

report

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Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo

by Georgina Stevens





Roma, Ashkali and Egyptian children pose for a photo at the renovated Centre for Co-operation and Integration 'Fidan Lahu', funded by the OSCE, Fushe Kosove/Kosovo Polje, June 2008.

Hasan Sopa/OSCE.

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Minority Rights Group International

Minority Rights Group International (MRG) is a non-governmental organization (NGO) working to secure the rights of ethnic, religious and linguistic minorities and indigenous peoples worldwide, and to promote cooperation and understanding between communities. Our activities are focused on international advocacy, training, publishing and outreach. We are guided by the needs expressed by our worldwide partner network of organizations, which represent minority and indigenous peoples.

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Abbreviations

AC FCNM	Advisory Committee on the Framework Convention for the Protection of National Minorities.	ICCPR	International Covenant on Civil and Political Rights
ADL	Kosovo Anti-Discrimination Law	ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
Ahtisaari Plan	Comprehensive Proposal for the Kosovo Status Settlement, by UN Special Envoy Martti Ahtisaari	ICESCR	International Covenant on Economic, Social and Cultural Rights
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women	ICO	International Civilian Office
CLARO	Centre for Legal Aid and Regional Development (until March 2008 known as MPDL)	ICR	International Civilian Representative
CRC	Convention on the Rights of the Child	ISG	International Steering Group
CRIC	Committee on the Rights and Interests of Communities, a permanent Consultative Committee of the Assembly of the Republic of Kosovo	KFOR	Kosovo Force (UNMIK and NATO-led international security forces)
EC	European Community	KJC	Kosovo Judicial Council
ECHR	European Court of Human Rights	KRAF	Kosovo Roma and Ashkali Forum
ESDP	European Security and Defence Policy	MPDL	Movimiento por la Paz, el Desarme y la Libertad (NGO, since March 2008 known as CLARO)
EU	European Union	MRG	Minority Rights Group International
EULEX	European Union Rule of Law Mission in Kosovo	NATO	North Atlantic Treaty Organization
European Convention	European Convention for the Protection of Human Rights and Fundamental Freedoms	NGO	Non-Governmental Organization
EUSR	European Union Special Representative	OSCE	Organization for Security and Cooperation in Europe
FCNM	Council of Europe Framework Convention for the Protection of National Minorities	PISG	Provisional Institutions of Self-Government in Kosovo
FRY	The former Federal Republic of Yugoslavia	SAP	(EU) Stabilization and Association Process
HCNM	OSCE High Commissioner on National Minorities	SFRY	The former Socialist Federal Republic of Yugoslavia
HR Committee	Human Rights Committee	SRSR	Special Representative of the UN Secretary-General
		UN	United Nations
		UNDP	United Nations Development Programme
		UNHCR	United Nations High Commissioner for Refugees
		UNMIK	UN Mission in Kosovo

Executive summary

Since Kosovo's declaration of independence on 17 February 2008, there has been a vacuum in effective international protection for minorities in Kosovo. A lack of certainty over the status of the territory has limited the practical application of international human rights law. There is a danger that the new international organizations operating in Kosovo, including the European Union Rule of Law Mission (EULEX) and the International Civilian Representative (ICR), will compound the failure of the United Nations' Mission in Kosovo (UNMIK) to ensure a tolerant, multi-ethnic society in which equality, non-discrimination and the rights of minority groups are protected.

An international protectorate since 1999, Kosovo has suffered engrained hostility between ethnic Albanian and Serb communities, and continued segregