included in the *Act on Foreigners* dated 25 June 1997.

According to the statistics on foreigners, 29,377 foreigners are registered as permanently domiciled in Poland, while 924 are entitled to the temporary stay. This refers only to foreigners who live in Poland lawfully.

The number of complaints received by the Commissioner for Civil Rights Protection from organisations and individuals who belong to national and ethnic minorities is relatively small. These complaints constitute a tiny percentage of all the complaints examined by the Commissioner's office.
However, owing to the high importance accorded to respect for minority rights as one of the basic standards of democracy and the rule of law, the Commissioner devotes special attention to complaints filed by minorities, treating them as a leading priority.

B. Monitoring of the status of Roma minority

In 2002, the Commissioner for Civil Right Protection examined 33 cases concerning national minorities. Seventeen of these cases were initiated by the Commissioner *ex officio* on the basis of findings made by himself at meetings with representatives of minority organisations and groups. The other 16 cases were initiated on the basis of formal complaints filed by minority organisations or natural persons.

Five of the cases concerned complaints of discrimination based on nationality. A resident of Nowy Sacz stated that as a Roma (Gypsy) he had been accosted and verbally abused by certain residents of his city and had seen anti-Romany graffiti on walls, which caused him to feel threatened.

As a result of the Commissioner's intercession, the local government authorities of Nowy Sacz declared that the Police and city administration would henceforth be more sensitive to the aforementioned problems. In Cracow, a woman of Romany origin claimed that her family had suffered discriminatory treatment in relation to granting her social security benefits. However, two separate investigations found those complaints groundless. A Romany social organisation complained that persons of Romany origin had been discriminated against when they had been refused entry to a free public event held at a sports stadium. The investigation carried out by the

Commissioner's did not confirm the charge of discrimination – instead, it found that the entry had been refused to an internal stadium parking lot provided only for authorised persons with special permits. A Cracow resident of Romany origin approached the Office of the Commissioner for Civil Right Protection claiming that he had been discriminated against and harassed on account of his origin, but he is yet to provide more details concerning the alleged incidents.

The social-economic conditions of Poland's Romany minority are particularly difficult in the mountainous regions of Malopolskie Voivodship. The situation of this minority in Podkarpackie Voivodship is not substantially different from that in other regions of Poland. Accordingly, the Council of Ministers decided to extend government assistance first of all to the Carpathian Romany community of Malopolskie Voivodship. The necessity of government action to relieve the plight of the Romany community had been stressed for years by NGO's, local government bodies in Malopolskie Voivodship, international organisations and Romany organisations. Responding to these calls for action, the government administration developed the *Pilot government programme in support of the Romany community in Malopolskie Voivodship for 2001-2003*. Romany representatives from local government structures as well as representatives elected by Romany communities were involved in developing these plans. Thus, the project was drawn up with the broad co-operation of local government bodies and NGO's, including Romany organisations. The *Programme* was adopted by the Council of Ministers on 13 February 2001. It provides for measures to improve living standards, social conditions, health, security and culture of the Romany minority and to combat unemployment among them. The *Programme's* main emphasis, however, is on education.

It should be emphasised that the *Programme* meets the criteria of the European Commission and other European institutions (such as the Organisation for Security and Co-operation in Europe) concerning assistance for the Romany community. Periodic Reports issued by the European Commission on Poland's progress in the accession process in 2001 and 2002 evaluated positively the actions undertaken by the government administration to improve the situation of the Romany.

Solutions that prove successful will be used in the longer-term, nation-wide *Government programme in support of the Romany community in Poland*, which will also be extended to the Podkarpackie Voivodship.

C. Dissemination of non-discrimination values

As part of the effort to disseminate knowledge about discrimination, its manifestations and methods of combating it, the Government Plenipotentiary for the Equal Status of Men and Women held a conference entitled *Equality and Tolerance in School Curricula and Textbooks* on 8 October 2002. The plenipotentiary is also involved in the *Strengthening Anti-Discriminatory Policies* project (as part of a PHARE programme) designed, *inter alia* , to raise the public's consciousness in these matters.

It should also be noted that the Government of Poland has launched the *Community Action Programme to Combat Discrimination for 2001-2006*, which provides for measures to fight xenophobic and intolerant attitudes.

D. Freedom of using minorities languages

With respect to the question concerning use of minority languages before administrative organs, the Government of Poland informs that bilateral treaties make a number of references to these matters.
These treaties, however, do not give members of minority groups the right to use their language in government administration. They make this right dependent either on the given country's laws (the treaties with the Czech and Slovak Republics) or simply state that the parties "shall consider permitting the use of national minority languages in their government organs" (the treaty with the Republic of Lithuania). The Government informs that there are no legal grounds on the national level for using minority languages in contacts with administrative organs (although the draft *National and Ethnic Minorities in the Republic of Poland Act* provides for such a possibility). Due to the fact that this right is not guaranteed by bilateral treaties, the position of national and ethnic minorities, not covered by bilateral treaties is no different from that of those who are. It should also be noted that, owing to the absence of the *National and Ethnic Minorities in the Republic of Poland Act*, there are no legal grounds for using minority languages in the situations described in Article 4 of the *Polish Language Act* dated 7 October 1999.

It follows that there are no voivodships, counties or municipalities in which members of minority groups may use their languages in contacts with administrative organs.

As far as the right to education in national or ethnic languages is concerned, the Government wishes to state the following:

In high schools in which a minority language is taught, this language is a compulsory subject. In high schools with a minority language and bilingual high schools, students can be examined in other subjects in their native language.

The possibility of holding examinations at the end of primary school and secondary school in minority languages in schools with those languages was introduced by the Minister of National Education and Sport in the Order dated 11 September 2002 amending *the Order concerning the conditions and manner of evaluating, classifying and promoting students and conducting examinations in public schools*. Examinations shall be held in minority languages in these schools as of 2005. This apparently late date stems from the requirement to prepare the necessary materials for the examinations. According to regulations, students must receive their examination *Information booklet* one-year prior to an examination. Currently, work is under way on preparing *Information booklets* in the country's various national and ethnic minorities languages.

With reference to the problem of Romany classes the Government of Poland informs that such classes exist solely at the level of primary school. After completion of these classes, Romany children have a possibility to attend integrated classes, but

there are no "Romany classes" at the secondary school or at higher levels. There have been no complaints concerning the quality of education in these classes. The choice between these two forms of education belongs solely to the parents. Romany classes constitute an additional and optional form of education in relation to integrated teaching. In practice, there are situations that in the same school some Romany children attend "Romany classes" while others attend integrated classes. The decision whether to send children to an integrated or "Romany" class is made by their parents. No tests are held in this matter. The Government does not currently consider the possibility of abolishing these classes; in any case, the school system in Poland is decentralised and the founding organ of each public school is a local self-government body. If "Romany classes" were eliminated by decree, their students would simply stop attending school (a large number of these children are several years behind their natural grade level). Addressing this problem, the *Pilot government programme in support of the Romany community in Malopolskie Voivodship for 2001-2003* proposes a new model for teaching Romany children, based on supporting Romany children in integrated classes. This model has already yielded its first results. In Malopolskie Voidvodship, where the idea of "Romany classes" arose and where they were the most numerous, such classes currently exist in only four schools. We hope that after the *Pilot programme* is extended to the entire country (which should occur in 2004), "Romany classes" will begin to disappear in other voivodships and that the problem will cease to exist within several years.

WOMEN AND CHILDREN

Juvenile remand centres (Re: Section 33)

Polish law does not require a court’s permission to maintain a contact with children placed in a juvenile centre. Such permission is required only in cases when minor’s parents are deprived of custody, or parents (or other persons) are explicitly prohibited by a court to contact a child. Cases, yet isolated, of prohibiting parents by the staff to contact a child placed in a centre do not result from the provisions of the law in force but from its incorrect application. A special attention will be paid to this.

The Government of Poland cannot share the opinion that defense counsels do not have a possibility to contact children placed in juvenile centres or reformatories. In criminal proceeding as well as in proceedings concerning juvenile cases, a free access of a defense counsel to his clients is guaranteed.

Certain restriction of free contact with the defense counsel may result from the possibility (provided for in Art. 73 § 2 of the Code of Criminal Proceedings) for prosecutor to be present during such a contact, if especially justified circumstances call for it.

Reproductive rights (Re: Section 34)

It is worth noting that, in accordance with Schedule 3 to the draft Order of the Minister of Health dated December 21, 2002 amending the Order of the Minister of Health dated March 26, 2002 on the List of Primary and Supplementary Drugs and Reimbursement for Supplementary Drugs (Official Journal No 28, Item 272, as

amended), the list of supplementary drugs covered by 50% reimbursement includes four types of new-generation hormonal contraceptive drugs: Harmonet, Minulet, Tri-Minulet, and Cilest. The reduced prices of the drugs will improve their accessibility.

The problem of abortion has long been the source of controversy in Poland. Many of the leading politicians have expressed views that the amendment, if any, to the Law on Family Planning, Protection of the Human Foetus, and Admissibility Conditions of Abortion (Official Journal of 1993, No 17, Item 78, as amended) – the so-called abortion law – should be subject to a national referendum.
The Government Plenipotentiary for Equal Treatment of Men and Women shares the opinion. The Government holds the view that no conditions exist to conduct such a referendum at the present moment, but they recognize the need to enforce existing provisions concerning the access to prenatal examinations and performance of abortions.

Sexual education (Re: Sections 35 and 36)

Under the Regulation of the Minister of Education and Sport dated February 26, 2002 on the Curriculum Foundations of pre-school Education and Comprehensive Education in Different Types of Schools (Official Journal of 2002, No 51, Item 458), it has become necessary to review textbooks, including family education textbooks. Experts are now reviewing the textbooks. Based on their opinion, it will be decided whether the textbooks are to be withdrawn, maintained unchanged or maintained on condition that suitable changes are made to the content.

On July 19, 2002, amendments were introduced to the Order of the Minister of National Education on School Education and the Content of Education on Human Sexual Life, Principles of Conscious and Responsible Parenthood, Value of Family and Life at the Prenatal Stage, as well as Methods and Means of Conscious Procreation Included in the Curriculum Foundations of Comprehensive Education dated August 12, 1999 (Official Journal of 2002, No 121, Item 1037, as amended). The amended provisions introduce a principle that education on contraception, will be taught based on full scientific knowledge on contraceptive methods. So far, education on conscious procreation has been limited to natural methods of determining fertility. The amended provisions also address extensively the problem of sexually transmitted diseases, with special emphasis on the transmission, infection, prevention, and social aspects of HIV/AIDS.

Domestic violence (Re: Sections 37-41)

According to surveys conducted by the Centre for Public Opinion Studies (CBOS) in 1993 and 1996, 18% of married women admitted that they were subjected to physical violence by their spouse.
Some 41% of divorced women reported that they had been often beaten by their spouse, and 21% that they had been sporadically subjected to violence by their spouse. About 32% of divorced women indicated that physical violence had been the main cause of their demand for divorce.

In August 2002, Poland adopted the National Program for Preventing and Combating Crime *Safe Poland*. The Program recognizes the prosecution and combating domestic violence against women and children as one of the major objectives of the state in combating criminal offences which are regarded as most painful by the Polish people. The Program ensures guarantees for suitable financing to meet its objectives. One of the responsibilities of the police is to intervene in domestic violence incidents.

The implementation of the system to prevent domestic violence began in 1998. Police, as the institution of the first contact, play an important role. Police officers are under obligation to maintain contacts with families in which domestic violence has been recorded.

Joint efforts of the National Police Headquarters, the Warsaw Police Headquarters and PARPA (State Agency for Solving Alcohol-Related Problems) led to the drafting of Regulation No. 25/98 of the National Police Chief on conducting domestic interventions by policemen in connection with domestic violence according to the so-called blue cards system. The Regulation determines, among other things, the conduct and the procedures of documenting domestic interventions.

In the course of few years when the procedure was applied, police field units signaled a need for changes, which were introduced in 2002 under Regulation No. 21/2002 of the National Police Chief.
The amended Regulation also allows for comments by non-governmental organisations co-operating with the police in this respect. area.

All police officers across the country are responsible for implementation of the procedure. Actions taken by police units in this respect are supervised and co-ordinated by the Social Pathology Department at the Office of Prevention Services of the National Police Headquarters. IT system was launched for the purposes of implementing a procedure to record data for the preparation of periodical reports.

Acting by themselves solely, the police are not able to eradicate domestic violence. It is necessary to ensure greater and more active support of all national and local governmental institutions that are competent in this area.

The institutions involved in providing assistance in pathological situations are as follows:

- State Agency for Solving Alcohol-Related Problems (PARPA);
- National Alliance of Individuals, Organisations, and Institutions “Blue Line”;
- Family Assistance Centres;
- Crisis Intervention Centres;
- Municipality and City Committees for Solving Alcohol-Related Problems;
- Psychological Assistance Centres;
- Health Care Units;

- Municipality and County Councils;
- Plenipotentiaries for Addictions affiliated with City and Municipality Authorities;
- Society of Children's Friends;
- Committee for the Protection of Children's Rights;
- Family and Juvenile Courts;
- Public Prosecutor's Offices;
- Welfare Centres; and
- Consultation and Information Units for Victims of Domestic Violence.

The police are convinced that closer co-operation and co-ordination of actions taken by different bodies based on information available to the police may contribute to improving the effectiveness of measures taken by the police.

The Government see recognizes a need to take measures aimed at effective prevention of domestic violence, including educational measures directed at police officers. It must be noted, however, that under the provisions of the Penal Code (e.g. Art. 157 § 5, frequently referred to as a ground for police interventions), damage to the body of closest relatives is an offence prosecuted at the request of the victim, a requirement which affects criminal prosecution of the offender. Only a clear request to prosecute and punish the offender may bring about optimal results to the police interventions. With respect to incidents meeting the description of the offence described in Article 207 of the Penal Code, there is a need to improve and promote measures taken by police officers.

The Government rejects a submission that the police regard such incidents of domestic violence as a private affair between of the family members. Despite the fact that there are a number of inefficiencies in discharging the responsibilities by the police, it seems that the above general statement is not warranted. At the same time, it is worth noting that domestic violence issues have been introduced to training programs for police officers.

A statement that in the Polish legislation there are no provisions which would make it possible to impose restrictions on persons who are a threat to their families and which would protect and assist victims of family offences is not correct. Such an arrangement is stipulated in Article 275 § 2 of the Code of Criminal Proceedings, which says that "a person under supervision is obliged to comply with the requirements contained in a court's or a prosecutor's decision. This restriction may extend to a prohibition of leaving a determined place of residence, obligation to report regularly before the supervisory authority, or to notification of intended departures and dates of return, and other limitation of his/her freedom necessary for the purpose of supervision." In practice, pursuant to this provision, prohibition to "approach" victims is imposed on perpetrators of family offences. Certainly, it is justified to draw the attention of courts and prosecuting authorities to the possibility and need to impose this kind of restrictions.

At the end of 2002, as part of measures aimed at improving the protection of victims of domestic violence through suitable legislative measures, the National Police Headquarters prepared and submitted to the Ministry of Internal Affairs and Administration a draft law amending the *Penal Code and Code of Criminal*

Proceedings to introduce a new institution - a prohibition for individuals to approach persons or places at a certain distance as determined by the court. This initiative is implemented as part of the government program *Safe Poland.*

TRAFFICKING IN HUMAN BEINGS

It is true that there is no definition of trafficking in human beings in the Polish Penal Code.
However, such a definition exists in the legal doctrine and in court's jurisprudence, what seems to be sufficient in practice. Nevertheless, it should be noted that legislative work aiming at modifying Article 253 of the Criminal Code is currently carried out and entered a parliamentary phase.

The Government informs that the final version of the *National Program for Preventing and Combating Trafficking in Humans* was elaborated at the end of 2002 and submitted to the Minister of Internal Affairs and Administration for final approval.

REFUGEES AND ASYLUM-SEEKERS

Legal guardians to separated refugee children (Re: Section 51)

The proposal to extend the provisions of the draft law on granting protection to non-nationals in the territory of the Republic of Poland so as to cover practically all foreign unaccompanied minors is not feasible in the light of the provisions of the draft. Under Article 47, Section 4 of the draft law, "The *de facto* guardian is appointed by the President of the Office for the Repatriation and Refugees from amongst the staff of the Office for a period until the end of proceedings on granting refugee status". The staff of the Office is not able to act as *de facto* guardians of all foreign unaccompanied minors that may stay in the territory of Poland.

At the same time, the Government of Poland would like to draw attention to the fact that in any administrative proceedings a legal representative (guardian or curator) must represent minors. The provisions of the Family and Guardianship Code regulate the establishment of guardianship or curatorship. The guardian (or, accordingly, the curator) protects both the person and the property of the minor, and in performing this task he/she is subject to supervision by the family and guardianship court (Art. 155 of the Family and Guardianship Code).

In the case of unaccompanied minors seeking refugee status, the rationale for establishing the institution of *de facto* guardian followed from the particular situation of this category of foreign minors. Accommodation in centres for foreigners, frequent cases of traumatic experiences in the country of origin, inability to contact the families are the reasons why it is extremely important to ensure a special form of guardianship conducive to preserving the child's personality and its proper development in extraordinary conditions during the proceedings on granting a refugee status.

Institution of "tolerated stay" (Re: Section 52)

The situation of the individuals described by the Commissioner is regulated in the draft Law on Granting Protection to Non-Nationals in the Territory of the Republic of Poland, which is now in the *Sejm*. The draft Law introduces the new legal institution of "tolerated stay", which meets the expectations indicated in the Report.

LABOUR AND SOCIAL RIGHTS

Situation of miners (Re: Se ction 53)

In line with the adjustment to the program to restructure the coal-mining industry, it is expected that 27,200 people (and not 35,000 as in the previous version of the program) will loose their employment in the industry.

Cases of redundant workers who continue to mine illegally, as noted in the Report, are in fact exceptional.

Labour law problems (Re: Section 54)

The Polish law guarantees timely payment of salaries (Art. 282 of the Labour Code) and protects employees against the effects of the employer's insolvency (Law of December 29, 1993 on the Protection of Employee Claims in Case of Employer's Insolvency).

The Government is aware that, in practice, there are incidents of non-payment of salary to employees. The Cabinet examined this problem at a meeting on September 20, 2002 and requested the Minister of Justice to:

- appeal to labour court presidents to accelerate all labour law cases and to consider as priority cases of non-payment of overdue salaries;

- appeal to commercial courts to obligate insolvency judges to inform receivers in bankruptcy about their statutory obligations toward employees;

- create a database with schedules of labour cases under examination by district labour courts, including cases of overdue salaries.

The State Labour Inspection receives approximately 35,000 employee complaints per year concerning irregularities in the application of labour law, of which over 80% are allowed. Half of the complaints concern payments of salary and other employee benefits.

Under the Law on the State Labour Inspection dated March 6, 1981 (as amended), inspectors can order the employer to pay salary for work and other employee benefits if they establish irregularities in payments to employees. If the employer evades compliance with the order, inspection bodies may conduct administrative execution.

As a result of the use of legal means at their disposal, including orders to pay, labour inspectors enforced PLN 75.2m in 2002 (42.7% of total due payments), that is 40% more than in 2001. They enforced due payments for the benefit of 55.4% of affected employees.

The constitutional freedom of association for trade unions purposes is developed in the Law on Trade Unions dated May 23, 1991. Article 1, Section 2 of the Law provides that a trade union is independent from employers in its statutory activities. Article 35, Section 1 of the Law provides for a fine or a imprisonment to be imposed on those who by virtue of their position or function interfere with the lawful establishment of a trade union organisation, obstruct lawful trade union activities, or discriminate employees on the grounds of their trade union membership, non-involvement in the trade union, or performing of a trade union function.

Possibility of ratification of the Revised European Social Charter (Re: Section 55)

A study on prospects for ratification by Poland of the Revised European Social Chart (of 1996) was initiated at the Ministry of Economy, Labour and Social Policy in February 2003. The work is scheduled to completed in 2005.

FREEDOM OF EXPRESSION *(Re: Sections 57 and 59.13)*

A decision of the Supreme Court, mentioned in the Report, concerning the limits of permitted criticism of public officials is an interpretation of the law in force. Since the regulations in force served as grounds for interpretation by the Supreme Court, there is no need to intervene as far as legislation is concerned.

It is true that the provisions of the Polish Penal Code concerning a defamation of a public official provide for the imprisonment as one of alternative penalties that could be applied for offences of this kind (it is worth mentioning that an offence of illegal “resistance” to public authority exists practically in all legal systems). The Government cannot agree, however, with the Report’s comment that the existence of this kind of penalty for cases of such defamation, as well as its application explicitly contradicts the Convention and the Court’s jurisprudence. For instance, in its judgment concerning the *Janowski vs. Poland* case (Application No. 25716/94) the Court found no violation of the Convention by the Polish court which had imposed a suspended imprisonment on a Polish national, for insulting municipal guards. In addition, it should be noted that in cases of defamation of public officials, the possibility of resort to the imprisonment is not frequently used. For example, in 2000 imprisonment was adjudicated for 441 offenders while the total number of offenders was 1074, and in only 72 of those cases imprisonment was imposed without a conditional suspension of its execution.

On this occasion, it should be stressed that the number mentioned in the Report (footnote 92) of 441 persons sentenced to deprivation of liberty for insulting public official concerns only the convictions for insulting public official while or in relation with his performing of professional duties (Art. 226 § 1 of the Code of

Criminal Proceedings). In addition, 4 persons were sentenced to imprisonment for insulting or humiliating a constitutional body of the Republic of Poland (Art. 226 § 1 of the Penal Code), including 2 cases of conditional suspension of the execution of this penalty.

These two offences cannot however be linked, as they refer to totally different categories of persons, although they are regulated in the same Article of the Penal Code. In the first case (Art. 226 § 3 of the Penal Code) these are the constitutional authorities of the Republic of Poland that are referred to. Only in such instances it may be analysed whether the sentences were or were not politically biased and whether they were aimed at protecting these officials from criticism. The other category of cases (Art. 226 § 1 of the Penal Code) refer to common offences almost always involving active aggression against officers of the police or of other services protecting legal order.

CommDH(2003)7

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

REPORT BY MR ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS

For the attention of the Parliamentary Assembly and the Committee of Ministers

[CommDH(2002)11]

I. Introduction

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

Having regard to the nature of the recommendation, formulated in the context of the accession of the Federal Republic of Yugoslavia to the Council of Europe, and Articles 3g[95] and 8,1[96] of the Commissioner's mandate, I informed the Secretary General of the Parliamentary Assembly of my decision to accept the recommendation by letter of 10th July 2002.

Two visits were undertaken to this end - the first, from 23 July to 6 August, to Serbia[97] and Kosovo, Montenegro and "the Former Yugoslav Republic of Macedonia", by Mr. Markus Jaeger, the Deputy Director of my Office, and Mr. John Dalhuisen, my Private Secretary, and a second, to Serbia and Kosovo and Montenegro, from 4 to 11 September, on which I was accompanied by Mr. Christos Giakoumopoulos, the Director of my Office and the above mentioned persons.

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

I would like lastly to express my gratitude to the Swiss and Finnish authorities, whose financial contributions to the functioning of my Office, enabled me to positively respond to the Parliamentary Assembly's unforeseen request. This final report for the attention of the Parliamentary Assembly and the Committee of Ministers of the Council of Europe outlines in greater detail the findings first presented to the Committee on Migration, Refugees and Demography of the Parliamentary Assembly immediately prior to the Parliamentary Assembly's decision on the accession of the Federal Republic of Yugoslavia to the Council of Europe on 24th September 2002.

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

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

97 See glossary (Appendix A)

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

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

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

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

Framework drawn up in May 2001, on the obligations of local institutions to respect international human rights standards. It cannot in the long run, as the situation continues to stabilise, be a salutary example to budding democratic institutions, to continue to be answerable to an ultimate executive authority, which does not itself adhere to these norms.

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

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

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

8. Calculating the number of individuals who might wish to return, indeed assessing any one individual's desire to return, is difficult. It depends, inevitably, on both push factors – the living conditions and prospects in their current place of residence – and pull factors – the situation they expect to find should they return. These factors are, moreover, particularly sensitive to time, which, whilst allowing for the conditions in Kosovo to improve, also tends to encourage integration elsewhere. It should not, in any case, be anticipated that all 230,000 registered IDPs will one day wish to return. The young and, especially, the urban, can be expected to integrate far more rapidly than the old and rural, whose skills are less adaptable and whose attachment to their places of origin is generally higher. Whilst property sales ought not, owing to the possibility of economic duress, to be taken as a definitive indicator of future intentions, it is worth noting that reliable estimates put the proportion of IDPs who have sold their property in Kosovo at about one third.

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

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

II. Background[98]

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

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

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

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

15. According to UNSCR 1244, UNMIK's main responsibilities are – in the follwing order[99] - to promote the establishment of substantial autonomy and meaningful self-administration in Kosovo; to organize and oversee the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; to perform basic civilian administrative functions where and as long as required; to facilitate a political process designed to determine Kosovo's future status; to support the reconstruction of key infrastructure and other economic reconstruction; to support, in coordination with international humanitarian organizations, humanitarian and disaster relief aid; to maintain civil law and order; to protect and promote human rights and to assure the safe and free return of all refugees and displaced persons to their homes in Kosovo.

16. In the FRY, the growing domestic opposition to Mr. Milosevic resulted in the victory of Mr. Kostunica in the federal presidential elections of 24 September 2000. Popular protest and strikes, culminating on 5 October 2000 when demonstrators took over the Federal Parliament, prevented Mr. Milosevic from annulling the results of the

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

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

elections. On 7 October 2002, Mr. Kostunica was sworn in as the FRY's new president. On 23 December 2000, free parliamentary elections were held in Serbia, followed by elections in Montenegro in April 2001. New governments, committed to reform, took office.

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

18. In January 2000[100], the Joint Interim Administrative Structure was established (JIAS), a predecessor to the PISG (see below). The three largest political parties to have emerged from the local elections, as well as Serbian Kosovan representatives sat in the Interim Administrative Council (IAC), a consultative mechanism between UNMIK and Kosovo's local leaders.

19. On 15 May 2001, the SRSG promulgated the Constitutional Framework[101] under which provisional institutions for democratic and autonomous self-government (PISG) were to be set up, pending the decision on the final status of Kosovo.

20. Elections for the 120 seats of the provisional parliament of Kosovo were held on 17 November 2001[102], resulting in Mr. Rugova's Democratic Alliance of Kosovo (DSK) holding 47 seats, Prime Minister Rexhepi's and Mr. Thaci's Democratic Party of Kosovo (DKP) 26 seats, Mr. Haradinaj's Alliance for the Future of Kosovo (AAK) 8 seats, the Bosnian Vatan party a few seats and the Serbian Povratak ("Return") party 22 seats[103].

21. The formation of the PISG took place on 4 March 2002. The PISG are composed of the Prime Minister, ten ministries and the Inter-Ministerial Co-ordinator for Returns. According to the Constitutional Framework and the UNMIK regulation which defines their composition and powers, the PISG exercise their functions under the ultimate authority of the SRSG, who has retained exclusive competence in certain key areas (reserved powers) [104].

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[100] UNMIK Regulation 2000/1, On the Kosovo Joint Interim Administrative Structure.

[101] UNMIK Regulation 2001/9, Constitutional Framework for Provisional Self-Government.

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

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

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

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

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

24. The current SRSG has made the gradual transferral of more responsibilities to the PISG conditional on good performance within the already transferred areas, and has set "benchmarks" for measuring the maturity of Kosovo society[105]. It would appear that not only the pace of the transferral of responsibilities, but also the answer to the question of the final status of Kosovo, is dependent on such progress. The slogan is "standards before status".

III. The human rights situation in Kosovo

1. Which human rights?

25. According to a decision taken by the SRSG in December 1999, the applicable law in Kosovo is the law that was applicable in the province up till 22 March 1989 (the day on which Kosovo lost its autonomous status within the SFRY) unless or until overridden by UNMIK regulations promulgated by him. In case of conflict, universal human rights standards take precedence[106].

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

27. These include the two UN Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights; the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (including the acceptance of the jurisdiction of the Committee against Torture to hear inter-State and individual petitions); the International Convention on the Elimination of All Forms of Racial Discrimination; the Convention on the Prevention and the Punishment of the Crime of Genocide; the Convention on the Elimination of All Forms of Discrimination Against Women. It is to be noted, however, that the Constitutional Framework enacted on 15

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

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

May 2001 by the previous SRSG, omits mentioning the UN Covenant on Economic and Social Rights and the UN Convention Against Torture, as applicable law in Kosovo. I concur with the previous United Nations High Commissioner for Human Rights, Mrs. Robinson, that these norms *"should be part of any legal framework established by a UN administration"*[107].

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

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

2. Who is accountable?

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

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

32. However, Belgrade still exercises influence in those parts of Kosovo where Serbs are a majority[108]. There, health staff and teachers receive instructions, pay and supplies from Belgrade. There are five Serbian-run parallel courts in Kosovo, and the District Court for these lower courts is located in Kraljevo, Serbia, where the (parallel) District Court of Mitrovica was relocated in 1999 to hear cases from Kosovo. These parallel courts employ a total of 34 judges, paid by Belgrade, and create an overlapping jurisdiction, which leads to the possibility of double jeopardy

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[107] Letter by Mrs. Robinson to Mr. Steiner, dated 14 March 2002, emphasis added.

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

and general public confusion. Belgrade has also supported the so-called "Bridge-Watchers", a sort of militia that physically prevents Albanian Kosovans from entering North Mitrovica[109]. Belgrade sponsors return projects selected and designed by it, pays for constructions and repairs according to its criteria, etc. The result is that the FRY (or rather Serbia) still remote controls large parts of public activity in certain parts of Kosovo.

33. On various occasions, UNMIK has officially objected to these "parallel structures", finding such activity to be in violation of UNSCR 1244. Work is under way, especially in the FRY/Serbian-UNMIK High Ranking Working Group (HRWG), to progressively dissolve such parallel structures[110]. Be this as it may, it is important, for the scope of this report, to recall that, by exercising power and influence in parts of Kosovo, the politicians and authorities in Belgrade retain a share of responsibility for the human rights situation in Kosovo[111].

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

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

36. Lastly, I find the view that UNMIK is not to be held responsible for the respect of human rights standards by KFOR problematic[112]. Were this the case, then one of the basic principles governing the functioning of any democratic State (or "entity") respectful of human rights and the rule of law, would not be respected in Kosovo: the principle that the military is not a separate power operating outside the realm of law and that it must fall under the full control of civilian power (see below Chapter III, 3, h).

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

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

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

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

3. Main human rights issues

a. Immunities of the international presence

37. UNMIK Regulation 2000/47[113] grants, on the one hand, UNMIK and KFOR immunity from any legal action wheresoever and, on the other hand, grants their personnel immunity from jurisdiction in Kosovo in respect of any civil or criminal act performed or committed by them in their official capacity within the territory of Kosovo.

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

39. In Kosovo, however, the UN mission is itself the (interim) government, insofar as the main government functions are fulfilled by it and the SRSG retains the supreme executive authority over the PISG. Kosovo's judiciary has been created and shaped by the international administration and remains under its control and international judges are available. The *rationale* for the immunities is consequently unclear. Indeed, in respect of Kosovo, the immunity of UNMIK is tantamount to immunity against itself and against authorities created and controlled by it. Likewise, the immunity of its and KFOR's personnel amounts to internationals being granted immunity against other internationals (or against nationals under their authority).[114]

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

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

42. With respect to the immunity from jurisdiction in Kosovo that UNMIK and KFOR personnel enjoy, it is to be noted that it can be waived by the SRSG under Section 6 of Regulation 2000/47, as such immunity is considered to be for the benefit of UNMIK and KFOR, and not for the individual. Indeed, it would appear that the SRSG has waived it where appropriate. Therefore, the immunity of international personnel is not necessarily tantamount to impunity. However, as OMIK put it, "*[t]he*

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

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

justice system in Kosovo, in terms of both its independence and its authority to enforce the law, has not had a positive experience with regard to the exercise of the immunity privilege, especially when it has related to criminal cases"; OMIK has monitored five cases of criminal investigations against international employees of UNMIK. None of them has lead to the establishment of criminal liability of the officer[115].

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

b. Security and policing

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

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

46. In addition to the threat of inter-ethnic and political violence, there is also the danger coming from criminals, often well armed, as well as the whole range of problems of policing that one encounters in most countries. In particular, serious organised crime, often with international ramifications (weapons smuggling, drug trafficking, trafficking of human beings[116], money laundering …), still seems to have Kosovo as one of its strongholds[117].

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

[116] IOM and others report that there are about 1,000 women and young girls forced to prostitute themselved in some 100 brothels in Kosovo, out of whom some 60% come from Moldova, 20 % from Romania, 10 % from Ukraine. Ten percent of them are under 18 years of age. The living and working conditions in the Kosovo sex industry are judged *"abhorrent, exploitative and akin to slavery"; "members of the international community constitute a sizeable 40 percent of the clientele, mostly KFOR soldiers. There is a suspicion that UNMIK international police officers might be involved in trafficking – some members of the international police were repatriated for suspected involvement […] According to local NGOs, prior to the war in 1999 and the consequent international presence in*

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

48. UNMIK cites a 60% clear-up rate for major crimes, as well as the fact that the number of murders fell by half in 2001 as compared with the previous year, though rape, attempted murder and assault rates increased[118].

49. However, the overall performance of international and local police in crime prevention and repression is still judged poor by many[119], and certain allegations regarding their own behaviour give rise to concern. I am particularly worried by references to complaints of ill treatment/torture inflicted while in police custody, including by UNMIK agents[120]. Moreover, there are disturbing allegations of corruption and other illegal acts committed by police, some relating to the disappearing of private vehicles while in the custody of police, others to the "loss" of firearms deposited with the police for the purpose of official registration. Indeed, the relatively low wages of KPS officers (an apparently inadequate 300 euros a month), and the personal immunity of international ones, are unlikely to always encourage scrupulousness.

50. It is true that the attitudes of local Kosovans do not render policing easy. Many, from all communities, are extremely distrustful towards the police. But the problem is wider: there is a general lack of cooperation with law enforcement in

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Kosovo, not only trafficking but also prostitution was very uncommon" (Trafficking in Human Beings in Southeastern Europe: The UN Administered Province of Kosovo, UNICEF/UN OHCHR/OSCE-ODIHR, June 2002, pp. 95-106, at p. 96). See also: Return & Reintegration Project, Situation Report – Feb. 2000 to April 2002, IOM Kosovo Counter-Trafficking Unit and Vanity Fair, July 2002, pp. 112-117, 162-166.

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

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

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

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

Kosovo, where locals hesitate to provide necessary information both for fear of the police leaking information and due to the absence of serious witness protection programmes[121].

51. At the same time, it is evident that the variable standards inherent in international police forces and the relatively short periods of service of individual officers undermine operational efficiency. Linguistic barriers and the lack of experience of local customs inevitably exacerbate the difficulties faced by international police officers. The apparent success of the KPS[122] is consequently to be welcomed.

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

52. "*Post-war Kosovo was characterised by a climate of impunity: crimes were not investigated and criminals went unpunished*"[123]. The victims were mostly ethnic Serbs and Roma, as well as Albanian Kosovans suspected of collaboration with the Serbs. We have read and heard numerous reports, including by international personnel, of serious crimes, including murder, arson, assault, that were committed during the first few months of the international presence[124], sometimes in front of international personnel. When victims or their families came to report to KFOR, their depositions were frequently heard, but rarely acted upon[125]. Indeed, only very few successful investigations into such serious crimes committed in retaliation have been reported to date. This has gravely undermined the ethnic minorities' trust in the protection offered by KFOR and UNMIK, as well as in their impartiality.

53. It is urgent that serious investigations into crimes committed against minorities since the beginning of the international administration of and responsibility for Kosovo in June 1999, including abductions and disappearances, be given a higher attention by the police and the judiciary, than they have to date. Investigations should take place by all available means, and make use of the declarations that have been made over the years to KFOR, UNMIK, and all kinds of other authorities (the ICTY, the OSCE, various embassies, etc.)[126]. To me, this appears to be the only way in which the confidence of the minorities in the non-discriminatory, fair and efficient

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

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

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

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

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

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

functioning of the international administration of Kosovo can be regained. Also, as UNMIK's Office of Returns & Communities rightly points out, *"full reconciliation [between the communities] cannot take place in the absence of accountability for past crimes"*[127].

54. The police have started to make some sensitive arrests, including of members of the Kosovo Protection Corps (KPC), who were former members of the KLA[128]. I welcome that new development very much and commend UNMIK and KPS for it. However, for the time being, most arrests of Albanian Kosovan suspects are still confined to cases were the victims were also ethnic Albanians[129]. Voices within the Albanian Kosovan community, including a number of politicians, have regrettably shown hostility to these arrests. But this should not hinder police and justice from taking action as required.

d. Missing persons

55. Missing persons are an urgent issue in Kosovo. The ICRC has documented the names of some 3700 persons that have gone missing in Kosovo, of which approximately 2750 are ethnic Albanian and 850 Serb, with the remainder belonging to other minorities. This painful matter affects all the communities involved and is a concern that they all have a keen interest in seeing resolved[130]. Indeed, one cannot start building peace in the minds of people who await news of their beloved, as long as they are tortured in their hearts and in their minds by such unbearable uncertainty. To put an end to this situation is of the utmost urgency.

56. There are various issues involved as regards missing persons. One is the right to life of those who went missing (Article 2 of the ECHR). Although many people consider that almost all of those missing out of Kosovo have probably been killed, investigations into cases of "appearances" of alleged survivors must be made rapidly and thoroughly and families be informed of their outcome. Moreover, under Article 8 of the ECHR (and possibly also under Article 3[131]) the families of missing persons have a right to know about that person's fate. This encompasses their right to an accurate identification of all the bodies found so as to make sure whether or not their relative is among the dead, as well as, if so, information on where the body was found and how the person was killed, etc. The family also has a right to bury the body of the

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

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

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

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

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

dead relative, if and when recovered. The main action needed to address the above aspects of the problem is forensic work. It includes searches of alleged graves, exhumations, autopsies, the comparison of ante- and post mortem data, DNA tests, information from families, the return of bodies and belongings found to the families, etc.

57. In addition to the right of the families concerned to know the fates of their relatives, and to put an end to long years of anguish, the resolution of the outstanding cases represents an important factor in the reconciliation of the communities involved. For so long as such cases remain unresolved resentments and recriminations will continue to fester on all sides, whilst rumours of secret slave camps and ongoing abuses will continue to circulate[132]. The issue also impacts heavily on the confidence of all communities in the international administration, with, at present, both Serbs and Albanians suspecting it of bias and discrimination and all sides doubting its commitment to resolve justly the issues it intervened to rectify.

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

59. The resources, both human and material, available to the Office on Missing Persons and Forensic are, however, manifestly incommensurate with the task of rapidly resolving all these cases. The Office estimated at 300,000 euros the sum required to complete the task it was set by the SRSG and to continue the process of the identification of the remaining corpses. This sum would contribute to the contracting of the necessary technical personnel and the purchase of basic equipment.

60. The paucity of the sum in relation to the importance of the issue has encouraged me to appeal to member states of the Council of Europe to contribute urgently to the resolution of this problem. A document entitled "Missing Persons in Kosovo, Note by the Commissioner for Human Rights"[133] was presented to the Committee of Ministers of the Council of Europe on 18th September 2002.

e. Functioning of the judiciary

61. Establishing an effective justice system represents one of UNMIK's biggest challenges. When UNMIK arrived in Kosovo, the previous system, including personnel, court equipment, files and records, had left for or had been removed to Serbia. Most ethnic Albanians, except attorneys, had been prevented from working in the judiciary during the Milosevic era and thus lacked experience and up-to-date

[132] See Statement by Dr. Covic before the UN Security Council, New York, 17 September 2001, p. 8.
[133] Document CommDH(2002)9, 18 September 2002.

knowledge of the law[134]. Ten years of discrimination and institutionalised prejudice within the courts had "*generated disregard and disrespect for the judiciary among society as a whole*". After the collapse of the system a "*climate of revenge, general lawlessness, and impunity added to the challenge of establishing a fair and independent judiciary*". Moreover, "*the UN had never before had the responsibility for establishing a judicial system from scratch*".[135]

62. UNMIK has achieved that in Kosovo *"there is now a fully functioning court system complete with support staff, materials, and prosecutors and judges"*[136]. OMIK judged in October 2001 that *"[t]he current system has been endowed with the necessary mechanisms to ensure an efficient case-flow management whilst, on the one hand, guaranteeing individuals due process and, on the other hand, holding the members of the judiciary accountable for their performance"*[137].

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

64. UNMIK has made efforts to create a multi-ethnic judiciary. This is not an aim as such. It is a means considered to create the best conditions for having an impartial judiciary in which the communities may place trust. This is important, if one wants to avoid the recourse to private justice. Until recently, interference from Belgrade has hampered UNMIK's efforts in this field. Appointed ethnic Serbian judges and prosecutors did not take up their posts, because Belgrade appears to have threatened them with the withdrawal of their FRY pension rights if they accepted to work for UNMIK (see also above Chapter III, 2). The problem has been addressed by an agreement concluded between OMIK and Belgrade in July this year that will hopefully bring the number of Serbian judges and prosecutors who actually work from 4 to maybe 40, out of a total of more than 420 posts[138]. The screening of candidates, as is done for ethnic Albanians, should avoid the recruitment of ethnic Serbian judges with records of politicised convictions against Albanians during the 1990s.

65. However, the main means for avoiding that bias and intimidation influence judicial decisions in sensitive cases, has been sought in the employment of well protected and well paid international judges and prosecutors, as well as in the establishment of international panels with an international prosecutor. These measures are not a panacea. It has been hard to find qualified practitioners, who are fluent in

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

[135] ICG Balkans Report No. 134, *op.cit.*, p. 1.

[136] ICG Balkans Report No. 125, *op.cit.*, page 9.

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

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

English, ready to live in Kosovo and who possess the requisite cultural sensitivity[139]. Also, the relatively small number of internationals in the justice system has not reduced the risk of bias in minor cases and municipal courts[140]. Moreover, the solution is not sustainable in the long run.

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

67. Indeed, "*there is a tension between the immediate need to secure justice using international judges, prosecutors, and police and the effort to strengthen capacity to build a justice system for the future*"[141]. Continued efforts in terms of training and support of the judiciary, coupled with administrative oversight, may slowly help find a way out of the dilemma.

68. Administrative oversight (which must not be used as an occasion to try to influence individual judicial decisions) has to monitor individual performance in terms of quantity and quality, leading to the sanctioning of individual members of the judiciary, whether nationals or internationals, were appropriate and with due respect for the their right to defence. A delicate balance has to be struck between judicial independence and accountability. UNMIK is trying to address this problem through two mechanisms set up in mid-2001. The Judicial Investigation Unit (JIU) holds disciplinary hearings against Kosovan judges and prosecutors further to accusations that may be levied by the police, OMIK, other judges and prosecutors, defence counsel or citizens; it has taken disciplinary action in several cases. The Kosovo Judicial and Prosecutorial Council (KJPC), advises the SRSG on matters related to the appointment of judges, prosecutors and lay-judges and hears complaints that are handed over to it by the JIU. The composition and close relation to the SRSG of these oversight bodies has been criticised by OMIK[142], but UNMIK hopes that these mechanisms will respond to all kinds of accusations against judges and prosecutors.

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

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

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

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

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

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

f. Legal certainty

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

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

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

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

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

g. Relations between the executive and the judiciary

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

77. The most serious cases are those where the SRSG has decided, by executive order, to maintain individuals in detention, despite formal judicial decisions, whether

by Kosovan or international judges, ordering their release[143] (the present SRSG, in office since March 2002, has to be credited for never having resorted to extra-judicial detention).

78. Detention by decision of the SRSG is not formally authorised or foreseen in any legal instrument. It has been explained that the legal basis for his power is to be found in Section 1 of UNMIK Regulation No. 1999/1 on the Authority of the Interim Administration in Kosovo, dated 25 July 1999, the pertinent part of which reads: *"All legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the SRGSG"*. A report by the Ombudsperson of Kosovo, partly based on applications lodged by individuals who had been detained, has concluded that *"the absence of judicial control over deprivations of liberty imposed under Executive Orders issued by the SRSG constitutes a violation of paras. 3 and 4 of Article 5 of the ECHR"*[144].

79. Some of the concerns reflected in the Ombudsperson's above mentioned report were apparently addressed in UNMIK Regulation 2001/18, dated 25 August 2001, on the Establishment of a Detention Review Commission (DRC) for Extra-judicial Detentions Based on Executive Orders. In another Special Report, the Ombudsperson concluded, that Regulation 2001/18 had not validly addressed his concerns, because the DRC, composed of three international members appointed by the Secretary General, could not be considered to be a court in the sense of para. 4 of Article 5 of the ECHR and that the procedures under which that Commission was to operate did not meet the requirements of that provision of the ECHR[145].

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

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

82. It is also worth noting that UNMIK regulates by administrative decisions (taken by all sorts of commissions) various matters that would normally require either legislative action or judicial decision. As there are no administrative courts, and

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

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

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

regular courts consider that UNMIK enjoys immunity from legal process, the inhabitants of Kosovo are denied access to judicial remedies against these areas of the administration.

h. Civilian control over armed forces

83. UNSCR 1244 contains provisions on the respective competences of the international civil presence (UNMIK) and the international security presence (KFOR). Paragraph 9 contains a list of responsibilities of the international security presence in Kosovo, some of which are entrusted to it "*until the international civil presence can take responsibility for this task*" (Paragraph 9(d) and (e)). Paragraph 9 (f) provides that the security presence will "*[support], as appropriate, and [coordinate] closely with the work of the international civil presence*". These provisions do not express the idea of control by the civilian presence over the security presence. Nor does the list of the responsibilities of the civilian presence (Paragraph 11) include oversight of and responsibility for what the security presence does (or fails to do). Also, Paragraph 6 of UNSCR 1244 is not entirely clear: The UNSC "*Requests the Secretary-General to appoint […] a Special Representative to control the implementation of the international civil presence, and further requests the Secretary-General to instruct his Special Representative to coordinate closely with the international security presence to ensure that both presences operate toward the same goals and in a mutually supportive manner*". One does note, however, that the above-mentioned, diplomatically worded provisions are preceded by Paragraph 5 which reads: The UNSC "*Decides on the deployment in Kosovo, under UN auspices, of international civil and security presences […]*" (emphasis added)[146].

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

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

86. It is obvious, however, that the relationship between KFOR and UNMIK does not fulfil this requirement. The existing good and close co-operation between KFOR and UNMIK does not amount to the required democratic control over the armed forces. If, as the Ombudsperson of Kosovo put it, "*UNMIK […] is the surrogate state of Kosovo*"[147], then UNMIK must also exercise control over the armed forces of that "state" and, as a corollary, accept accountability for their actions.

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

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

87. The lack of civilian control over the armed forces in Kosovo is particularly incongruous if one considers that the Parliamentary Assembly of the Council of Europe has requested from the FRY, as one of the conditions for its admission to the Organisation, the commitment "to enact legislation or, preferably, to include provisions in the Constitutional Charter to bring the army under civilian control"[148].

i. Arrest and extra-judicial detention by KFOR

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

89. The Commander of KFOR (COMKFOR) has, however, interpreted UNSCR 1244 as granting him the power to arrest and detain individuals without any involvement of the judiciary, and no external control[149]. COMKFOR orders detention in cases where, in his opinion, public safety is threatened. He does not present evidence to a court showing that detention is necessary; detainees do not receive written documentation that establishes the precise legal grounds of their detention[150].

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

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

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

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

91. This legal basis, the policy, the process and the conditions of detention by KFOR were kindly explained to us by the Legal Advisor of COMKFOR[151]. The policy, as laid down in Section 4 of COMKFOR Directive 42 dated 9 October 2001, is to detain persons *"only if they constitute a threat to KFOR or a safe and secure environment in Kosovo and civilian authorities are unable or unwilling to take responsibility for the matter"*(emphasis added[152]).

92. *"Organized ethnic violence, organized violence [at the border with Macedonia], organized crime and corruption, inability of current Kosovo legal system to face these situations: threat to a safe and secure environment in Kosovo"* were given to us as the reasons for present detention orders[153].

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

94. As to the practicalities, extra-judicial detention by KFOR is basically a decision to keep in detention persons arrested, instead of setting them free or handing them over to UNMIK. After an initial restraint of a maximum of 18 hours by decision of the KFOR on-site commander, Multi-National Brigade (MNB) Commanders may continue to detain (in an MNB detention facility[154]) the individual for no more than 72 additional hours (in exceptional cases they can apply for another 72 hours *"in order to gather intelligence of evidence on the detainee"*). Further detention can only be ordered by COMKFOR himself, for detention periods of up to 30 day, renewable, with no time limits for the total length of detention[155].

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

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

97. It must be recalled that, pursuant to international human rights standards, deprivation of the right to liberty may only occur for a limited series of reasons and in accordance with a procedure provided for by law. Moreover, persons arrested and detainees have a number of specific fundamental rights (see, for instance Article 5 of the ECHR). Persons detained must be informed in detail of the reasons of their

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

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

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

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

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

detention (Article 5 par. 2 ECHR) ; they must be able to appeal to a judge challenging the legality of their detention, have their case dealt with speedily by a court and be released if their detention is not lawful (*habeas corpus*, Article 5 par. 4) ; they must also be compensated if illegally detained (Article 5, par. 5). In addition, persons who may be detained on reasonable suspicion that they have committed an offence (pre-trial detainees) must be brought promptly before a judge and shall be entitled to trial within a reasonable time or to be released pending trial.

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

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

100. However, after more than three years of international administration, such a situation happily no longer exists in Kosovo. KFOR itself indicates that the security situation is under control, except in very few places of the territory[156]. UNMIK underlines that important progress has been made under its rule over Kosovo over the past three years, as concerns police and the administration of justice.

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

101. COMKFOR accepts that progress has been made, but insists that his special powers to arrest and detain remain necessary[157]. Whilst KFOR may, indeed, still need to be able to arrest and, perhaps even detain, individuals in order to fulfil its mandate, such powers must be specifically provided for in a normative instrument setting out at least the precise conditions for the exercise of these powers, the maximum time-limit of the detention, the independent authority that will hear appeals or other judicial remedies available to the persons arrested to challenge the legality of their deprivation of liberty.

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

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

j. Conditions of detention in UNMIK facilities

104. My team and I have visited two out of the seven detention facilities run by UNMIK in Kosovo. Our visits, which were hosted in an open, cooperative, manner, did not amount to full-fledged inspections[158]. This is why I will limit myself to making only a few remarks on salient impressions, without claiming to be exhaustive. I wish to add that it seems that, in spite of problems that still remain to be resolved, UNMIK has brought tremendous progress to the Kosovo prison system, as compared with the situation it found when it came.

105. At the Pristina Detention Centre, the main problems we saw were: Total lack of sports facilities (indeed, there are only two walking areas, which are far too small for prisoners serving long sentences), the lack of significant recreation and rehabilitation activities, as well as the fact that there was no separation of remand

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

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

prisoners from sentenced prisoners. The cells we saw had almost no daylight coming in and seemed to be poorly ventilated. Also, the Centre does not have an open-type part, which, in the light of regional habits, represents an especially severe form of detention.

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

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

k. Internment of mentally handicapped persons

108. A recent report by a specialised non-governmental organisation[159] has drawn the attention to the conditions of mentally handicapped persons placed in institutions. It appears from the report that the applicable law and regulations regarding decisions on, control over and conditions of the internment of persons who are (supposed to be) mentally handicapped would deserve urgent review. Whilst I do not have first hand experience of this issue, OMIK has confirmed that it is aware of the situation and assured me of its desire to see the situation improved.

l. Establishing and securing property rights

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

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

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

111. At the end of 1999, UNMIK set up the Housing and Property Directorate (HPD, run by UN- HABITAT) and a Housing and Property Claims Commission (HPCC) as an interim measure to clarify and restore property rights and resolve long-standing claims[160]. Both institutions have broadly defined functions[161], that are bound to be progressively handed over to local authorities. For the time being they have *"exclusive jurisdiction to receive and settle"* three specific categories of claims involving residential property disputes in Kosovo[162]. These are claims by individuals who lost property as a result of discriminatory laws of the Milosevic era ("Category A Claims"), claims by individuals who entered into informal transactions on the basis of free will of the parties during that era and until October 1999 ("Category B") as well as claims by refugees and IDPs who have lost possession of their property after 24 March 1999, as a result of the conflict ("Category C").

112. However, due to the absence of rules of procedure for a long period, the fact that the applicable law on property has still not been officiallly compiled and published and an authoritative interpretation of it been made[163], and also due to its blatant lack of resources, the HPD has never fully functioned since its establishment three years ago. A Contingency Plan adopted by HPD's management in November 2001, in reaction to dwindling resources, even foresaw that the institution would gradually close down programmes and cease all activites by the summer of the current year[164].

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

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160 UNMIK Regulation 1999/23, 15 November 1999.

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

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

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

164 *Ibid*, p. 6.

114. The Government of Serbia is of the view that the unresolved property issue is an *"enormous problem for all those who left their homes"*[165]. It *"insist[s] on repossession of movables and real estate [which] the IDPs left behind. Where this is not possible, adequate compensation must be ensured"*[166]. OMIK underlines that the success of HPD in fulfilling its mandate is essential to the return and reintegration process for Kosovo's minorities[167].

115. These assessments were confirmed by the results of HPD's claims intake until June 2002. With offices opened also in Serbia proper and Montenegro (and one to come, in "the Former Yugoslav Republic of Macedonia") HPD has collected some 5,000 additional claims in April and June 2002, bringing the total of claims to some 17,785 – 95 % of which are C Claims concerning loss of property by Serbs and Roma having left Kosovo[168].

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

117. In 2002, the HPD has so far operated with approximately 30 % of the budget it estimates is required to carry out its functions; 2,4 million USD are needed for the remainder of the year[169], more than 8 million to finish its caseload.

118. In order to establish and secure people's property rights in Kosovo, to facilitate return of minority members to their lawfully owned property, to improve the housing situation in general and to allow for investment in Kosovo, it is indispensable that the HPD and the HPCC be put in a position to cope within a reasonable time with the case-load of claims, without concession to the quality of their decisions[170].

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

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165 Government of the Republic of Serbia, National Strategy for Resolving the Problems of Refugees and IDPs, Belgrade, 30 May 2002, p. 9.
166 *Ibid*, p.10.
167 Property Rights in Kosovo (January 2002), OMIK, Department of Human Rights and the Rule of Law, p. 7.
168 Periodic Report April-June 2002, HPD, p. 2.
169 *Ibid*, p. 6.
170 This is also one of the main recommendations made by OMIK (Property Rights in Kosovo (January 2002), OMIK, Department of Human Rights and the Rule of Law, pages 7 and 35).

m. Respect of property rights by the international presences

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

121. It seems logical that the use of state or other public property by the international surrogate state and its emanations, does not give rise to payment. The same applies to possible damage done to state property by the surrogate state.[171]

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

123. Perhaps the major problem concerns property used or damage caused by KFOR. While, pursuant to UNSCR 1244, there has to be a unified command and control of KFOR[172], as was established in the form of COMKFOR, the fact is that COMKFOR does not respond to any claims against its components (the MNB, including the national components). Nor has it issued instructions to the MNB on this matter. Bearing in mind KFOR's total immunity and the corresponding absence of any courts that would hear claims against KFOR, everything depends on the good will of each component.

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

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

126. The right of every natural and legal person to the peaceful enjoyment of his/her property being a recognized human right (see Article 1 of Protocol 1 to the ECHR), I can only underline that UNMIK, COMKFOR and all the components of KFOR, as well as all international personnel have an obligation to respect the property rights of all owners of private property in Kosovo, whether these dwell inside or outside Kosovo. In particular, adequate leases should be paid for buildings and land used, just as damage done has to give rise to adequate and swift reparation.

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

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

n. Access to employment and services

127. Many reports have reached me of alleged discrimination of local[173] minorities, especially as regards access to employment, health and other social services, schools, etc. Also, I have witnessed that public utilities are sometimes not supplied or insufficiently supplied to the minority populations, especially to ethnic Roma, Egyptian or Ashkalie.

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

o. Monitoring the respect of human rights

129. There have been complaints by both OMIK and the Ombudsperson, that UNMIK regulations entrusting them with the monitoring of UNMIK's abidance by human rights standards are not always respected by UNMIK. In particular, the Ombudsperson of Kosovo has complained about the refusal to permit him to enter the prison of Dubrava to meet with detainees on hunger strike, while OMIK states that its human rights Officers *"are regularly refused to access to court"* for monitoring purposes. OMIK's remark that its Department of Rule of Law/Human Rights *"continues to encounter problems with implementing its mandate within UNMIK Pillars"*, that *"despite these practical challenges, there are a number of encouraging signs"*, that *"recommendations put forth in OMIK's reports are now generally welcomed by those who are subjected to constructive criticism"* and that *"some of these recommendations have, indeed, been implemented"* [174] give rise to concern over UNMIK's general attitude towards criticism over the last three years.

130. In line with my observations on the accountability for actions and omissions by KFOR, I consider it inappropriate that the Ombudsperson for Kosovo *"does not have the authority to address KFOR"* regarding the detention of persons[175]. Although

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

[174] OMIK Quarterly Trends Reports No.2 : 1 April – 30 June 2002, p. 8 (emphasis added).

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

KFOR was not directly included[176] under the Ombudsperson's jurisdiction I feel, like Jiri Dienstbier, the Special Rapporteur of the UN Commission on Human Rights[177], that COMKFOR should agree to provide full cooperation to the Ombudsperson.

131. It would be desirable that UNMIK (including KFOR) and the PISG make sure that they are always open to constructive criticism, including in sensitive areas, coming both from both mandated and non-mandated observers. Mandates of human rights monitors need to be respected at all times. Issues criticised need to be seriously examined and shortcomings addressed within a reasonable time. In this context, I commend OMIK for the objectivity and clarity of their reports on human rights problems of the UNMIK administration, of which they are a constituent element. I also warmly welcome and place much hope in the setting up, by the SRSG, of the Human Rights Oversight Committee that, inter alia, opens the possibility for OMIK and others to comment on the human rights aspects of draft regulations. I was also glad to see that the Ombudsperson's latest report was displayed at the entrances of many UNMIK facilities in Pristina, notwithstanding the criticism it contains of UNMIK. It grieved me, though, to read that many of the Ombudsperson's reports and recommendations to UNMIK have elicited no response whatsoever[178].

p. Places of worship and cemeteries

132. The fury of destruction has not halted before places of worship and cemeteries in Kosovo[179]. While some mosques are being repaired and quite a number of new ones have been and are being built, mostly with the help of Islamic countries, orthodox churches and cemeteries of ethnic Serbs are either totally destroyed or severely damaged and I have not seen reconstruction work underway. In addition, many of the orthodox churches that could be used, are simply closed in order to protect them. It seems to me highly desirable to set signals by starting reconstruction and repair of orthodox churches and cemeteries and by trying to protect those that have not been destroyed in a manner which allows worshippers to enter them, especially in the very centres of the cities.

133. I noted that, for the CCK, the "protection of cultural heritage" (which, in CCK publications, comprises most of all churches and cemetries) is listed as the second criterion for returns, after security, but before property rights[180].

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

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

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

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

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

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

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

1. Displacements of populations from Kosovo: a short overview

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

136. Until the arrival of KFOR in mid-June 1999, some 850,000 mostly Albanian Kosovans were pushed out of Kosovo, terrorised by Serb and Yugoslav military, paramilitary and police forces[181]. Their flight became significant as of 1998, when the intensification of KLA armed activities triggered increased repression by Serbian forces. It turned into a mass exodus during the NATO air campaign from March to June 1999. Between 350 and 400,000 ethnic Albanian Kosovans fled to Albania, some 120,000 to Montenegro and approximately 360,000 to "the Former Yugoslav Republic of Macedonia". When the Macedonian Government closed down the border to Kosovo, Western European countries (mainly Switzerland, Germany and the Scandinavian countries) and the USA agreed to fly some 90,000 displaced persons out of Skopje[182].

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

138. When the Albanian Kosovans returned, they found that most of their houses and properties had been looted, heavily damaged or completely destroyed[183] in their absence, and that some 200,000-280,000 Kosovans, mostly ethnic Serbs and Roma, Egyptian and Ashkalie, had left the country at the same time as the Yugoslav and Serb forces (approximately 170,000 Serbian and Roma Kosovans as well as other members

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

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

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

of non-Albanian communities stayed[184]); several thousand went to "the Former Yugoslav Republic of Macedonia", some 200,000 to Serbia, and another approximately 30,000 to Montenegro[185]. In fact, on the roads between Kosovo and Montenegro, the columns of returning Albanians literally crossed those of fleeing Serbs, Roma, Egyptians and Ashkalies apparently without incident. Only very few of the persons displaced in that second wave have since returned to Kosovo.

139. The returnees and/or radical KLA elements, in turn, looted and destroyed the property of their former Serb and Roma neighbours[186] and resorted to violence (including killings and abductions) against remaining Serbs and Roma, in spite of KFOR's presence (see also Chapter III, 3, c of this report). This is why Serb, Roma, Egyptian and Ashkalie Kosovans have continued to leave Kosovo since the arrival of KFOR and UNMIK. It seems that until recently they even outnumbered returnees[187].

140. There is also still an important number (22,500 persons according to UNHCR [188]) of Albanian, Serb or Roma Kosovans, who have found shelter in other places within Kosovo and cannot, as of yet, return to their homes (the so-called "internally internally displaced persons", or "IIDPs").

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

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

[186] Curiously, I have not found data on these destructions.

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

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

141. This report does not deal with IDPs and refugees of the ethnic Albanian minorities of South-East Serbia and "the Former Yugoslav Republic of Macedonia" who have fled recent armed conflicts there and quite a number of whom are still in Kosovo today.[189]

142. With respect to the notion of "minority", it has to be borne in mind that in Kosovo all communities form the majority populations in some places, whilst constituting the minority in others. On a Kosovo-wide scale, the ethnic Albanians are the majority and ethnic Serbs, Roma, Ashkalies, Egyptians, Bosniaks, Gorani, Turks, etc. constitute minorities. Unless otherwise specified, the term "minority" means non-ethnic Albanian in this report.

2. The need for realism

143. The issue regarding the fate of persons displaced from their homes in Kosovo is inextricable. It involves, among others, questions of rights, obligations and values but also of human, political, financial and military feasibility. No single solution is capable of satisfying all these imperatives. Any solutions found, indeed, any action taken, will bear elements of hardship and injustice. A realistic attitude is required from all sides, as well as the acceptance of compromise.[190]

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

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

146. The FRY, Serbian and Montenegrin authorities find themselves in a very difficult economic situation, following the wars in the former republics and in Kosovo, and due to the effects of international sanctions. There is high unemployment, not enough sustainable economic activity, little investment etc. The 230,000 IDPs from Kosovo, added to the 377,000 "registered refugees" and the 75,000 "war affected persons"[191] who live in Serbia today[192], constitute a particular burden for the economy, as these individual have most of the time come with no or

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[189] 81,000 ethnic Albanians fled from armed conflict in "the Former Yugoslav Republic of Macedonia" in 2001, 5000 of them still benefit of temporary protection in Kosovo. Also, some 10,000 ethnic Albanians from southern Serbia still seem to be there (Humanitarian Issues Working Group, HIWG/02/2, 1 June 2002, para. 7).

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

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

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

very little belongings. Very many of them are in need of assistance. In such a situation it would seem understandable that the FRY, Serbia and Montenegro are interested in the rapid return to Kosovo of as many IDPs as possible[193].

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

148. The international community at first envisaged the return of all IDPs to Kosovo, as is evident from the wording of UNSCR 1244[194]. Indeed, having intervened in Kosovo in order to prevent the Serbs from conducting an "ethnic cleansing" of ethnic Albanians, the international community felt and still feels that it must be equally firm with those Albanian Kosovans who, in turn, might wish to keep ethnic Serbs out of Kosovo today. Emphasis is placed, therefore, on the creation of a multi-ethnic society and respect for the human rights of the other: *"returns and integration are key mid-term priorities for UNMIK", "at the heart of the Kosovo political agenda"*[195].

149. A realistic approach to this agenda will nonetheless show that, although *"all refugees and displaced persons from Kosovo shall have the right to return"*[196], some of them – perhaps many of them - may not wish to return (see Chapter IV, 3: "(Measuring) the wish to return", and Chapter IV, 7: "Conditions for return").

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

151. For the time being, most returns have been spontaneous, and the very small number of organised returns (300 individuals[197]), which started only in August 2001, was organised by UNHCR *"through a painstaking and resource-intensive process to ensure a least the minimum conditions of safety and sustainability"*[198], with sometimes disappointing results[199].

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

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

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

196 Constitutional Framework, Chapter 3, Section 3.4.

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

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

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

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

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

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

154. With respect to Kosovo, the right of IDPs and refugees to return to a safe and secure environment is explicitly dealt with in Paragraph 11 (k) of UNSCR 1244, which entrusts UNMIK with the responsibility of *"assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo"*. KFOR is mandated under Paragraph 9(c) with establishing *"a secure environment in which refugees and displaced persons can return home in safety"*, while UNHCR is designated as the entity responsible for the "*supervision"* of the *"safe and free return of all refugees and displaced persons"* (Annex 2, item 7; see also the Constitutional Framework, Chapter 3, Section 3.4). The Constitutional Framework requires the *"competent institutions and organs in Kosovo [to] take all measures necessary to facilitate the safe return of refugees and displaced persons to Kosovo"* (Chapter 3, Section 3.4).

155. As the Constitutional Framework sets out, other rights are linked to the individuals' right to return, such as their *"right to recover their property and personal possessions"* (Chapter 3, item 3.4). The UNHCR adds: *"The right to return is intrinsically linked with the right to equal protection before the law, the right to liberty of movement, the freedom to choose one's own residence, and the right to property. The realisation of these rights cannot take place without minimum guarantees of returnees' most basic right to life and physical security"*. Also linked to the right to return *"is the entitlement of returnees to enjoy civil, political, economic, social and cultural rights on a non-discriminatory basis, such as the right to use one's own language, the right to work, and the right to housing, education, health care, and social benefits. It's only when these rights are guaranteed that IDPs and refugees have the possibility of a free and informed choice on whether to return or not"*.[200]

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

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[200] UNHCR, Ninth Assessement of the Situation of Ethnic Minorities in Kosovo (Period covering September 2001 to April 2002), para 159.

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

4. (Measuring) the wish to return

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

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

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

161. Clearly, not all the IDPs from Kosovo will eventually decide to return. Taking into account the socio-professional composition of the persons displaced out of Kosovo[201], their rural or urban origins in Kosovo, the length of time they or their families lived there, their age, the fact that a number of them have sold their property in Kosovo as well as the time already elapsed since their departure, a rough estimate might be: roughly one third of the 230,000 IDPs from Kosovo prefer to integrate fully in Serbia or Montenegro (or have already succeeded to do so), another third is desperate to return (mostly the elderly, rural population who cannot not sell their property in Kosovo, who do not have professions that allow them much flexibility and whose attachment to their land is generally strongest), while the last third remains undecided[202].

162. I should like to finish this chapter with a word about the time factor. With respect to the return of IDPs and refugees to Kosovo, time works both ways. On the one hand, as time goes on, the emotional and other links to Kosovo wither, while the

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

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

links to the new place of residence become tighter, especially for the young. Here, time plays against return. On the other hand, time is needed for the wounds to heal and for reconciliation with individuals of the other communities to become possible. Here, the passage of time improves the possibilities of sustainable return.

5. The definition of return

163. UNMIK has explained the objectives, the principles and the process for the return of persons displaced out of Kosovo[203]. The main idea is to *"[emphasize] the individual in the process"*, to promote *"a rights-based approach"* and, ultimately, to enforce the individual's *"right to sustainable return"*. This approach can only be welcomed from a human rights perspective.

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

165. In both UNSCR 1244 and the Constitutional Framework, the word *"return"* is almost invariably followed by the word *"to their homes"*[204].

166. Based on the above, UNMIK has concluded in its Concept Paper: *"Therefore, organised return will be to the place of origin constituting the optimal durable solution to the current displacement. Resources are to be focused on the conditions at the location of origin."*[205] This, apparently, does not mean that return to other places in Kosovo than the very location of origin, will be prohibited[206]. It will just not be sponsored by the international presences in Kosovo. As put in the Concept Paper: *"The priority is to support returns to the places of origin"*[207].

167. It would appear, however, that the line between not favouring return to another place than the very place of origin, and opposing such return, has been somewhat blurred. Thus, the Concept Paper itself underlines that *"[the] principles contained*

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[203] UNMIK Concept Paper.

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

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

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

[207] p.2 (emphasis added).

herein apply equally to all returns whether spontaneous or assisted"[208]. The fact that UNMIK indeed clearly opposes return of minority Kosovans to other places in Kosovo than their precise place of origin is documented in a recent letter from SRSG Steiner to the President of the CCK, Mr. Covic, in which the former opposes Serbian aid for return to locations that are less than are a few kilometres away from the precise place of origin: "*Regional Working Groups and Municipal Working Groups in Kosovo are the established local coordination mechanisms to ensure that returns take place according to UNMIK's policy. […] all assistance to returnees must be cleared and authorized by these Working Groups on Returns. […] Clearly, this approach that consists of aiding the returns of IDPs to locations other than their places of origin goes against UNMIK's policy and responsibilities. It is detrimental to the returns process."*[209]

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

169. The main reason for UNMIK's attitude seems to be distrust of Belgrade and the fear of demographic engineering in an attempt to reclaim or partition Kosovo by "colonisation"[210]. It is not for me to comment on such political considerations.

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

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

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[208] UNMIK Concept Paper, p. 1.

[209] Letter dated 18 July 2002.

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

172. Moreover, the insistence on return to the very house/village were someone came from greatly reduces the scope of immediate return. Also, groupings of people allow for economies of scale as regards the (re)construction of houses, the (re)construction and the running costs of infrastructure, public services and public utilities as well as the efforts necessary for maintaining their safety. Groupings are also likely to reduce fear among returnees.[211]

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

6. Conditions for return

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

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

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

177. As set out above in this report (see Chapter III, 3, b: "Security and policing"), although the security situation has much improved, lack of safety is still a primary concern in Kosovo, not only, but especially, for members of ethnic minorities. The security situation is still such, in short, as to significantly limit the scope of possible of return in certain areas. Indeed a recent return program witnessed[212] involved round the clock KFOR protection for 15 heads of families who told us that they could not even

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

[212] To Bica, near Klina.

walk the 50 meters from their houses to cultivate their fields. The enjoyment by ethnic minority Kosovans of freedom of movement outside their enclaves or North Mitrovica is still severely restricted. KFOR, which is mandated under UNSCR 1244 to establish a secure environment in which refugees and displaced persons can return home in safety, is, however, reconsidering its approach to minorities' safety.

178. In the light of the improved security situation in certain areas, and the political imperative to stimulate return, KFOR has considered that the correct approach should be flexible and decentralised and follow on a case by case basis, whilst avoiding the creation of new isolated enclaves[213]. This means that KFOR moves away from *"impos[ing] conditions on visits and returns, which were in many instances overly restrictive"*[214]. Rather, it is acknowledged that *"[s]ecurity measures need to facilitate and make inter-ethnic interaction possible instead of creating barriers that entrench separation and impact on the chances of realising other rights […]. Efforts will be undertaken to scale down the level and visibility of area-specific security measures in order to avoid perceptions of continued separation between minority and majority communities."*[215] In the same vein, KFOR considers that*"[a]s soon as the situation allows [it] should play a less prominent role in Kosovo security matters handing over as many tasks as possible to UNMIK Police and the KPS[216]"*. In other words, KFOR is ready to take some risks, and the ongoing process of removal of escorts and checkpoints is conducive to the idea of removing barriers between the different communities.

179. Restrictions on free movement may still have to be imposed "*if the failure to do so could destabilise the security situation and impact negatively on future […] returns. Also, even when the fundamental right of return is beyond questions, [IDPs and refugees] should accept that this aspiration cannot be satisfied in all cases in the short term. Therefore, […] returns in some areas may be limited, or in some cases prohibited, until the necessary conditions are suitable for return"*[217]. KFOR is *"currently ready to support the return to some selected locations Kosovo-wide and, if required, to create the circumstances for some others to happen"*[218].

180. It is, however, evident that the single largest obstacle for return is the lack of financial means for preparing and sustaining returns, whether individual or to pre-identified organised return locations. Over the last three years, public and private donors have made considerable efforts to repair or rebuild, as a matter of priority, the houses of the returning Albanian Kosovans[219]. This part of the reconstruction is by

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

[214] *Ibid*, p. 3.

[215] *Ibid*, p. 3.

[216] *Ibid*, p. 3.

[217] *Ibid*, p. 4.

[218] *Ibid*, p. 5.

[219] Donors and agencies have made efforts to ensure that the beneficiaries of their respective aid programmes are by and large treated equally. Thus, no matter who provides aid to whom, the average value of repair or reconstruction works offered to a family of up to 6, is approximately 11,000 Euros (there are discrepancies, however, as to the amount of work which beneficiaries have to provide themselves, under the various aid programmes). In addition, around 30-40 % of the sums used for

and large completed. However, rather little has been done until now for the reconstruction of the properties of ethnic Serbs[220] and still less for the houses of the Roma who left[221]. Donor fatigue is being signalled. But, as the Serbian Government insists: *"The funds for reconstruction need to be ensured on the same principles as those applied in the case of [the] Albanian population"*[222]. (See also above, Chaptes III, 3, l ("Establishing and securing property rights") and III, 3, m (" Respect of property rights by the international presences")).

181. In addition to security and reconstruction aid, the preconditions for sustainable return include access to public and social services, mainly education (in each community's own language whenever possible), health care and medical services, social security and social assistance, garbage collection, etc. Adequate budgetary allowances and work planning will be needed to ensure adequate public utilities (water, electricity, sewage system, roads, etc.) to minority communities, including returnees[223].

182. The President of the CCK asserted in July 2002 before the UN Security Council *that "returnees came back to Central Serbia and Montenegro, after they were unable to get their previously held jobs. There are no Serbs left in public services, industry, agriculture farms or the system of electric power supply"*[224]. Fair and equal employment opportunities in the public and private sector (to the extent that those exist[225]) have to be granted to minorities. UNMIK and the governmental authorities have a responsibility to ensure equitable representation of all communities in the public sector and provide effective remedies for discrimination in the hiring process and in the workplace. A draft anti-discrimination law is currently being prepared. It is to be hoped that it will, if introduced, succeed in addressing these issues.

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

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reconstruction or repair of destroyed houses are spent on the neighbourghs' houses, so that they "accept" the repairs for the benefit of the other community ...

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

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

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

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

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

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

184. Last but not at all least, there is the essential question of individual attitudes. This is, ultimately, the critical element. Albanians, Serbs, Roma and other minorities will have to live together, side by side, peacefully, in a democratic, multi-ethnic Kosovo, in which human rights and the rule of law prevail. Ethnic Albanians will have to distinguish between criminals and innocent members of the Serbian and Roma communities. Ethnic Serbs will have to accept that there is a new Kosovo in which, with due respect for the safeguards of democracy and the rule of law, and regardless of the ultimate degree of autonomy, ethnic Albanians will hold and use the vast majority of voting rights. Both communities, and many of the individuals who compose them, are still quite far away from such attitude[226], without which sustainable return and integration will remain difficult.

185. To this end, contributions will have to be made by political leaders and influential persons on all sides, including religious authorities. Among the very encouraging examples one finds a number of initiatives of Prime Minister Rexhepi, who visits Orthodox places of worship[227], makes speeches in Serbian and makes moderate, conciliatory statements that underline the need for all communities to gradually overcome hatred and mistrust. On the Serbian side, I heard realistic, moderate and positive views[228] expressed by the President of the Coordination Centre for Kosovo (CCK), Mr. Covic. Such views are not necessarily representative, however, of the declarations of public figures both inside and outside Kosovo.

186. UNMIK's aim was, in May 2002, to *"achieve breakthroughs in minority returns during the summer and autumn 2002 to effect a change in climate and to build momentum for more significant numbers of returns during 2003 and 2004"*[229]. The sober assessment for the current year made by our hosts at COMKFOR in August 2002 speaks for itself: *" [A] maximum of 2400 people from various minorities would return if enough funding [were made] available"*[230].

7. The question of the final status of Kosovo

187. Under Paragraph 11 (c) of UNSCR 1244, one of the responsibilities assigned to UNMIK is *"f acilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords*". No indication on the final status is given, other than the reference to Rambouillet. However, repeatedly stress is laid on continued sovereignty of the FRY over the province, pending the determination of the final status[231].

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

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

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

229 UNMIK Concept Paper, p. 1

230 COMKFOR slides of 3 August 2002.

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

188. The Rambouillet accords, that were signed in February 1999 by Kosovo Albanian representatives, but not by Yugoslavia, state: *"Three years after the entry into force of this Agreement, an international meeting shall be convened to determine a mechanism for a final settlement for Kosovo, on the basis of the will of the people, opinions of relevant authorities, each Party's efforts regarding the implementation of this Agreement, and the Helsinki Final Act […]"*[232]. It is noteworthy that the three-year time frame of the Rambouillet accords is not mentioned in UNSCR 1244.

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

190. In April this year, that is almost three years after the beginning of the international administration of Kosovo, the new SRSG formulated his so-called "benchmarks" approach to the question of the final status: A certain number of conditions must be fulfilled in Kosovo, before discussions about the final status will start. The benchmarks approach has been summarized in the slogan "standards before status": standards of democracy, rule of law and human rights will have to be respected on the territory, by its inhabitants and the PISG, before political negotiations on the final status of the territory will take place[233].

191. The advocates of "standards before status" recall that Kosovo is not yet ready to administer itself, in whatever form. It is therefore suggested to concentrate on improving democracy, the rule of law and the respect of human rights, because, regardless of its final status, Kosovo will have to function according to these values.[234]

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

193. Firstly, the uncertainty over the final status hampers the readiness of the Serbian and Albanian communities to reconcile and to respect each other's human rights. Leaving the final status question open keeps everybody's hopes and frustrations alive: Albanian Kosovans still fear a return of the Serbs in one way or another, while extremist Serbs keep on fueling the hope for return to a position close to the *status quo ante*. These attitudes are detrimental to the readiness to respect the (human) rights of the other.[235]

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

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

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

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

194. Secondly, uncertainty over the final status of Kosovo cannot but have a negative impact on potential investor's willingness to invest in the territory[236]. This, in turn, is obviously not helpful for the enjoyment of economic and social rights by all inhabitants of Kosovo.

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

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

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

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

198. In Serbia, the Government has formulated and published a National Strategy For Resolving the Problems of Refugees and IDPs (hereafter: National Strategy). The National Strategy addresses the options of both "*repatriation*" and "*local integration*", by identifying difficulties and proposing ways forward. Although, on various occasions, the text underlines that both options are equally open to IDPs, there is a clear tendency to consider local integration to be the likely solution for refugees from the former republics, and return the solution for IDP's from Kosovo (and Metohija)[237].

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

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

199. The Implementation Programme that goes with the National Strategy, follows the same line and its title worryingly makes no mention of IDPs[238]. Indeed, in the substantive parts in which the various programmes for "*Ensuring Conditions for Local Integration*" are set out, only refugees are mentioned as the beneficiaries, not IDPs. As the IDPs from Kosovo, from what I have seen, live in a comparably difficult situation in Serbia, I strongly hope that IDPs will be able to benefit just like refugees from these programmes[239] which are aimed at addressing such vital issues as housing, the gradual closing down of collective centres and employment.

200. The living conditions of many Kosovan Serbs and Roma, which my office and I have seen in various locations in Serbia and Montenegro, whether in official or unofficial collective centres or in private accommodation[240], are at best difficult and often dire.

201. Indeed, my own observations are well reflected in what an NGO survey, funded by the Norwegian Refugee Council, concluded in March this year, states: *"IDPs reside on the very margin of society. Since they became displaced in Serbia […] living conditions for most of them have greatly deteriorated. A general impression […] is utter disinterest of subjects, fatigue and exhaustion [and] the evident difficulties of IDPs to integrate into the micro-environment due to the lack of prospects in their present situation, but also to the lack of possibilities for day-to-day survival. For most IDPs the basics required for minimum existence are provided by local and international humanitarian organisations. […] They face worries about their future and dilemmas where to go or where to stay ?"*[241].

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

[239] If I understood well the Deputy Prime Minster of Serbia, Dr. Covic, then this will be the case.

[240] Of the approximately 200,000 registered IDPs in Serbia, some 8 % secure their own accommodation, 40 % live with family and friends, 41 % rent the appartment they live in, and 7 % have been accomodated in collective centres (National Strategy, p. 12). Others dwell in specialised institutions and student dormitories (UNHCR, Belgrade, Refugees in FR Yugoslavia, Collective Accommodation of Refugees and IDPs in FRY as at 1 July 2002). Official collective centres are places for which leases with the owner have been established and where the state pays for water, electricity, some heating, etc.. Unofficial collective centres are by and large squats, some tolerated by the owners, some not or no longer.

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

202. In spite of the above, the situation of most IDPs and refugees in Serbia and Montenegro is no longer qualified as an "emergency situation" according to their criteria, by the specialised international agencies and NGOs[242]. This explains why these donors are presently rapidly downscaling their operations in Serbia and Montenegro[243], leaving the respective governments with an additional burden, which they have difficulties shouldering. The ICRC has, however, identified some 50,000 individuals in Serbia and a further 9000 in Montenegro, who will continue to need emergency humanitarian assistance. For these individuals at least, the international community should continue helping the authorities.

203. The planned gradual closing down of official collective centres, plus court ordered evictions of IDPs from unofficial ones (especially in Montenegro[244]), will particularly affect the most vulnerable people, like the elderly, single parents, orphans and individuals who need specific health care. Given the great economic difficulties which Serbia and Montenegro face, it seems necessary that donors and international agencies – including the Development Bank of the Council of Europe – assist the governments in providing alternative, durable housing solutions to at least these people.

204. Talks with the mayor of Belgrade, Mrs. Hrustanovic, whose municipality hosts 80,000 IDPs from Kosovo, have convinced me that it would be wise to see to it that not only IDPs (and refugees) benefit from international assistance, but also the most vulnerable individuals of the local population, whose situation is not better. This is essentially a question of the equal treatment of individuals living in comparable conditions.

205. In Montenegro there is no national strategy as of yet, but the Commissioner has explained to us that it is in the making. Representatives of the international community there feel that the absence of a clearly formulated national strategy is a major handicap with respect to donors' readiness to continue supporting the

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

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

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

government with respect to assistance for IDPs and refugees. This is particularly worrying because, as both the Government and the UNHCR recognize, *"[l]ocal integration is perceived as the most likely solution for the majority of the diplaced population of Montenegro"*[245].

206. The Serb and the Montenegrin authorities are to be commended for the efforts they have deployed over the years to help IDPs benefit from social services including health services and from schools more or less in the same way as other citizens. One of the encouraging results is that according to the statements of parents, in Serbia *"most children of IDPs established a new circle of friends and got used to the new environment"*[246] (for which much credit be given to the local citizens). Notwithstanding these efforts, I was worried to hear and read that IDPs feel that their chances to find a job in Serbia are much worse than of the local population[247] and that they face lack of understanding and numerous obstacles in their relationships with local authorities[248].

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

208. However, IDPs from Kosovo, who retain certain legal rights as citizens of the FRY, have only limited access to important political rights conferred by the Republic of Montenegro[249]. Here, the IDPs are the victims of the difficulties between the Serbian and Montenegrin governments, concerning the question of the relations between the two entities. Perceived by the present Government, which is in favour of independence of Montenegro, as being potentially in favour of Montenegro remaining linked to Serbia, IDPs from Kosovo are not offered the possibility to fully integrate in this part of their country (the FRY). The concern would appear to be to prevent them from formally establishing residence in municipalities in Montenegro and applying for Montenegrin citizenship, and the voting rights that go with it. This is certainly regrettable from a human rights point of view.

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

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

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

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

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

209. I should like to stress the fact that the living conditions and respect for the human of Roma IDPs are generally lower than other IDPs in Montenegro and Serbia. In this context, my attention was drawn to the fact that Roma in several countries of the former Yugoslavia face significant difficulties in obtaining basic documents, such as birth certificates, personal identity documents, local residence permits, documents related to (in most cases, state-provided) health insurance, marriage certificates, work booklets, death certificates, passports, IDP and refugee registration documents. "*Exclusionary obstacles created by a lack of documents can be daunting and in many instances, the lack of one document can lead to a "chain reaction", in which the individual at issue is unable to secure a number of such documents. In the extreme case, a Romani child without a birth certificate may wind up in a situation of complete paralysis with respect to the exercise of basic rights: precluded access to basic health care, effectively hindered freedom of movement (including the right to leave one's own country), denial of the right to vote, exclusion from state housing provided to persons from socially weak groups, as well as the inability to have real access to other rights and services crucial for basic human dignity."*[250]

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

211. There are currently 3306 persons displaced from Kosovo currently residing in "the Former Yugoslav Republic of Macedonia", the majority of which are Roma, Egyptian or Ashkalie and the remainder Gorani[251]. These individuals, who have crossed an international border are potential refugee applicants. Some 1500 of them are currently living in two camps, Katlanovo (438 individuals) and Suto Orizari (1,108). The rest are privately accommodated. My team has visited both these camps. Katlanovo offers good living conditions in a nice setting, but is totally isolated the countryside; as a result it is impossible for the Roma living there to have any

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

[251] UNHCR Statistics for Macedonia from 1 to 30 June 2002.

occupation that brings in some money. Suto Orizari was built only three years ago, on a former municipal rubbish site, in a very poor locality, mostly inhabited by local Roma. The camp is in a lamentable state, due to the underground waste that resurfaces in the case of rain, improperly executed construction work, and the lack of respect shown by its inhabitants.

212. The main difficulty that they face is that they are currently enjoying only a temporary humanitarian status, which allows them to reside in "the Former Yugoslav Republic of Macedonia", but prevents them from being able to work there. The right to demand refugee status is provided by the Macedonian constitution – the difficulty resides in the fact that there is no further legislation establishing a mechanism for obtaining such a status and the right to seek employment that goes with it. This explains why in the "the Former Yugoslav Republic of Macedonia" only 40 individuals have applied for refugee status (18 of whom are Bosnians), and 27 have obtained it. It seems urgent that the "the Former Yugoslav Republic of Macedonia" adopt adequate legislation or asylum procedures.

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

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

9. Forced return

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

216. Presently, there is a tendency in the host states to make Kosovans return to Kosovo or to other places in the FRY. Some countries, like Switzerland for example, offer financial incentives to returnees. Others return forcibly. From January to June this year, Germany has forcibly returned 1,785 individuals, the UK 648, Switzerland 425, Norway 266, Slovenia 247, Belgium 103, etc.; the total of "*forced returns to*

Pristina" registered by UNMIK Border Police for that period of time is 3737 persons[252]. The Norwegian Refugee Council returnee monitoring team has stated that *"79 individual cases of minority returns were recorded of which 11 were reported as having been forcibly repatriated to Kosovo"* from January to August 2002[253].

217. The UNHCR has issued a position paper on the question of returns[254]. Its starting point is to recognize that the vast majority of Kosovo Albanians who fled during the Kosovo crisis have returned home and *"only few of them have experienced individual protection problems."* [255] However, UNHCR recalls that there are certain categories of Kosovo Albanians who may face serious problems, like those who come from areas where they constitute an ethnic minority, those in ethnically mixed marriages and of mixed ethnicity, as well as those who are perceived to have been associated with the Serbian regime after 1990. Claims from persons who fall under these categories should be carefully considered, while *"claims not falling in these categories may be considered in accelerated procedures."* [256] There are also vulnerable individuals, like chronically ill or handicapped persons, unaccompanied elderly people or children, etc. whose cases should be carefully studied.

218. With respect to minorities, UNHCR states: *"Minorities [in Kosovo] continue to experience varying degrees of threat to their life and personal integrity […] Improvements in the general situation are having a gradual impact on some minority communities in specific locations, and some have managed to secure a limited degree of tolerance within certain areas. This does not imply that the risk of serious human rights violations has disappeared. […] It is important to note that, even during such 'quiet' periods, minorities continue to endure less visible forms of mistreatment that erode the community's will to remain and hence continue to cause displacement or impede sustainable returns."*[257] UNHCR concludes that *"minority return should take place on a strictly voluntary basis and based on fully informed decisions […] Minorities should not be forced, compelled or induced to return to Kosovo." UNHCR's position remains that members of minority groups in Kosovo […] should continue to benefit from international protection in countries of asylum."* [258]

219. In considering applications for asylum from persons originating from Kosovo, some asylum countries assess whether an internal relocation alternative is available for them in other parts of the FRY. The UNHCR position on that question is that *"[t]he circumstances faced in Serbia and Montenegro by IDPs from Kosovo lead UNHCR to the general conclusion that internal displacement in such conditions does not offer an adequate or reasonable alternative to international protection."*[259]

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[252] Forced Returns to Pristina, Protection Unit, UNHCR Pristina (leaflet).
[253] Forced Returns from Western Europe (leaflet).
[254] UNHCR Position on the Continued Protection Needs of Individuals from Kosovo, April 2002.
[255] *Ibid*, p. 1.
[256] *Ibid*, p. 2.
[257] *Ibid*, p. 3.
[258] *Ibid*.
[259] *Ibid*, p. 1.

UNHCR offers detailed information on present conditions for IDPs from Kosovo in various areas of the FRY and invites refugee status determining authorities to proceed to a *"cautious assessment of any internal relocation alternative"*[260], in the light of such information.

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

V. Main Findings and Conclusions

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

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

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

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

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

5. The international administration and all its members enjoy immunity from jurisdiction in virtue of UNMIK Regulation 2000/47. Whilst the immunity of internationals would appear to be lifted in most cases where a well-founded request is made (and a number of individuals have been prosecuted by their national authorities), the very existence of such an exception is increasingly difficult to justify. Kosovo is administered by an international administration, not by an independent local administration. Its judiciary has been created and shaped by the international

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[260] *Ibid.*

administration and remains under its control; international judges are available. Such disregard for the rule of law and the right of access to court must, inevitably, undermine the credibility of international attempts to promote precisely such values. Indeed, it is difficult to expect local Kosovans to place their faith in a judicial system that has been built up by the international community, but in which that community itself has little confidence.

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

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

2. Specific human rights issues

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

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

10. The problem of missing persons remains one of the most salient unresolved human rights issues in Kosovo. Three years after the arrival of the international presence the fates of some 3700 persons from all communities remains unknown. In

addition to the torment of the families concerned, the failure to address this issue adequately represents a significant obstacle to the reconciliation of all parties and gravely undermines their confidence in the international administration. The creation, in June this year, of a new Office on Missing Persons and Forensics is, therefore, a positive development. It is, however, urgent that this office receives the necessary human and financial resources to fulfil its objectives rapidly.

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

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

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

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

15. The security situation would appear to remain such, however, as to warrant, in exceptional circumstances, KFOR arrests and detentions. Such powers ought, though, to be clearly conferred by the competent legislative authority in a normative document specifying the conditions under which they may be used and providing for control by

an independent judicial body. The actions aimed at guaranteeing a safe and secure environment, as well as the fight against criminality and terrorism, must be carried in conformity with the principles of the rule of law and in full respect of non-derogable human rights.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

APPENDIX I

Glossary

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

APPENDIX II

Acknowledgements

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

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

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

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

CommDH(2003)7

RECOMMENDATION
OF THE COMMISSIONER FOR HUMAN RIGHTS

CONCERNING

certain rights that must be guaranteed during the arrest and detention of persons following "cleansing" operations in the Chechen Republic of the Russian Federation

[CommDH/Rec(2002)1]

I. The problem of the continuing violence in the Chechen Republic of the Russian Federation is a source of major concern within the international community. In the last six months a number of international organisations present on the spot and Russian and international NGOs actively involved in fostering respect for human rights in Chechnya have noted, in parallel, that a positive trend is emerging in the Chechen Republic, particularly as regards economic and social reconstruction efforts undertaken by the federal and local authorities. However, all the organisations present in Chechnya maintain that the climate of anxiety over security subsists, aggravating tension and affecting, above all, the civilian population. This atmosphere of tension is said to stem from both the action of separatist fighters and the reprisals of the federal forces.

Since the end of the active military phase of the "anti-terrorist operation" in Chechnya was announced, most of the problems complained of by the civilian population appear to result from the operations of federal forces in Chechen towns and villages. These actions, carried out to check the registration of inhabitants in their places of domicile and residence, more commonly called "cleansing operations" (*"zachistki"* in Russian), are intended, according to the Russian authorities, to identify and arrest fighters hiding in the midst of the civilian population.

These operations, which are legion, have, from the outset, caused considerable suffering to the civilian population, who regard them as seriously undermining security. Some of these operations have resulted in substantial unjustified acts of violence by soldiers against the civilian population. Acts of this nature, reported by the NGOs and also by the victims themselves, have prompted increasing concern on the part of the Commissioner, who has alerted the Russian federal authorities, the military command in Chechnya and the Prosecutor General of the Russian Federation on several occasions. The Commissioner has repeatedly pointed out that strict respect for human rights and serious efforts to curtail the climate of impunity are the only means of securing civil rest in Chechnya. The participants in the seminar organised by the Commissioner in November 2001 reiterated that there will be no peace without justice in Chechnya.

For their part, the federal authorities have made substantial efforts to respond to calls from the international community and NGOs, by adopting enforceable texts aimed at halting illegal acts by soldiers. These include, in particular, Decree no. 46 of the Prosecutor General "on reinforcing supervision of respect for civil rights during operations to check citizens' registration of place of domicile (*propiska* cards) in relation to their current whereabouts within the Chechen Republic" of 25 July 2001, which provides *inter alia* that prosecutors must be present during such operations, and Order no. 80 of General Moltenskoi, Commander of the federal forces in Chechnya, laying down new, stricter rules of procedure for "cleansing" operations, dated 27 March 2002. The latter text undeniably provides a response to the conclusions of the seminar organised by the Commissioner in Strasbourg in November 2001. These documents demonstrate the authorities' concern to respond to criticism from the local population over the numerous human rights violations committed during *zachistki*.

Nevertheless, the Commissioner continues to receive alarming information from Chechnya. It seems that, despite the adoption of the new texts mentioned above, the situation remains fraught. The Commissioner is particularly concerned over complaints from the civilian population that many individuals held during cleansing operations, which are still carried out on a regular basis, have gone missing. According to numerous witness statements, it has often been the case during such operations that a number of people, both men and women, many of them young, have been put on military trucks and taken to unknown destinations. According to these statements, these are often military bases and regimental outposts within the Chechen Republic. It is true that some such individuals have been released once their identity has been checked. However, in a significant number of cases, the corpses of detainees have been found while others have disappeared and their families have been unable to trace them.

The Commissioner decided to follow up this worrying information by writing personally to the Prosecutor General of the Russian Federation on 5 February 2002 (taking him up on his proposal at a meeting in Moscow on 14 September 2001), expressing his concern and requesting information on the action taken by the organs of the *Prokuratura* in this respect. In April 2002, at the request of the Prosecutor General of the Russian Federation, the Commissioner received a reply from the Deputy Prosecutor General of the Russian Federation with responsibility for the Southern Federal District.

The Deputy Prosecutor General's reply reveals that human rights violations were indeed committed and recorded during recent cleansing operations despite the efforts of the organs of the *Prokuratura* to prevent them. In particular, some of the individuals arrested were still considered as missing and criminal investigations had been opened in order to locate them. It appears that the efforts of the *Prokuratura* have had little impact, as the investigations opened have not produced the desired results. The Deputy Prosecutor General's letter mentions the case of the cleansing operation in Tsotsin Yurt on 30 December 2001, during which no less than five individuals were arrested and taken away by soldiers, no further news of their fates and whereabouts being heard. By 25 March 2002, the date of the Deputy Prosecutor General's reply, criminal investigations nos. 75013, 75014 and 75015 opened by the *Prokuratura* concerning those disappearances had made no progress.

The fact that many individuals are still missing seriously affects the situation in Chechnya, undermining the civilian population's trust in the federal authorities. The continuing disappearances engender a strong feeling of fear, vulnerability and uneasiness among civilians vis-à-vis the federal forces.

Most of the missing persons were seen for the last time in the hands of soldiers, which incurs the liability of the State. Under the established precedents of the European Court of Human Rights (see for example the judgment in Timurtas v. Turkey of 13 June 2000 or more recently in Bilgin v. Turkey of 17 July 2001), a person who goes missing following arrest by the law enforcement agencies and who was last seen in their custody may be considered, in certain circumstances, as dead, with the State

bearing responsibility for their death. Disappearances of this kind consequently constitute a grave violation of human rights.

II. In view of the above, it should be stressed that any individual arrested, whatever offences they may be accused of, must enjoy all the rights granted to every Russian citizen by the Russian Federation Constitution (hereinafter the "Constitution"). It is vital that all constitutional guarantees be applied to the persons arrested, wherever they are arrested and detained, including on military bases.

Three questions need to be considered: what are the rights of the persons arrested and transferred to the territory of military bases? Who is competent to ensure that the constitutional rights of the persons arrested are respected? Are the rights of the individuals detained respected in practice and what can be done to improve respect for their rights?

1. What are the rights of the persons arrested and transferred to the territory of military bases?

Under Article 22 of the Constitution, the arrest or imprisonment of any person may take place only on the basis of a court decision, and preventive detention may not exceed 48 hours. Under Article 108-3 of Russia's new Code of Criminal Procedure, it is the prosecutor who must seek a decision from the court to place a suspect in detention.

Once arrested, the individual in question must go before the prosecutor within 48 hours or be released. It is clear, furthermore, that, if the individual is a civilian, he or she must be brought before a civilian prosecutor, even if they are held by the army. Military prosecutors are competent only for cases involving servicemen suspected of breaking the law.

The persons arrested by soldiers during "cleansing" operations are clearly civilians or in any case individuals not serving in the regular Russian army. In such cases, military prosecutors are not competent, even if the detainees are held inside military bases, where military prosecutors have a priority right of access.

Therefore, once arrested, any civilian, wherever he or she is held, is entitled to be brought before a civilian prosecutor within 48 hours of their arrest, even if detained at a military base. That is their constitutional right.

2. Who is competent to ensure that the constitutional rights of the persons arrested are respected?

Article 1 of Constitutional Federal Law no. 168-FZ of 17 November 1995 "On the *Prokuratura* of the Russian Federation" (hereinafter the "Law") stipulates that one of the functions of the *Prokuratura* is to safeguard human rights and confers upon prosecutors the functions of supervising respect of human rights and freedoms throughout Russian territory including, therefore, Chechnya.

It is clear, then, that the prosecutor is recognised by the legislator as the prime guarantor of the respect for human rights, particularly those of individuals held in custody. The prosecutor is competent to ensure that civil rights are respected. If they

are not, the prosecutor must intervene, according to the Law, to ensure the respect for rights and curtail the violations discovered. This is one of the main prerogatives conferred upon the *Prokuratura* and highlights the importance and unique role of that institution within the Russian judicial system.

Article 22 empowers prosecutors to fulfil their task by granting them a right of access to any establishment or the premises of any state authority.

It is, therefore, first and foremost the responsibility of civilian prosecutors to ensure the respect for the human rights of any civilian arrested during "cleansing" operations and held for more than 48 hours, whatever their place of detention.

3. Given the situation, what can be done to improve respect for the rights of the persons arrested?

It appears that, so far, the civilian prosecutors working in Chechnya have not succeeded in exercising their powers on the territory of military bases. In the light of the information received from the Deputy Prosecutor General and numerous witness statements, it seems that even though, there appears to be no text prohibiting access for civilian prosecutors to military bases, they do not enter those premises to exercise the powers conferred on them by Article 22 of the Law. It would also seem that civilian prosecutors are not given any information on the number of civilians arrested by the armed forces, their exact places of detention or the charges against them.

Furthermore, military prosecutors are not competent to deal with the cases of civilians held on military bases, as their competence is limited to servicemen alone. Indeed, Article 47 of the Law expressly states that the military prosecutor is competent to supervise the lawfulness of the detention of servicemen in places of detention on regimental territory, expressly limiting the prerogatives of military prosecutors and thereby emphasising that civilians do not fall within their remit.

Consequently, this is a difficult situation which is worrying on several counts. Persons detained in military bases are deprived of access to justice unless they are handed over to the civilian authorities. The constitutional rule providing guarantees for access to justice for the citizens of the Russian Federation is not being complied with here. Moreover, in affecting the right to liberty, this situation constitutes a grave violation of Article 5 of the ECHR. It must be pointed out that both the Russian Federation Constitution and the ECHR apply in full and unreservedly to the territory of Chechnya, which is not subject to any special regime.

In sum, a person arrested and then detained in a place apparently inaccessible to civilian prosecutors and falling outside the remit of military prosecutors is subject to arbitrary treatment and in a situation tantamount to a flagrant denial of justice.

Such a situation is inadmissible and should be rectified to guarantee access to justice for any person arrested and detained so as to ensure effective respect for human rights.

As we know, under Articles 21 and 22 of the Law there may be no obstacles to free access of civilian prosecutors to any public or private establishment, even a military base. However, the rarity with which civilian prosecutors enter establishments subject to military regulations, results in a malfunctioning of the judicial system.

It is necessary, therefore, to act swiftly to this problem. It seems that in such a situation it is for the Prosecutor General of the Russian Federation to take appropriate measures to ensure that the entire civilian population living in the Chechen Republic may enjoy their constitutional rights. Furthermore, Article 17 of the Law confers on the Prosecutor General the functions of directing and coordinating the activities of the entire *Prokuratura* system in Russia, granting him substantial regulatory powers and designating him as the person chiefly responsible for the implementation of the *Prokuratura*'s functions on the territory of Russia (article 17-4).

In view of the aforegoing, The Commissioner for Human Rights, acting in accordance with Committee of Ministers Resolution (99) 50 on the Council of Europe Commissioner for Human Rights adopted on 7 May 1999 (hereinafter the Resolution);

Recalling the recommendations made in the report of his visit to the Russian Federation, including Chechnya, from 25 February to 4 March 2001, and notably the recommendation on combating impunity and relaunching the judicial system;

Recalling the conclusions of the Seminar concerning the "protection of and respect for human rights as the basis for the democratic reconstruction of the Republic of Chechnya" organised by the Commissioner in Strasbourg on 26-27 November 2001;

Taking account of the relevant provisions of the Russian Federation Constitution, the new Code of Criminal Procedure and Constitutional Federal Law no. 168-FZ of 17 November 1995 "On the *Prokuratura* of the Russian Federation";

Taking account of Decree no. 46 of the Prosecutor General "on reinforcing supervision of respect for civil rights during operations to check citizens' registration of their place of domicile (*propiska* cards) in relation to their current whereabouts within the Chechen Republic" of 25 July 2001, and Order no. 80 of General Moltenskoi, Commander of the federal forces in Chechnya, laying down new, stricter rules of procedure for "cleansing" operations, dated 27 March 2002, and noting that these texts are still not adequately complied with;

Recalling his letter of 5 February 2002 to the Prosecutor General of the Russian Federation, Mr Ustinov, and the reply from the Deputy Prosecutor General of the Russian Federation with responsibility for the Southern Federal District, made at Mr Ustinov's request;

Taking into consideration various information and witness statements provided by the representatives of non-governmental organisations actively involved in fostering respect for human rights in Chechnya;

Recalling the established precedents of the European Court of Human Rights, which presume that the State is liable for persons who have gone missing and were last seen in the custody of the public authorities;

Convinced of the importance of the *Prokuratura*'s role in protecting human rights on the territory of the Russian Federation and, in particular, the Chechen Republic, aware of the progress and efforts made by public prosecutors to afford justice to those who need it in Chechnya and elsewhere, and encouraging the work of the *Prokuratura* to guarantee respect for constitutional rights and freedoms to all citizens of the Russian Federation;

Considering that Article 3.e. of Resolution (99) 50 states that the Commissioner for Human Rights shall "identify possible shortcomings in the law and practice of member states concerning the compliance with human rights as embodied in the instruments of the Council of Europe, promote the effective implementation of these standards by member states and assist them, with their agreement, in their efforts to remedy such shortcomings";

Having regard to Article 8.1. of Resolution (99) 50,

issues the following recommendations:

1. That the authorities take all necessary steps to ensure that, during operations to check citizens' registration of their place of domicile (*propiska* cards) in relation to their current whereabouts within the Chechen Republic, so-called "cleansing" operations undertaken by the armed forces, the provisions of Decree no. 46 of the Prosecutor General of the Russian Federation and Order no. 80 of General Moltenskoi are effectively applied and that any breaches thereof be severely sanctioned;

2. That, in order to ensure that citizens actually enjoy the constitutional rights guaranteed in the event of their arrest and detention by soldiers or on the territory of a military base, the Prosecutor General take action to secure effective access by civilian prosecutors to all places where civilian detainees might be held, including military bases, in accordance with Article 22 of Constitutional Federal Law no. 168-FZ of 17 November 1995 "On the *Prokuratura* of the Russian Federation";

3. That, in order to implement the aforegoing recommendations and strengthen effective respect for human rights, the Prosecutor General might envisage, on the basis of his regulatory powers, setting up specific machinery for cooperation and coordination between civilian and military prosecutors in Chechnya. This might entail, for example, joint inspection teams, comprising a civilian prosecutor and a military prosecutor, who would make a joint inspection visit to a military base with a view to meeting detainees and, where applicable, exercising their respective prerogatives to institute legal proceedings in respect of the civilian detainees and, if necessary, prosecute for any violations committed by servicemen when arresting civilians;

4. That the material and human resources available to the civilian *Prokuratura* be reinforced so that it may duly exercise its supervisory and investigative functions;

5. That the necessary steps be taken so that the families of detainees and, where applicable, non-governmental organisations actively involved in fostering respect for human rights in Chechnya are informed of the fate of persons arrested and/or detained during operations to check citizens' registration of their place of domicile (*propiska* cards) in relation to their current whereabouts within the Chechen Republic.

Alvaro Gil-Robles
Council of Europe Commissioner for Human Rights

Strasbourg, 30 May 2002

APPENDIX II

OPINIONS

CommDH(2003)7

OPINION 1/2002

OF THE COMMISSIONER FOR HUMAN RIGHTS, MR ALVARO GIL-ROBLES

on certain aspects of the United Kingdom 2001 derogation from Article 5 par. 1 of the European Convention on Human Rights

[CommDH(2002)7]

I. Introduction

1. By letter of 9th April 2002, the Joint Committee on Human Rights requested the Commissioner for Human Rights of the Council of Europe (the Commissioner) to submit an opinion concerning a number of issues raised by the United Kingdom's derogation from article 5 (1) of the European Convention for Human Rights (the Convention) in respect of certain provisions of the Anti-Terrorism, Crime and Security Act 2001. The call for evidence concerned, in particular, the adequacy of the parliamentary scrutiny of the measures taken by the United Kingdom Government to this effect.

2. The Commissioner submits this opinion in accordance with Articles 3(e), 5 (1) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights. Article 3(e) instructs the Commissioner to "identify possible shortcomings in the law and practice of member states concerning the compliance with human rights as embodied in the instruments of the Council of Europe". Article 5(1) states that "the Commissioner may act on any information relevant to the Commissioner's functions", including "information addressed to the Commissioner by governments, national parliaments**,** national ombudsmen or similar institutions in the field of human rights, individuals and organisations." In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports."

II. Derogations under Article 15 of the ECHR :

3. Article 15 of the Convention allows States to derogate from a number of its articles "in times of war or other public emergency threatening the life of the nation" provided that the measures taken do not exceed those "strictly required by the exigencies of the situation". States seeking to derogate must inform the Secretary-General of the Council of Europe of the measures taken and the reasons therefor.

4. The European Court of Human Rights (the Court) is competent to decide on the validity of derogations. It has, however, granted states a large margin of appreciation in assessing both the existence of a public emergency and the strict necessity of the measures subsequently taken. National authorities are, "by reason of their direct and continuous contact with the pressing needs of the moment, […] in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of the measures necessary to prevent it"[261]

5. The Convention does not expressly require an effective domestic scrutiny of derogations under Article 15, and the Court has not yet had occasion to pronounce on the matter. The requirement is, however, easily discerned.

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[261] *Ireland v. UK*, judgment of 18.01.1978, Series A, N°25, para 207

6. The Court has repeatedly emphasised the close relationship between democracy and the rights guaranteed by the Convention, stating, for instance, that "democracy appears to be the only political model contemplated by the Convention and, accordingly, the only one compatible with it"[262].

7. The separation of powers, whereby the Government's legislative proposals are subject to the approval of Parliament and, on enactment, review by the courts, is a constitutive element of democratic governance.

8. Effective domestic scrutiny must, accordingly, be of particular importance in respect of measures purporting to derogate from the Convention: parliamentary scrutiny and judicial review represent essential guarantees against the possibility of an arbitrary assessment by the executive and the subsequent implementation of disproportionate measures.

9. It is, furthermore, precisely because the Convention presupposes domestic controls in the form of a preventive parliamentary scrutiny and posterior judicial review that national authorities enjoy a large margin of appreciation in respect of derogations[263]. This is, indeed, the essence of the principle of the subsidiarity of the protection of Convention rights.

10. This opinion is not concerned with the judicial review of derogations.

11. The parliamentary scrutiny of derogations is consistent with the Constitutional norms of several European countries regarding the use of emergency powers. Declarations of different types of emergencies typically require simple or qualified parliamentary majorities, or are subject, along with the related measures, to subsequent parliamentary confirmation[264].

12. The formal requirement of the parliamentary approval of derogations is not on its own sufficient, however, to guarantee an independent assessment of the existence of an emergency and the necessity of the measures taken to deal with it. It is clear that the effectiveness of the parliamentary scrutiny of derogations depends in large measure on the access of at least some of its members to the information on which the decision to derogate is based.

III. The adequacy of the UK procedure with respect to derogations

13. The rights guaranteed by the Convention were incorporated into United Kingdom domestic law by the Human Rights Act 1998. Section 3 of the Act provides that, in so far as it is possible to do so, primary legislation must be read and given effect in a way which is compatible with Convention rights. Under Section 4, the court, in this case the Court of Appeal or House of Lords, may make a

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[262] *United Communist Party of Turkey and Others v. Turkey*, judgment 30.01.1998, Reports 1998-I, para 45.

[263] It is interesting to note that the only case in which the Court did not accept a State's assessment regarding the existence of a public emergency was in *the Greek case* [12 YB 1(1969)], in which the derogation was declared by the government set up following the military Putsch in 1967.

[264] See "Emergency Powers", European Commission for Democracy through Law (the Venice Commission), Science and technique of democracy No. 12.

declaration of incompatibility of a provision of primary or secondary legislation with a right guaranteed by the ECHR. In respect of new legislation, Section 19 requires that the Minister in charge of a Bill make a statement before parliament (a "statement of compatibility") to the effect that the Bill's provisions are compatible with the Convention rights.

14. The Human Rights Act outlines in sections 14 and 16 the procedure for derogating from Convention rights for the purposes of domestic law. The Secretary of State responsible designates the derogation through a statutory instrument in the form of an Order in Council, which must subsequently be included in Schedule 3 of the Act. The order designating the derogation comes into effect immediately, but expires after a period of 40 days unless both Houses pass a resolution approving it. A designation order may be made in anticipation of a proposed derogation.

15. The Home Secretary first announced proposals to combat the "the threat from international terrorism" on 15th October 2001. On 11th November 2001 the Human Rights Act 1998 (Designated Derogation) Order 2001 was made by the Home Secretary. It came into effect two days later. The Designated Derogation Order was debated in Parliament on 19th November and approved on 21st November 2001. The first draft of the Anti-terrorism, Crime and Security Bill 2001 was laid before Parliament on 12th November 2001 and received Royal Assent on 13th December 2001. The Secretary General of the Council of Europe was informed of the United Kingdom's derogation by Note verbale on 18th December 2001.

16. It is clear from the related chronology that the United Kingdom Parliament enjoyed, in principle, two separate occasions on which to scrutinise the derogation in question; firstly, on approving the Derogation Order and, secondly, when passing the derogating provisions of the Anti-terrorism, Crime and Security Bill[265].

17. It is to be noted that the derogation was designated for the purposes of domestic law in anticipation, not merely, as is provided for by Section 14(6) of the Human Rights Act, of the United Kingdom's derogation from its obligations under the Convention, but prior also to the enactment of the legislation necessitating the derogation, in this case, even, before the proposed Bill had been laid before Parliament. Two related problems would appear to arise in respect of this chronology.

18. It is not clear, firstly, that this sequence is consistent with the legal nature of derogations. A derogation is made in respect of certain measures that would otherwise infringe rights guaranteed by the Convention and is constituted by its

[265] The United Kingdom Parliament exercises no control over the notification of the Secretary General of the Council of Europe of a derogation from the Convention, which, as a treaty obligation, remains a crown prerogative. However, in so far as the United Kingdom Parliament is required to approve the derogating measures themselves this would not appear to be problematic, especially when, as is desirable, the notification of the Secretary-General occurs only after the passage of the relevant Act.

formal announcement (under the Convention, through notification of the Secretary General of the Council of Europe) *in relation to* those measures.
Indeed the Court has shown some flexibility with regards to the timing of notifications, accepting delays of up to two weeks following the adoption of the measures in question[266], suggesting that the derogation comes into force not on notification but on promulgation. This is unsurprising since it is only the measures themselves that can define the scope of the derogation. Indeed, the notification or, for the purposes of domestic law, the designation of a derogation will, on its own, be of no legal consequence. The effect of the procedure adopted in respect of the United Kingdom derogation was, therefore, oddly, to invert the formal requirement; instead of the order sanctioning the measures, the measures confirmed the order.

19. There is, secondly, a risk that this sequence will undermine the effectiveness of the parliamentary scrutiny of the derogation. A designated derogation comes into effect immediately, and, therefore, unless the measures themselves have been examined beforehand, prior to any scrutiny whatsoever. The United Kingdom parliament must, however, subsequently approve the order. Parliament's ability to scrutinise the necessity of the derogation at this stage, might appear, in this case, to have been limited by the fact that the derogating measures had not yet been finalised. Indeed, the first draft of the proposed Bill was laid before Parliament only the day after the designated derogation was made, the House of Commons, having, furthermore, only one week to consider the Bill before being asked to approve the order. It is true that the designated derogation has no effect until the enactment of the attendant measures. However, the practise of designating a derogation prior to the debating of the derogating measures risks not only eliminating an effective scrutiny of the order itself, but also potentially reducing the urgency of a detailed scrutiny of the subsequent measures. This will especially be the case where the derogation order enables the Secretary of State to make a declaration of compatibility in respect of the Bill he wishes to put forward. In effect, two small parliamentary hurdles are substituted for one large one.

20. The Commissioner is of the opinion, therefore, that it would be both more coherent and provide a greater guarantee of effective parliamentary scrutiny if, as a general rule, derogations were designated for the purposes of domestic law - and the Secretary General notified - only after the measures requiring them have been promulgated.

21. In the instant case, the Commons' debates of 19th November suggest that its members were well acquainted with the proposed provisions of the Anti-terrorism, Crime and Security Bill, reasonably precise indications of which were, in any case, already available since 15th October. Nor do the debates during the subsequent passage of the Bill reveal an absence of concern over the real necessity of taking the significant step of derogating from Convention rights. What the latter debates do reveal, however, is that several members of Parliament felt insufficiently informed as to the extent of the threat and unable to assess,

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[266] *Lawless v. Ireland*, judgment of 01.07.1961, Series A N°3, and *Ireland v. UK*, above-mentioned judgement, para. 80.

therefore, whether it constituted a public emergency and whether the relevant provisions of the Bill were strictly required.

22. An effective parliamentary scrutiny presupposes an informed and independent assessment. The information relevant to proposed derogations is likely, however, to be of a sensitive and perhaps publicly undisclosable nature. Whilst it might, under such circumstances, be acceptable to restrict Parliamentary access to such information, the failure to disclose any information at all, where it is maintained that such information exists, is manifestly incompatible with the requirement of the democratic control of executive authority which is of particular importance in respect of measures limiting rights guaranteed by the Convention.

23. One mechanism amongst many might be to make the information warranting the derogation available to a specially constituted ad hoc Committee. The Committee, made up, perhaps, of selected representatives from a limited number of concerned Parliamentary Committees, could, in turn, report their assessments to both Houses. One might have included, for example, in respect of the derogation in question, the Home Affairs Committee, the Joint Committee on Human Rights and the Joint Committee on Statutory Instruments. It is to be noted in this respect that special parliamentary commissions competent to examine classified information exist in several Council of Europe member states for the control of secret services.[267]

IV. The review and renewal of derogations

24. The need for effective parliamentary scrutiny applies equally to the periodic review and possible renewal of derogations. The Human Rights Act 1998 provides, in section 16 1(b), that designated derogations shall lapse 5 years after the initial order is made and, in section 16 (2), that the Secretary of State may extend the order for a further period of 5 years at any time prior to the initial order's expiry. In respect of renewals, the derogation order comes into force, unlike the original order, only on its approval (within 40 days) by Parliament. The Human Rights Act makes no mention of review.

25. In the absence of any review procedure, the Commissioner is of the opinion that the 5 year period provided for by the Human Rights Act 1998 is excessive. It must be recalled that derogations are valid only for so long as the public emergency obtains and that much can change in 5 years. In the opinion of the Commissioner derogations ought to be subject to renewal conditional on the approval of Parliament no later than 12 months after coming into effect.

26. The provisions of the Human Rights Act 1998 are improved upon in respect of the derogating sections of the Anti-terrorism, Crime and Security Act 2001, which, under section 29 (1) of the Act, expire 15 months after the coming in to force of the Act. The Secretary of State may, under section 29 (2), revive the sections for subsequent periods not exceeding 1 year each, subject to the approval of Parliament (Section 29 3(b)). The Secretary of State shall, under

[267] See *Klass v. Germany*, judgement of 06.09.1978, Series A N°28

section 28 (1) "appoint a person to review the operation" of the derogating measures within 14 months of the Act's coming into force and within 11 months of each of renewal.

27. The review procedure is unclear. Question marks remain over the independence of the reviewer, his or her access to the necessary information and the subsequent availability of his or her conclusions. The requirement that the Secretary of State put the report before Parliament as soon as is practicably possible presents some difficulty. It is hard to foresee a practical obstruction that would justify delaying its immediate disclosure. There is no guarantee, furthermore, that the disclosure of the report would coincide with the request that Parliament approve an extension order.

28. It would perhaps be preferable, therefore, to merge the review and renewal procedures, such that the timeframes were identical for both and the review was conducted by, or in tandem with, a selected number of Committee members who might advise both houses on its approval of the new derogation Order.

V. Considerations on the justification of the United Kingdom 2001 derogation

29. Sections 21-23 of the Anti-terrorism, Crime and Security Act 2001 provide for the potentially indefinite detention of foreign nationals the Home Secretary suspects of involvement in international terrorism and whom he is unable to deport owing to a well-founded fear of persecution in the country of origin and the inability to secure a third country of destination[268].

30. In his report on his visit to Spain and the Basque Country[269], the Commissioner recognised the threat of terrorism as "… [affecting] not only the fundamental rights of individuals but also the free exercise of certain civil and political rights which are the basis and foundation of every democracy". States have, as a result, an essential obligation to protect both their institutions and their citizens against terrorist actions. It is important, however, that the threat of terrorism is combated with due respect for the rule of law and without prejudice to the European human rights *acquis*, which constitutes the cornerstone on which our democratic societies are based.

31. The Court has recognised terrorism as a "threat to the organised life of the community of which the State is composed"[270] capable of constituting grounds for derogating and has, as indicated above, given States a large measure of discretion in their assessment regarding the existence of a public emergency and the necessity of the measures taken to deal with it.

32. In the instant case, the Commissioner has not had access to any additional classified information on which the decision to derogate might have been based

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[268] The lengthy detention of persons that cannot be deported owing to a real risk of a violation of Article 3 in a receiving country was found, in *Chahal v. United Kingdom*, (judgement of 26.05.1993, Series A N°258-B) to constitute a violation of Article 5(1).

[269] February 2001, CommDH(2001)2

[270] *Lawless v. Ireland* A3 para 28 (1961). See also *Ireland v. United Kingdom* A25 (1978) and *Brannigan and McBride v. United Kingdom* A 258-B (1993)

and is consequently unable to express a firm opinion on the existence of a public emergency within the meaning of Article 15 of the Convention. The Commissioner would, however, like to raise the following considerations.

33. Whilst acknowledging the obligation of governments to protect their citizens against the threat of terrorism, the Commissioner is of the opinion that general appeals to an increased risk of terrorist activity post September 11th 2001 cannot, on their own, be sufficient to justify derogating from the Convention. Several European states long faced with recurring terrorist activity have not considered it necessary to derogate from Convention rights. Nor have any found it necessary to do so under the present circumstances. Detailed information pointing to a real and imminent danger to public safety in the United Kingdom will, therefore, have to be shown.

34. Even assuming the existence of a public emergency, it is questionable whether the measures enacted by the United Kingdom are strictly required by the exigencies of the situation.

35. In interpreting the strict necessity requirement, the Court has so far declined to examine the relative effectiveness of competing measures, preferring instead to allow such an assessment to fall within the margin of appreciation enjoyed by national authorities[271]. This does not exclude the possibility, however, that demonstrable availability of more or equally effective non-derogating alternatives will not cast doubt on the necessity of the derogating measures. This might especially be the case where so important right as the right to liberty and security is at stake. It is, at any rate, not clear that the indefinite detention of certain persons suspected of involvement with international terrorism would be more effective than the monitoring of their activity in accordance with standard surveillance procedures.

36. The proportionality of the derogating measures is further brought into question by the definition of international terrorist organisations provided by section 21(3) of the Act. The section would appear to permit the indefinite detention of an individual suspected of having links with an international terrorist organisation irrespective of its presenting a direct threat to public security in the United Kingdom and perhaps, therefore, of no relation to the emergency originally requiring the legislation under which his Convention rights may be prejudiced.

37. Another anomaly arises in so far as an individual detained on suspicion of links with international terrorist organisations must be released and deported to a safe receiving country should one become available. If the suspicion is well founded, and the terrorist organisation a genuine threat to UK security, such individuals will remain, subject to possible controls by the receiving state, at liberty to plan and pursue, albeit at some distance from the United Kingdom, activity potentially prejudicial to its public security.

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[271] See *Ireland v. UK*, above-mentioned judgement.

38. It would appear, therefore, that the derogating measures of the Anti-Terrorism, Crime and Security Act allow both for the detention of those presenting no direct threat to the United Kingdom and for the release of those of whom it is alleged that they do. Such a paradoxical conclusion is hard to reconcile with the strict exigencies of the situation.

39. Whilst detention under the derogating powers of the Anti-Terrorism, Crime and Security Act requires that the individual be an undeportable foreigner, it is triggered, ultimately, only on the suspicion of involvement with an international terrorist organisation. Though the reasonableness of the Home Secretary's suspicion is justiciable, it remains the case that the detention is effected without any formal accusation and subject only to a review in which important procedural guarantees are absent. The indefinite detention under such circumstances represents a severe limitation to the enjoyment of the right to liberty and security and gravely prejudices both the presumption of innocence and the right to a fair trial in the determination of ones rights and obligations or of any criminal charge brought against one. It should be recalled that an ill-founded deprivation of liberty is difficult, indeed impossible, to repair adequately.

40. In so far as these measures are applicable only to non-deportable foreigners, they might appear, moreover, to be ushering in a two-track justice, whereby different human rights standards apply to foreigners and nationals.

41. Whilst Article 15 of the Convention does not prohibit derogations tending to this effect or preclude restrictions of the rights outlined above, it is clear that such measures can be justified only under the most limited of circumstances.

Alvaro GIL-ROBLES
Commissioner for Human Rights

CommDH(2003)7

OPINION 2/2002

OF THE COMMISSIONER FOR HUMAN RIGHTS, MR ALVARO GIL-ROBLES

on certain aspects of the review of powers of the Northern Ireland Human Rights Commission

[CommDH(2002)16]

1. Introduction

1. The Northern Ireland Human Rights Commission (the Commission) was established on 1 March 1999 under the Good Friday Agreement and the Northern Ireland Act of 1998. The Act made a provision for the Commission to report on, inter alia, the adequacy and effectiveness of the functions conferred on it within two years of its establishment.

2. The Commission submitted the required report in February 2001, providing 25 recommendations to this effect. In May 2002, the Government of the United Kingdom (the Government) published a consultation paper on its response to the Commission's report which presented the Government's draft response to the Commission's recommendations (the Consultation Paper). The Northern Ireland Office of the Government noted that before finalising decisions and taking action, where necessary, to give effect to these, it wished to hear other's views on the subject. The Northern Ireland Office invited comments by 16 August 2002 to the Consultation Paper.

3. By letter of 26 July 2002, the Chief Commissioner of the Northern Ireland Human Rights Commission invited the Commissioner for Human Rights of the Council of Europe (the Commissioner) to submit a response to the Consultation Paper.

4. The Commissioner submits this opinion in accordance with Articles 5 (1) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights. Article 5(1) states that "the Commissioner may act on any information relevant to the Commissioner's functions", including "information addressed to the Commissioner by governments, national parliaments**,** national ombudsmen or similar institutions in the field of human rights, individuals and organisations." In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports." The Commissioner is required by Article 3(d) to "facilitate the activities of national ombudsmen or similar institutions in the field of human rights".

II. International instruments on national human rights institutions

5. The significant role of human rights institutions in the protection and promotion of human rights has been underlined in a number of international instruments. The Committee of Ministers of the Council of Europe adopted a recommendation on the Establishment of Independent National Human Rights Institutions in 1997 (Rec. No R (97) 14) in which it recommended the establishment of effective national human rights institutions and recalled the "Principles relating to the status and functioning of national institutions for the protection and promotion of human rights" (the Paris Principles[272]). The Paris Principles, which were

[272] The Paris Principles were formulated at the first International Workshop on National Institutions for the Promotion and Protection of Human Rights in Paris in 1991. Participants included representatives

endorsed by the General Assembly of the United Nations in its Resolution 48/134 of 1993, represent internationally accepted minimum standards in relation to national human rights institutions.

6. The World Conference on Human Rights in 1993 reaffirmed the important and constructive role played by national institutions for the promotion and protection of human rights, and encouraged the establishment and strengthening of such institutions, having regard to the Paris Principles[273].

7. The United Nations Commission on Human Rights and the General Assembly have adopted annual resolutions to support the establishment and strengthening of national human rights institutions. In its latest resolution on this issue (A/56/158), the General Assembly reaffirmed the importance of the development of effective, independent and pluralistic national institutions. It welcomed the rapidly growing interest throughout the world in the creation and strengthening of national institutions and encouraged member states to strengthen such institutions. The General Assembly noted with satisfaction the efforts of those States that had provided their national institutions with more autonomy and independence, including by giving them an investigative role or enhancing this role, and encouraged other States to consider taking similar steps.

8. In its latest resolution on this issue (2002/83)[274], the United Nations Human Rights Commission reiterated the continued importance of the Paris Principles, recognized the value of further strengthening their application and encourages States, national institutions and other interested parties to consider ways to achieve this. It also expressed its appreciation to those Governments that had committed additional resources for the purpose of the establishment and strengthening of national human rights institutions.

III. Preliminary considerations

9. The 1993 World Conference on Human Rights recognized that it is the right of each State to choose the framework for the national institution that is best suited to its particular needs at the national level in order to promote human rights in accordance with international human rights standards. At the same time, in referring to the Paris Principles, the World Conference recognised the minimum standards to be applied with regard to the competences and responsibilities of national human rights institutions. The Paris Principles also stipulate the minimum standards for the institutions' methods of work, seeking to ensure that the institutions have the necessary powers to fulfil their responsibilities.

10. While there are significant variations with regard to national human rights institutions' mandates and roles, the Paris Principles stipulate that 'a national institution shall be given as broad mandate as possible, which shall be clearly set

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of national institutions, States, the United Nations, its specialised agencies, intergovernmental and non-governmental organisations.

[273] Para. 36, Part I of the Vienna Declaration and Programme of Action (A/CONF.157/23).

[274] This resolution, as well as the General Assembly resolution (A/56/158), was co-sponsored by the United Kingdom.

forth in a constitutional or legislative text, specifying its composition and its sphere of competence.'

11. Such variations will reflect the differences in the judicial and administrative structures in place at the local and national levels in different countries. Care must notably be taken when establishing a national or regional human rights institution to ensure coherence between existing or projected non-judicial, or quasi-judicial [human rights] protection mechanisms, such as Ombudsmen or specific issue Commissions (such as Equality Commissions). It is also important to ensure that, where a multiplicity of roles is foreseen for a human rights institution, the powers enjoyed in virtue of one of its functions do not adversely affect, or undermine, the effective fulfilment of a different one.

12. Having established, with due regard to the above considerations, the kind of institution desired, it is self-evidently crucial for the resulting institution's effectiveness that its terms of reference provide, for each function, matching duties and powers.

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13. This opinion will focus on the following issues raised by the Commission in its report:

    1) The Commission's financial independence (recommendations 5 and 6);
    2) Investigative powers (recommendations 22 and 24);
    3) The referral of draft laws and policies (recommendation 11);
    4) The Commission's power to bring proceedings in its own name (recommendation 17).

14. In formulating this opinion, the Commissioner was guided by the above-mentioned international instruments as well as the Good Friday/Belfast Agreement, which outlined the main functions and powers to be conferred to the Commission.[275] The Commissioner has also had regard to the powers and practices of human rights institutions in Council of Europe member states and other Common Law countries.

[275] The Belfast Agreement provided that "A new Northern Ireland Human Rights Commission, with membership from Northern Ireland reflecting the community balance, will be established by Westminster legislation, independent of Government, with an extended and enhanced role beyond that currently exercised by the Standing Advisory Commission on Human Rights, to include keeping under review the adequacy and effectiveness of laws and practices, making recommendations to Government as necessary; providing information and promoting awareness of human rights; considering draft legislation referred to them by the new Assembly; and, in appropriate cases, bringing court proceedings or providing assistance to individuals doing so."

IV. Detailed considerations

Independence, financial autonomy and level of funding of the Commission

Recommendation 5[276]: A new section 68(3B) should be inserted into the Northern Ireland Act 1998 which reads: 'The Commission shall be provided with sufficient resources to ensure that it can carry out each of its functions effectively'.
Recommendation 6: A new paragraph 6A should be inserted into Schedule 7 to the Northern Ireland Act 1998 which reads 'Subject to the duties imposed by section 68(3A), and in order to further its activities for the promotion and protection of human rights in Northern Ireland, the Commission may from time to time apply for or accept grants from lawfully constituted bodies or raise funds through the provision of services or other lawful activities'.

Further recommendation: The governing legislation should assert the principle that Government will not interfere in the Commission's spending once an adequate overall budget for the Commission has been agreed.

15. Independence is an indispensable characteristic of an effective human rights institution. Financial autonomy and an adequate level of funding are among the means to guarantee such independence. According to the Paris Principles, human rights institutions should enjoy a level of funding that allows the institution "to be independent of the Government and not [to] be subject to financial control which might affect its independence" [277]. It is obvious that a human rights institution should have its own budget which is sufficient for the fulfilment of its tasks. Apart from the regular financial scrutiny through review and the evaluation of financial reports, other bodies, such as the Government or individual ministries should not interfere in the use of the institution's resources.

16. The Commission noted that it had not been as effective as it might have been because of the lack of resources available to it and listed in its report a number of activities that had therefore been curtailed. The Commission's current ordinary budget barely covers basic staffing and accommodation costs, leaving little for its actual activities. The Commission is consequently obliged to submit additional bids during the budget year for further resources in order to carry out specific tasks related to its mandate. Under this system the Secretary of State for Northern Ireland, to whom such bids are made, is unduly able to influence the Commission's priorities. It is clear that such a system significantly reduces the financial autonomy, and hence the independence, of the Commission. A clear statement in the law on the need for sufficient resources and on the principle of financial autonomy would address these concerns.

17. Accountability for the use of public funds is certainly important. It cannot, however, be the role of the Secretary of State to operate as a financial watchdog through the granting or withholding of necessary funds. Schedule 7 of the Northern Ireland Act provides for the annual forwarding by the Commission of a statement of accounts to the Secretary of State. In addition, the Comptroller and

[276] For ease of reference, the relevant recommendations of the Northern Ireland Human Rights Commission are reproduced here, following the numbering in its original report of 2001.
[277] See paragraph 4 of the Paris Principles.

Auditor General are required to examine and certify the statement and prepare a report for the consideration of Parliament. These provisions would appear to be adequate for ensuring the necessary accountability.

18. The Government agreed that the Commission should be able to accept funding from other sources, and committed itself to ensuring that the arrangements under which the Commission may accept funding from outside sources will be clearly set out in a Memorandum of Understanding to be signed between the Commission and the Northern Ireland Office. The Government was not, however, convinced of the need to include a specific provision in the law on this matter.

19. In the Commissioner's view, such a provision would, however, be important in terms of avoiding any uncertainties as to whether the Commission is in principle entitled to accept such funds. More detailed arrangements could be set out in the Memorandum of Understanding, which the Commissioner hopes will soon be signed between the Commission and the Northern Ireland Office.

20. However, any additional funding, regardless of its source, ought to be complementary, to which end it is essential that the ordinary budget creates a solid basis for the regular functions of the Commission. The Commission should not be in a position where it has to apply for additional funding from the Government or other sources to carry out its statutory duties.

Investigations and access to documentation

Recommendation 22: A new section 69(8A) should be inserted into the Act which reads: 'The Commission shall, in order to assure itself that human rights are being protected or to investigate any alleged violation of human rights, have access to all places of detention in Northern Ireland and to all places where persons are in the care of a public authority or of a person or body exercising functions of a public nature.'

Recommendation 24: A new section 69(8C) should be inserted to the Northern Ireland Act 1998 which reads: 'For the purposes of conducting investigations under section 69(8), the Commission may require a person whom the Commission reasonably believes to be in possession or control of any information, document or thing that is relevant to an investigation being conducted by the Commission, (a) to furnish that information, document or thing to the Commission and (b), where appropriate, to attend before the Commission to answer fully and truthfully any question put to him or her by the Commission (other than a question the answer to which might incriminate the person) and (c), if so requested by the Commission to sign a declaration of the truth of his or her answers to any questions put to him or her under paragraph (b).'

21. As it currently stands, section 69(8) of The Northern Ireland Act 1998 (the Act) enables the Commission to conduct such investigations as it considers necessary or expedient for the purposes of exercising the functions specified elsewhere in

the same section. No further indications are given regarding the extent of the Commission's investigative powers, nor as to their relation to its different functions. The Commission has, however, reported significant difficulties in carrying out investigations and has consequently suggested the insertion of the above provisions.

22. In order to establish the investigative powers appropriate for any human rights commission it is necessary to be clear about the functions the powers are required for. It cannot but be observed that the failure of the Northern Ireland Act to clearly delineate the Commission's investigative powers reflects a certain ambiguity over the precise nature and scope of the Commission's functions. Consequently, certain concerns arise relating to the potential overlapping of functions between the Commission and other institutions and the potentially problematic combination of extensive investigative powers and the right subsequently to bring proceedings.

23. In general, investigations conducted by human rights institutions can be divided into the following categories:

    1) Investigations of a general nature. Such investigations would typically be conducted for the purposes of identifying patterns of abuse and for recommending to the Government or other state bodies measures of a general nature, such as changes in legislation or prevailing practises.

    2) Investigations of individual cases.

        a. Investigations as part of an individual complaints procedure. There are many variations in complaints procedures, but the majority could be characterized as quasi-judicial in that they seek to reach a settlement of the case through mediation, conciliation or the subsequent referral of the case to another body. Since such procedures are quasi-judicial, the institutions are normally granted powers to demand the disclosure of information that are similar to those of a court.

        b. Investigations of an individual case or related group of cases involving an alleged human rights violation made upon the institution's own initiative.

24. The first function outlined above clearly falls within the competences of the Commission. In contrast, the mediation functions outlined in 2a and b, are not clearly stated in the Northern Ireland Act (and find no mention in the Good Friday/Belfast Agreement), but might be deduced from the combination of section 69(5)a, which provides that the Commission may give assistance to individuals in accordance with sections 70, and 70(3)c, which states that the Commission may provide any other assistance [than assistance in respect of legal proceedings] that it thinks appropriate.

25. It is clear that the effective fulfilment of both these functions would require significant powers of investigation with respect both to access to places of detention, or other sites where there is a risk of human rights violations, and to the disclosure of information relevant to the matters it is examining.

Access to places of detention and other places

26. Whilst the Commission has in the past had access to places of detention it wished to visit (though not always to individual detainees it wished to question), it recommended that a specific provision be inserted in the law on this matter so as to avoid any future doubt over the Commission's visiting powers. In response, the Government noted that there where other bodies who already had important statutory roles in protecting detainees from violations of their human rights. The Government believed that it would confuse the issue if the Commission were to seek to take on board or duplicate these functions.

27. The Commissioner would like to note that the existence of other bodies with overlapping mandates does nothing to remove the existing statutory duty on the Commission to promote the protection of human rights, wherever it believes there to be a risk of violations. Nor will the concerns or investigations of different bodies with overlapping competences necessarily coincide. Furthermore, the duplication of activities can be avoided by arrangements between the various bodies with visiting powers. The Commission has, for instance, already signed Memoranda of Understanding with the Equality Commission and the Police Ombudsman, in which the Commission has committed itself to referring individual complaints falling within the competences of more specialised institutions to those institutions.

28. It is only logical that a body with a broad human rights mandate be given the same statutory powers to visit places of detention and other places where persons are held as the other bodies referred to by the Government, whose mandates are more limited. Access to such places is instrumental for conducting investigations and should therefore be ensured by the law. In addition, the Commission should be able to freely interview any person within such places without obstruction by the authorities.

Power to obtain documents, information or things

29. The Paris Principles recommend that a national institution should be able to 'hear any person and obtain any information and any documents necessary for assessing situations falling within its competence'. The United Nations Handbook on National Institutions[278] lists in greater detail powers that are fundamental for conducting effective investigations, such as the free access to all documents, including public records, which, in the opinion of the investigative body, are

[278] National Human Rights Institutions : A Handbook on the Establishment and Strengthening of National Institutions for the Promotion and Protection of Human Rights.

necessary for a proper investigation of the complaint, and the power to compel the production of relevant information.

30. It is clear that the Commission would need the power to obtain documents and information from all official institutions and from any person exercising a function of a public nature in order to establish the necessary facts for the purposes of elaborating general recommendations or mediating in respect of an individual case. The obligation of public officials to cooperate with the Commission's investigations would, therefore, need to be clearly stated in the law.

31. The absence of an explicit legal provision relating to the disclosure of information or documentation for the purposes of such investigations risks creating uncertainty among those who have been requested to provide information. It might be unclear for them whether they have a duty to do so, or whether they even have the right to do so. A specific provision on the power to obtain information would create an important element of legal certainty.

32. The Commissioner fails to be convinced by the Government's suggestion that the Commission could resort to judicial review to enforce the disclosure of the information it requires. Judicial review should be the last resort – an exception rather than the rule. It would be strange for any institution to require a court order to fulfil its mandated functions.

33. In its recommendations, the Commission does not explicitly request a provision imposing sanctions, subject to the decision of a court, on officials who refuse to attend hearings, answer questions or who deliberately mislead the Commission. They would, however, be a logical corollary of the powers the Commission is requesting and are, indeed, typically associated with the investigative powers of similar institutions in other countries.

34. The powers of investigation desired by the Commission and examined above are, it must be emphasised, those that would usually be related to the functions of mediation or the preparation of general recommendations to different State authorities. Indeed, the Commission refers to the comparable powers enjoyed by other investigative bodies in Northern Ireland, such as the Assembly Ombudsman and the Police Ombudsman, in its report.

35. However, it would appear from the Northern Ireland Act, and the Commission's report and the Government's response, that the Commission's primary role in respect of individual applications is rather to provide assistance in adversarial proceedings before the courts. As the power to bring proceedings before the courts is provided for in section 69(5)b, and section 69(8) relates the Commission's investigative powers to all the powers listed in section 69, the impression is certainly given that the Commission enjoys powers to investigate for the purposes of court proceedings it may wish to bring in its own name or assist an individual in preparing.

36. The considerations raised by the Government in its response to the Commission's report concerning a confusion of roles are not without foundation here and there are legitimate concerns that the combination of the Commission's investigative powers and its ability to bring proceedings before the courts would confer powers that would exceed those typically enjoyed by public prosecutors.

37. In short, whilst the Commission is arguing that it does not enjoy investigative powers commensurate with its functions, the Government is arguing the reverse - namely that it does not have the functions requiring the powers it is requesting. The precise nature and scope of the Commission's powers and functions needs to be determined:

38. Does the Commission enjoy, in addition to its advisory role, a mediatory role vis-à-vis the bodies it might wish to investigate, or an exclusively adversarial role, or, as would appear to be the case, some combination of the two?

39. Whilst the Commission would, in the latter case, require significant investigative powers, great care would have to be taken to ensure that the rights of persons appearing before the Commission and the principle of the equality of arm are respected at all times. The Commission, itself, acknowledges that persons appearing before it ought not to be obliged to reply to questions the answers to which might incriminate themselves. An additional guarantee for those appearing before the Commission would be that any information obtained during such proceedings could not subsequently be used in court. Indeed such a limitation exists in respect of the Irish Human Rights Commission[279], which enjoys a similar combination of roles. The rights of those appearing before the Commission to legal representation would need to be considered. Care would also need to be taken to clearly define the Commission's investigative powers vis-à-vis different actors, including both different types of public official (one might think, for instance, of Prosecutors, Ombudsmen, Parliamentarians and military personnel, all of whom may have, for different reasons, certain immunities or secrecy obligations[280]) and private individuals, whether acting in a purely private capacity, or assuming typically public functions, and who might, again, have professional secrecy obligations, such as lawyers, doctors, priests, or journalists.

Referral of draft laws and policies

> Recommendation 11: "A new section 69(3A) should be inserted to the Act which reads : 'The Secretary of State and the Executive Committee shall refer to the Commission all draft laws and policies proposed for Northern Ireland as early as practicable and before they are introduced to Parliament or the Assembly or made available to the general public'."

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[279] See the Human Rights Commission Act of the Republic of Ireland, which addresses such situations in Paragraph 16 of section 9: 'if a person furnishes any information, document or thing to the Commission … the furnishing of that information, document or thing shall not give rise to any civil liability in contract, tort or otherwise and nor shall the information, document or thing be admissible as evidence against that person in any civil or criminal proceedings."

[280] See, for instance, Section 14(5) of the Australian Human Rights and Equal Opportunity Commission Act 1986, and Section 128 of the Human Rights Act 1993 of New Zealand.

40. The Commission was entrusted with important advisory duties vis-à-vis the Secretary of State and the Northern Ireland Assembly, including the Executive Committee of the Assembly in the Northern Ireland Act. Under section 69(3), "the Commission shall advise the Secretary of State and the Executive Committee of the Northern Ireland Assembly of legislative and other measures that ought to be taken to protect human rights…". Under section 69(4), "the Commission shall advise the Assembly whether a Bill is compatible with human rights...". Moreover, the Commission has a general duty under section 69(1) to "keep under review the adequacy and effectiveness in Northern Ireland of law and practice relating to the protection of Human Rights".

41. The Commission has reported difficulties in proofing proposed legislation due to the lack of early access to proposed Bills and Orders, which has meant that the Commission's views were frequently not heard in the preparation process of Bills. The Commission consequently made the above recommendation to insert a new subparagraph 69 (3A).

42. In its Consultation Paper, the Government reiterated the principle that the Commission should have the opportunity to comment on draft legislation and changes to existing practice as they relate to human rights protection. The Government did not, however, endorse the Commission's specific recommendation in this regard, particularly on the grounds that there are also other bodies charged with proofing legislation to ensure compliance with human rights. Such duties have been entrusted with the Ministers, the Departments and the Parliamentary Committee on Human Rights. The Government also noted that there are other parties who have a legitimate interest in scrutinizing new legislation and practice and that it would not be right to afford the Human Rights Commission a unique role in this regard. These arguments are not without force.

43. The Commissioner would, however, like to underline that the role of a human rights institution is not to replace the responsibilities of the Parliament, Government or other bodies to ensure that legislation is consistent with human rights. The role of a human rights institution is to complement the work of these bodies by providing its specific expertise gained through the performance of its other functions, such as investigations, which place the institution very close to the concrete human rights concerns. A human rights institution is therefore particularly well placed to assess the practical implication of proposed legislation for possible human rights concerns and might advantageously contribute to the elimination of potential difficulties at an early preparatory stage. It would consequently be beneficial if those drafting legislation were to receive the advice of the Commission on a proposed bill as early as possible.

44. In the opinion of the Commissioner, regular access to draft legislation and information on plans relating to legislation and policies affecting the respect for human rights in Northern Ireland would greatly enhance the ability of the Commission to perform its advisory duties. The Commission would, moreover, need to be informed of such legislative initiatives at an early stage if it is to offer considered advice in a timely manner.

45. The Commissioner was pleased to learn that discussions are under way between the Commission and the Northern Ireland Government departments on a Protocol regarding the granting of early access to the Commission of planned legislation. The Commissioner would like to encourage the Northern Ireland Office and other UK Government departments to consider favourably the adoption of a similar protocol.

Power to bring proceedings in its own name

> Recommendation 17: 'In section 71(1) of the Northern Ireland Act 1998, the reference to section 69(5)(b) of the same Act should be deleted - so that the Commission will then have the power to bring proceedings in its own name and when doing so rely on Convention rights'.

46. At present, the power of the Commission to bring proceedings involving law or practice relating to the protection of human rights is limited so that it cannot rely on the Convention rights when bringing proceedings in its own name.[281] This limitation reproduces the victim requirement set out in the European Convention on Human Rights in respect of the European Court.[282] The victim requirement was introduced to the European Convention in order to prevent abstract cases being brought before the European Court and to avoid the proliferation of cases brought by unrelated third parties.

47. The latter concern would evidently not arise in respect of a clearly defined exception for the Commission. As the Commission has noted, member states of the Council of Europe have a discretion to go beyond what is strictly required by the European Convention and similar exceptions to the victim requirement at the national level already exist in other countries for bodies set up to promote and protect human rights and fundamental freedoms. It is, moreover, most incongruous that the Commission should be mandated to "bring proceedings […] relating to the protection of human rights", but be effectively able to do so only if it is able to find existing provisions of UK law on which to base its case.

48. The main difficulty would appear to arise rather in respect of powers that would enable the Commission to bring cases that would result in abstract rulings on the human rights compatibility of legislation. Whilst such a power would enable potential incompatibilities to be identified, as it were, preventively, the Commissioner understands that the resemblance of such proceedings to abstract constitutional challenges would significantly alter current judicial practise in the United Kingdom, and in a way that its current judicial structure is, perhaps, ill-equipped to deal with.

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[281] Section 71 (1) of the Northern Ireland Act provides that:
"Nothing in section 6(2)(c), 24(1)(a) or 69(5)(b) shall enable a person –
(a) to bring proceedings in a court or tribunal on the ground that any legislation or act is incompatible with the Convention rights; or
(b) to rely on any of the Convention rights in any such proceedings,
unless he would be a victim for the purposes of article 34 of the Convention if proceedings in respect of the legislation or act were brought in the European Court of Human Rights".

[282] It is to be noted that the European Court allows also indirect victims or potential victims to initiate proceedings before it.

49. It ought, however, to be possible to allow the Commission to challenge legislation on the ground of incompatibility with the Convention rights, if, though not a victim itself, it has brought proceedings in its own name in the place of an identifiable victim (whether potential or indirect[283]) or class of victims. Such a provision would keep human rights rulings tied to the protection of a given individual's or set of individuals' rights, without unduly limiting the Commission's ability to raise compatibility issues.

Alvaro GIL-ROBLES
Commissioner for Human Rights

[283] As these terms are understood in the jurisprudence of the European Court of Human Rights.

APPENDIX III

STATEMENTS

CommDH(2003)7

STATEMENT

BY MR ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS

ON HIS VISIT TO THE REPUBLIC OF AZERBAIJAN

14 – 20 September 2002

From 14 to 20 September 2002, I visited Azerbaijan at the invitation of the Minister of Foreign Affairs, Mr Vilayat Guliev, and the head of Azerbaijan's parliamentary delegation to the Council of Europe, Mr Ilham Aliyev. The purpose of the visit was to make contact with the Azerbaijani authorities and to help set up the new ombudsman's office in Azerbaijan.

1. The ombudsman's office

A seminar on the newly-created office of ombudsman was held in Baku on 16 and 17 September 2002 (see doc. CommDH(2002)12). The seminar was co-hosted by the Commissioner's Office and Azerbaijan's first ombudsman, Ms Elmira Suleimanova, in co-operation with the Commission for Democracy through Law (Venice Commission). The seminar was attended by Azerbaijani political and administrative officials, including local and regional government officials, as well as representatives of numerous NGOs, national minorities, refugees and displaced persons.

The seminar helped determine the main focus of the Ombudsman's activities in Azerbaijani society. The participants emphasised that the Ombudsman should seek to protect not only Azerbaijani nationals but anyone present on Azerbaijani territory and, more generally, all those who came under the jurisdiction of the Azerbaijani authorities, irrespective of nationality, race or religion. The Ombudsman should give particular attention to the most vulnerable sections of the population, such as children, women, the elderly, refugees and displaced persons or persons deprived of their freedom.

Members of the government and senior Azerbaijani officials further assured the Commissioner of their intention to support the activities of the new office. The Minister of Justice, Mr Fikret Mammedov, told the Commissioner that a decree had been passed, which was designed to establish active co-operation between the Minister of Justice and the Ombudsman's office, and to make ministry officials aware of the new institution.

2. Some human rights issues

The visit began with a meeting with representatives of the main non-governmental organisations involved in human rights protection, enabling the Commissioner to gain a better insight into the current situation in Azerbaijan. The Commissioner also held talks with ministers and other government officials, in particular the Minister of Internal Affairs, Mr Ramil Usubov, the Minister of Justice, Mr Fikret Mammedov, the Prosecutor General, Mr Zakir Garalov, the Head of the Presidential Administration and Mr Ramiz Mehdiev. In the course of these conversations, the Commissioner drew attention to the main areas being monitored by the Committee of Ministers.

a. Political prisoners

The Commissioner urged the Azerbaijani authorities to continue co-operating with the Council of Europe with a view to finding a permanent solution to the issue of political prisoners and preventing further cases of prisoners whose arrest might have been

motivated by political considerations. He also asked his negotiating partners to maintain and step up the work of the Pardons Commission, which came under the authority of the President of Azerbaijan.

The Commissioner was informed by NGOs and representatives of the inhabitants of Nardaran of events that had occurred in the village. He urged the authorities, in particular representatives of the Prosecutor General's Office, to swiftly complete their investigation into the events. He also asked that those arrested be given proper treatment, bearing in mind that according to various NGOs, some of the arrestees were seriously ill.

b. Refugees and internally displaced persons

In the course of his visit, the Commissioner travelled to settlements for refugees and internally displaced persons (IDPs) in various parts of Azerbaijan. I would particularly like to thank Mr Ali Gasanov, Vice-Prime Minister, Chair of the State Committee responsible for Refugees and IDPs, and also our colleagues in the UNHCR Baku office for their invaluable assistance in arranging this visit.

Most the refugees are from Armenia or the former Soviet republics of Central Asia (a notable example being the Mesketian Turks). They have been looked after by the authorities since they arrived back in 1989-1991 and have become integrated into Azerbaijani society. Their housing problems have been largely resolved.

The 700,000 or so IDPs, on the other hand, are Azerbaijani nationals who were forced to leave their homes because of the conflict between Azerbaijan and Armenia over Nagorno Karabakh. These IDPs have experienced extreme hardship right from the outset, and their situation has scarcely improved in the intervening decade. After fleeing their land and homes, the first problem the IDPs encountered was lack of housing. Many of them managed to find lodging with friends or relatives (in the so-called "private" sector). Those who were not able to do so were placed either in refugee camps in a rural area near the occupied territories or in public buildings, such as former hotels, workers' hostels, kindergartens, schools, etc. situated mainly in the cities, such as Baku and Sumgait.

- *visit to the camps*

On 18 September, Ms Suleimanova, officials from the Ministry of Foreign Affairs and staff from the UNHCR Baku office accompanied the Commissioner on a visit to the region of Saatli, 250 km to the south of Baku, and later to the city of Sumgait.

The **region of Saatli** took in many IDPs originally from the Djebrail region, who were housed in the camps that sprang up in 1993. The Commissioner, together with the heads of administration for the Saatli and Djebrail regions, MM Gulhuseyn Akhmadov and Makhmud Guliev, visited three camps: the camp situated in the town of Saatli itself, where people are living in railway carriages, and two camps situated on the outskirts, one consisting of tents and the other of temporary, clay brick buildings.

Living conditions in the camps can only be described as extremely tough, not to say shocking. For over 10 years, 1,211 families have been living in cattle wagons, without windows, water, heating or mains; the temperature soars to over 50°C in summer and plummets in winter. Even though it was not excessively hot outside, the heat in the wagons which we visited was stifling. It was appalling to see old people, women and children sitting or lying on the railway tracks under the wagons, trying to escape the heat. The situation observed in the tent settlement on the outskirts of Saatli is equally serious; conditions there are clearly very hard and we saw many sick people, which was hardly surprising.

The situation in the third camp visited is slightly better. Funded by a special UNHCR rehabilitation programme, this camp consists of small temporary, clay brick buildings. Although the houses do not have a proper floor, with only a thin plastic sheet to cover the ground, conditions there are less primitive. The houses consist of one room, often divided up with carpets to house the entire family or even several families.

In the **city of Sumgait**, we managed to visit three hostels for IDPs, in the company of the Mayor, Mr Tavakkul Mammadov. These hostels, located in public buildings, house 47,000 of the 60,000 IDPs living in the city. Once again, conditions are extremely harsh, and are further aggravated by the problem of unemployment. One of the hostels is situated in a former hotel, another in a former college and the third in a former workers' hostel. Several families, some of them large, are housed in very small rooms, irrespective of the number of people. The Commissioner did, however, note the promise made by the Mayor to the inhabitants of Building No. 6 to take urgent steps to repair the pipes, which have been flooded in the basement for years, and to rid the building of rats.

- *the right to return*

One of the primary rights that must be afforded IDPs is the right to return to their own land. This is a recognised right and everyone the Commissioner met, whether old or young, made it plain that they wanted to go home, even if it meant rebuilding everything and starting again from scratch. For nothing can justify the fact that thousands of men, women and children, having been forced to flee their homes, often without even the most basic belongings, should be left to languish in intolerable circumstances for a decade. The situation is exacerbated by the fact that these IDPs, who are from rural areas, have lost their land, and thus been deprived of their only source of income.

- *measures needed to improve the situation of IDPs*

Pending their return, however, it is the duty of any government in such circumstances to do everything in its power to relieve the suffering of its citizens. To allow the IDPs to remain in their current precarious state is to make them victims twice over, first of war and then again of the failure to resolve the conflict to which they remain hostage.

There are a number of worrying points here: in the town of Saatli, the children of IDPs, although born in the town, do not attend the same schools as the children of native residents. A special school has been set up for the children of IDPs in railway carriages and a number of other schools, reserved for refugees, are in an extremely dilapidated state.

The situation with regard to infirmaries and other healthcare centres in the camps is equally worrying. Many of those the Commissioner spoke to in the Sumgait hostels complained that the healthcare provided in the hospitals is fee-based and too expensive for most people.

The Azerbaijani authorities are fully aware of the problem and have pledged to rectify matters as quickly as possible. It is, in fact, imperative that the government face up to its responsibilities towards citizens experiencing hardship.

The Commissioner was informed that the day before the visit to the camps, a new site consisting of permanent buildings for IDPs was opened in Bilasuvar. This is a step in the right direction.

The Commissioner, furthermore, welcomes the recent decision by President Aliev to allocate US$ 72 million from the National Oil Fund to assist IDPs. Some of this money will be used to provide permanent housing for the latter.

The Azerbaijani authorities emphasised the importance of further humanitarian aid from the international community, as economic conditions in Azerbaijan remain bleak. Give the scale of the problem and the plight of the population, the Commissioner believes that the international community should heed this appeal by the Azerbaijani authorities.

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STATEMENT

BY MR ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS,

ON HIS VISIT TO THE REPUBLIC OF ARMENIA

2 - 5 October 2002

Introduction

The following is a brief report on my visit to Armenia from 2 to 5 October 2002, on which I was accompanied by Ms Lilit Daneghian, Head of the Council of Europe Department at the Ministry of Foreign Affairs of the Republic of Armenia, and two members of my office, Mr Alexandre Guessel and Mr Gregory Mathieu. The initial purpose of the trip was to take part in the seminar "International Experience and Perspectives of Human Rights Protection before the Constitutional Court", at the invitation of the European Commission for Democracy through Law (the Venice Commission).

I took advantage of my presence in Yerevan to get in touch with the authorities and the representatives of civil society and discuss some major human rights topics.

I wish to thank all those who were able to give me information on the situation, and especially the President of the Republic, Mr Robert Kocharian, the Minister for Foreign Affairs, Mr Vartan Oskanian, and all the members of his staff, as well as the Minister of Justice, Mr David Harutunian, and the President of the Constitutional Court, Mr Gagik Harutunian.

I. The office of Ombudsman

1. At the seminar I had the opportunity to present my views on the important role of the Ombudsman in a modern democracy and to stress the need to establish such an institution as soon as possible in Armenia. According to the Armenians to whom I spoke, in particular the Minister of Justice, it was only a matter of time before the office of Ombudsman was going to be established. Draft legislation on the Ombudsman was apparently ready for discussion by the National Assembly, but it would be necessary to wait until the constitutional reform was completed, as several provisions in the new constitution would concern the Ombudsman.

2. The Armenians' argument that the Ombudsman could only become a truly parliamentary institution if the new constitution is adopted seems convincing. Nevertheless, Armenia needs to appoint an Ombudsman as soon as possible to improve human rights protection for all Armenian citizens and residents. Moreover, in accordance with the views expressed in Report 9542 (2002) of the Parliamentary Assembly on the "Honouring of obligations and commitments by Armenia", it is desirable that the draft legislation be discussed and enacted by the National Assembly as soon as possible so that it can come into force immediately after the constitutional reform.

3. At a meeting with the Deputy Speaker of the Armenian Parliament, I invited Armenia to take part in the forthcoming Round Table of European Ombudsmen, which will be organised by my Office in November 2003.

II. The death penalty

4. The overall impression gained from the discussions was that there was obviously a political willingness to honour the commitments taken vis-à-vis the Council of Europe, and this was clearly reaffirmed by the President of the Republic.

5. As regards ratification of Protocol N° 6 - one of the commitments Armenia entered into on becoming a member of the Council of Europe - it was initially stated in various quarters that it would be bad timing to abolish the death penalty at the time Armenia was in the midst of an election campaign.

6. Other arguments concerned a technical question relating to the alleged incompatibility of the ratification of Protocol No 6 with Article 17 of the Constitution. These arguments have been firmly dismissed in an opinion issued by the European Commission for Democracy through Law (the Venice Commission) at its 49th plenary session on 15 December 2001 (paragraphs 21-24).

7. Finally, it was argued that, the maximum penalty provided for in the Criminal Code currently in force was a fifteen-year prison sentence. Consequently, one would have to wait for a reform of the Criminal Code that would provide for the possibility of a longer prison sentence, before considering abolishing the death penalty. Be that as it may, I am of the opinion that any delays in the process of abolition beyond the forthcoming elections would be clearly unjustifiable.

III. Conscientious objectors

8. Another issue raised during the various meetings was the situation of conscientious objectors, who are currently sentenced to imprisonment for refusing to perform national service. Armenia needs to enact new legislation establishing genuine alternative civilian service for persons who refuse to take up arms on religious or ethical grounds, as in the case of Jehovah's Witnesses.

9. Indeed, conscientious objectors could be useful by employed in civilian activities instead of serving prison sentences. We were told that draft legislation on this subject was currently being discussed. I stressed the need to secure the proportionate and civilian character of this type of service and I pointed out that it would be a good idea to transfer responsibility for examining requests for conscientious objector status from the Ministry of Defence to a civilian department.

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STATEMENT

BY MR ALVARO GIL-ROBLES
COMMISSIONER FOR HUMAN RIGHTS,

ON HIS VISIT TO ALBANIA

20 - 22 October 2002

1. At the invitation of Mr Ermir Dobjani, the Albanian "People's Advocate" (Ombudsman), I made an official visit to Albania from 20 to 22 October 2002. I was accompanied by Mr Markus Jaeger, Deputy Head of my Office, who arrived in Albania two days before me to prepare for my visit. I also had the pleasure of once again meeting the Albanian Permanent Representative to the Council of Europe, Ambassador Shpëtim Caushi, who took the time to accompany us to all of our official meetings except those with non-governmental representatives.

2. I had already informed my interlocutors that I did not intend to make a detailed assessment of the general human rights situation in Albania. I do not consider it a good idea to add a further report to the numerous general and specific reports which various observers and human rights representatives, including those from the Council of Europe, have written or are about to write on the subject of Albania.

3. The main purpose of my visit (see enclosed programme) was therefore to establish initial contact with the Albanian authorities, members of the opposition and representatives of civil society, to see for myself how human rights issues are perceived in Albania, and to find out directly from Albanian political leaders how they intend to tackle these problems.

4. Among the many serious human rights problems facing Albania – the malfunctioning of the judicial system, the still too frequent police brutality, the deplorable conditions of detention in some of the premises I visited, the fact that police stations continue to be used for prolonged detention (despite the promises made long since by Albanian authorities to the Council of Europe!), difficulties in gaining access to fundamental social rights such as the right to healthcare, etc. – I took special note of four specific problems: (i) the conditions of pre-trial detention, (ii) Albania's reputation for being closely involved in various forms of trafficking in human beings, (iii) women's and children's rights in Albania itself, and (iv) the problems still posed by the tradition of blood vengeance.

5. (i) Some of the people I met in prison, who were being held "on remand", should apparently have been considered as already serving their sentence, as the courts had already handed down their judgments. However, they have been waiting a long time, sometimes over 6 months, for notification of judgment. As a result the prisoners concerned are deprived of the regime to which sentenced persons are legally entitled. I also noticed that the under-age detainees I visited in prison n° 313 were completely cut off from the outside world with no access to either newspapers, radio or television. Mr Spiro Peçi, the Minister of Justice, promised me that these young offenders would be given access to a television in the days following our meeting and that he would ensure that this applied to all prisons.

6. (ii) It unfortunately became clear during my various meetings that Albania continues to be a centre for all sorts of trafficking in human beings: trafficking in Albanian women and girls for forced prostitution in other countries;

trafficking in foreign women and girls, also for the purpose of forced prostitution in other countries; trafficking in children for illegal work, for begging and for the purpose of selling their organs abroad (it is however difficult to verify this last allegation); and smuggling illegal Albanian and foreign immigrants into the European Union. However, I was also able to see for myself that all the government authorities are aware of and acknowledge these problems. I had the very strong impression that all the ministers concerned, and first and foremost the Prime Minister and the President of the Republic, are now genuinely tackling the problem of these widespread human rights violations. A national strategy was adopted in late 2001, setting deadlines and clear and ambitious objectives. According to the information I received - not only from government sources – the first stages in this strategy have actually been implemented and smuggling people by boat to Italy has stopped as a result. I hope that these efforts will continue and that, as stated in the national strategy, trafficking in human beings via Albania will be fully eliminated by the end of 2004. My office will continue to keep abreast of developments.

7. (iii) The whole of Albanian society needs to become aware of the importance of respecting the rights of women and children. I therefore agreed with the Albanian Minister for Social Affairs and Employment, Ms Valentina Leskaj, that we would hold a joint seminar in Albania in 2003. At a second meeting with Ms Leskaj in Strasbourg on 14 November 2002, we made progress in deciding on a programme for this seminar which would take account of local and regional concerns as we also wish to invite participants from neighbouring countries.

8. (iv) Traditional vendetta killings are continuing to have harmful effects not only in Albania but also in some neighbouring countries. This phenomenon is little known in other parts of Europe but it wrecks the lives of some 2500 to 3500 people every year as the members of a murderer's clan are obliged to leave their homes and all their possessions behind them and find refuge elsewhere out of fear of murderous reprisals for an act which they did not commit. We discussed with the Minister of Public Order (Interior), Mr Luan Rama, the possibilities of organising a public debate on this spiral of violence at a meeting which should, preferably, be held in one of the areas known for its "blood-for-blood" killings. We would like to hold this meeting in spring 2003.

9. The Office of the Commissioner for Human Rights wishes to call on the relevant Council of Europe departments to assist it in conducting these activities.

10. Notwithstanding the number and scope of the continuing human rights problems in Albania, this statement ends on two positive notes.

11. The Office of the Albanian Ombudsman raises high expectations. The People's Advocate, who, given the context, has impressive human and material resources, is taking all sorts of action, including vigorous audiovisual

campaigns. We wish to thank him for the remarkable way in which he organised our visit and are confident that his office will give Albanian citizens efficient help in defending their rights.

12. We were struck by the honesty and lucidity with which not only the Albanian authorities but also the members of the opposition - all of whom gave us a warm welcome – acknowledged Albania's problems. Given that they are so clearly aware of their problems, it should be possible, with the assistance of the Council of Europe and the Commissioner for Human Rights, among others, to make substantial progress in the not too distant future.

APPENDIX VI

CONCLUSIONS

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CONCLUSIONS

OF
THE EUROPEAN OMBUDSMEN CONFERENCE

co-organised by

MR. ALVARO GIL-ROBLES,
COMMISSIONER FOR HUMAN RIGHTS

and

Mrs. LEONARDA KUODIENE,
LITHUANIAN OMBUDSMAN

Vilnius, Lithuania, 5 – 6 April 2002

[CommDH(2002)3]

In the framework of the Lithuanian Presidency of the Council of Europe, the Lithuanian Ombudsman and the Minister for Foreign Affairs agreed with the

Commissioner for Human Rights, Mr. Alvaro Gil-Robles, to co-organize the next Ombudsmen Conference in Vilnius on 5 – 6 April 2002. The Commissioner for Human Rights would like to thank the Georgian Ombudsman for having consented to hold the meeting in Lithuania rather than in Georgia, as was previously decided during the Warsaw meeting on 28 and 29 May 2001.

The theme dealt with at the meeting between the European Ombudsmen and the Commissioner was "The role of the Ombudsmen in the protection of human rights". Four sessions took place and the European Ombudsmen arrived at the following conclusions, presented at the closing ceremony by the Director of the Office of the Commissioner for Human Rights:

1. The participants attach great importance to the role of the Ombudsman in the protection of human rights. Indeed, human rights are not a luxury but a necessity for the enhancement of democracy. More than that, in our continent they form the basis, the common principles, and the constitutional heritage on which the Europe of tomorrow is being constructed. Protecting human rights is not an option, but the surest route to a common democratic stability.

The role of the Ombudsman in this respect is obvious. The Ombudsman is the link between the actors of human rights protection: the authorities and the individuals. Effective human rights protection requires in fact a synergy between State authorities and civil society and the Ombudsman may be an effective tool to achieve this synergy.

2. As stressed by the Mediator of the French Republic, Mr. Bernard Stasi, independence is essential to the effective functioning of the Ombudsman. This independence must be maintained towards the political power, various political parties, the Administration, as well as towards the lobbyists seeking to pressurise Ombudsmen to defend specific interests.

The independence should be asserted in the Ombudsman's status, but also in the Ombudsman's action. Indeed, the election by a qualified majority of the Parliament as well as irremovability and non-reappointment are undoubtedly elements that reinforce independence, though none of them can be considered as a condition *sine qua non* of the institution's independence. Moreover, the real guarantee of independence lies in the character, the will and the courage of the Ombudsmen who should have the capacity to resist all pressures, promises and temptations and, instead, engage in a constructive criticism. This means that they have to try to establish a mutual trust and confidence in their relations with the Administration. They should bring the Administration to understand that they are partners and allies, in so far as they help the Administration to remedy its mistakes and improve the respect for fundamental rights and freedoms.

3. As indicated by Mr. Sammut, in mature democracies that generally abide by the rule of law, offences against traditional human rights may not be a blatant everyday occurrence. Yet this does not rule out the possibility of the rights of citizens being threatened by public authorities. Within bureaucracies one may come across

officials with a sense of self-importance, indifference, obsession with rules and procedures, and lack of sensitivity to the problems that ordinary people face.
In new democracies, but quite often also in the older ones, the Ombudsman will be called upon to take action with a view to preventing arbitrariness and human rights abuses.

Mr. Hanzek rightly pointed out that some groups of the population complain less than others. Quite often there is an absence of complaints from precisely the most vulnerable sectors of the population, such as children, elderly people, foreigners, minorities of all kinds. This does not mean that violations do not occur among these groups; often, indeed, it is quite the opposite. The reason probably lies elsewhere: too little information about their own rights, unfamiliarity with the system, lack of trust in society, fear, etc. For the individual to be able to lodge a complaint, at least four conditions need to be met. These are: the awareness of one's own rights and the rights of others; the existence of complaint procedures; the absence of fears of negative consequences of complaining; and confidence that the system is capable of correcting violations.

Creating these conditions is an essential element of the Ombudsman's work. In concrete terms this consists of activities involving the promotion of human rights, helping to improve the legislation, and direct communication with marginalized or underprivileged groups.

4. The situation with respect to Roma communities, discussed during the last session of our conference, offers a concrete example of a situation that a minority group may face. Discrimination, lack of education, insufficient health care, heavy unemployment, and limited access to justice were identified as the predominant problems of this minority. Participants called on Ombudsmen to act with a view to bringing an end to the *de facto* segregation that exists within the educational system of several Council of Europe member states and provide equal access to some of the most elementary rights, such as the right to quality education, the right to a fair hearing and the right to social security.

5. The discussions on the basis of the presentation by Mr. Nowicki, the Kosovo Ombudsman, have shown that Ombudsmen can be confronted with crises of various types (economic, political, war and post-war crises) and that they may have an important role to play in these situations. Recent experience (since the 11 September terrorist attacks) shows that crises may take multiple forms and require the Ombudsmen's particular vigilance. This is all the more so as the reply to human rights violations cannot and should not be a diminution of the protection of human rights, but rather their reinforcement.

The Ombudsmen's constructive criticism, the flexibility of their working methods and their spirit of conciliation and mediation make them well placed to promote solutions to crises in full respect of human rights and democratic principles. The action of the State Ombudsman and the Ombudsmen of the Entities in Bosnia and Herzegovina and the activities of the Kosovo Ombudsman are examples of the positive impact that this

institution can have in post conflict situations in consolidating peace through the defence of human rights. The situation faced by several Ombudsmen acting in difficult political circumstances, as is particularly the case in Moldova, also has been mentioned.

Indeed, political players in crises situations do not always positively perceive the criticism offered by Ombudsmen. The Ombudsman institutions may thus, in times of crises, need the active support of their colleagues from other European countries to consolidate their position and to maintain their independence.

The effective functioning of Ombudsman institutions in Council of Europe member states is not a domestic issue. It is a matter of interest to all those concerned with Europe's democratic stability.

The Ombudsmen of Council of Europe member states must be ready to confront crises and to react, where necessary. They consider that the Commissioner for Human Rights might appropriately and effectively coordinate their possible responses to such crises. As a first step, a meeting on the role of Ombudsmen in crises situations could be convened.

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CONCLUSIONS

OF THE SEMINAR ON HUMAN RIGHTS AND THE ARMED FORCES

organised by

The Commissioner for Human Rights

and

The Commission of the Council of Federation on International Affairs of the Federal Assembly of the Russian Federation

Moscow, 5 – 6 December 2002

[CommDH(2002)22]

As institutions integral to the functioning of democratic societies armed forces represent both mirrors and standard bearers for the values democratic societies are based on. The Commissioner for Human Rights has, therefore, been concerned to examine together with representatives of the armed forces of member states of the Council of Europe the importance of the respect for human rights within the armed forces and is grateful to the Council of Federation of the Russian Federation for its assistance in organising and supporting this event.

The participants of this seminar, for whose open and constructive contributions the Commissioner would like to express his gratitude, agreed on the following points:

1. Armed forces represent essential pillars of modern democratic societies at the service of their citizens and subject to the control of civil authorities. As such they must at all times be prepared to protect and uphold democratic institutions and values. Indeed, military institutions are to be considered not as autonomous realms but as being firmly situated within the applicable range of human rights norms. The dignity and professionalism of the military profession depends, therefore, on the full respect of the human rights of soldiers and the civilians it comes into contact with during its operations.

2. It is a corollary of the continuity of the applicability of human rights into the organisation of military life, that all soldiers, regardless of rank, whether professionally contracted or conscripted, are to be considered as citizens in uniform.

3. Whilst the unique requirements of discipline and operational efficiency require and justify certain restrictions to the rights of servicemen, these must at all times be proportionate to the military objectives envisaged and, in so far as possible, be clearly stated by law.

4. Bullying, intimidation and institutionalised violence within armed forces represent particularly pernicious abuses of the rights of servicemen, which cannot be justified under any circumstances, or by any traditions. Every possible effort must be undertaken to combat this phenomenon.

5. To this end, it is important that military personnel are informed of their rights and that commanding officers receive clear guidelines and adequate training enabling them to exert their authority in the full respect of the rights of their subordinates. It is a matter not merely of the awareness of human rights but of promoting a sensitivity to the central importance of human rights to military life and operations.

6. No amount of training will entirely eliminate human rights abuses in practise. Effective, transparent and accessible internal and external control mechanisms should, therefore, serve the dual functions of admitting complaints and punishing abuses within the armed forces. Indeed, the reputation and effectiveness of armed forces is conditional on the elimination of impunity for such offences.

7. Members of the armed forces are more likely to respect in turn the rights of those it comes to into contact with if their own rights are respected. Indeed, the respect for human rights by and of military personnel are two sides of the same coin, to be promoted simultaneously.

8. The respect for human rights and humanitarian law is inseparable from the success of military operations. There is, however, a continual need for the dissemination of clear and guidelines tailored to the increasingly diverse situations confronted by military commands during the course of new types of military intervention.

9. This is especially important where military operations are effected for the purposes of maintaining or restoring peace, democracy and the rule of law, whether within national borders, during peace and support operations or in situations of international armed conflict.

10. The defence of democratic societies, regardless of the nature of the threat, cannot be secured at the expense of the values and rights on which democratic societies are based and which the member states of the Council of Europe are bound to uphold.

The participants expressed a keen interest in the continuation of cooperation in the area of human rights protection, both between national armed forces and with the Commissioner for Human Rights. Future meetings between the Commissioner for Human Rights and members of the armed forces to examine separately and in greater detail the issues raised during this seminar should be organised on annual basis. The next such seminar will be held in Spain during the course of 2003.

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CONCLUSIONS

BY M. ALVARO GIL-ROBLES, COMMISSIONER FOR HUMAN RIGHTS

ON THE SEMINAR

"HUMAN RIGHTS, CULTURE AND RELIGION: CONVERGENCE OR DIVERGENCE? BELIEFS, VALUES AND EDUCATION."

Louvain-la-Neuve, Belgium, 9 - 10 December 2002

[CommDH(2002)24]

As part of a project to establish dialogue with representatives of the monotheistic religions, begun in Syracuse in 2000 and pursued in Strasbourg in 2001, the Commissioner for Human Rights wished this year to reconsider an important aspect of this dialogue in some depth, namely the search for common roots between the religious message and defence of fundamental human rights, whatever an individual's religious beliefs or agnosticism.

The Commissioner and participants express their gratitude to the Catholic University of Louvain in Louvain-la-Neuve, and particularly the Institute of Oriental Studies, for their warm welcome and interest, and for making it possible to pursue their activities in a convivial and open atmosphere.

1. At a time when human rights may seem to be in retreat, the representatives of religious communities reaffirm the urgent need for human rights' existence, and the role that they should play as a factor in inspiring human action, particularly in the public sphere.

   With this in mind, it seems that, by conferring rights, the European Convention on Human Rights and the Council of Europe's fundamental texts also constitute an equal number of responsibilities which human beings must assume.

   This being so, religious discourse should, even more than other approaches, point out that rights and duties are the two facets of this responsibility.

2. It was confirmed that human rights should not replace religion. On the contrary, these concepts represent two different expressions, even two different forms, of adhesion to the same fundamental principles, based on the inherent dignity of every human being.

   Equally, the fields of human rights and religion may overlap, without being completely equivalent, since one does not include the other. However, human rights and religious principles can be applicable simultaneously.

   Consequently, the question is one of determining the best form of correlation between them: is there a special or specific relationship between human rights and religion?

   On the one hand, it was pointed out that religion is not limited to a particular culture or a form of morality; it is distinguished by adhesion to a divine principle and appeals to the transcendent. Religious discourse on human rights is thus not required to limit itself to an ethical perspective.

   At the same time, human rights, as the product of reason, are an expression of universal values in human rationality.

3. After considering whether it is possible to accept the universal nature of human rights without diminishing affirmation and recognition of others, and whether it was possible to accept universal human rights while simultaneously expressing a specific form of these rights through one's religious commitment, the participants concluded together that human rights constitute a universal expression of principles and belong to the sphere of public life, while religion represents a specific formulation of these principles within each community.

   Although it is important that each religious community be able to choose the best method of interpreting human rights, as most appropriate in the light of its texts and tradition, it is also important to preserve the main achievements of human rights which may not be deviated from.

4. The participants consider that, based on the experience of rights within each religious community, there is a need to restore religious discourse to the centre of public life.

   All the participants reaffirmed that tolerance, with the respect and love for one's neighbour that it may lead to, is enshrined at the heart of the monotheistic religions, thus opening up an important arena for the implementation of human rights.

   However, it was strongly emphasised that the founding texts and standard-setting texts were subject to varied readings and interpretations which allowed varying potential for rights to emerge. In specific social or economic contexts, such readings could lead to different applications, and even in some cases to violence, which was to be ruled out. At the same time, the tendency to amalgamate religion and violence was also to be denounced.

   Consequently, the texts and their interpretations require in-depth analysis by specialists.

   This work must be carried out within each confession and each religion, and should then lead to comparison and a pooling of positive results.

   Various fanaticisms are currently practiced in the name of religious texts. Such practices result from erroneous or out-of-date readings and interpretations of the texts, contrary to the fundamental principles which underlie religion and which are the basis of the Universal Declaration of Human Rights. Accordingly, they should be rejected and condemned.

5. Construction of the Europe of tomorrow and, more generally, of the future, requires the development of a political culture that moves beyond hostility.

Consequently, it is more vital than ever to consider the ethical foundations of the principles that govern the life of our European societies. As common cultural matrices of these foundations and principles, religions have an important role to play in this process.

This is particularly relevant in that democracy and religion have in common the concept of recognition of and respect for others.

6. The participants reaffirmed the essential role of education in developing the consciences of future citizens.

Education in human rights should provide an opportunity for a transversal and multi-disciplinary approach. It should be incorporated in every place of education and in private or state schools, whether these are denominational or non-denominational.

Religions, which play an important role in young people's education, should also transmit human rights values through their teachings, by advocating recognition and respect.

In order to ensure the best possible quality in such a crucial and sensitive subject, the participants consider that the time has come to establish a specific training centre in which a methodology for integrating human rights into religious education, and for integrating the religious dimension into general education, could be developed.

Establishment of an institute of this sort could be entrusted to the Council of Europe and its Commissioner for Human Rights.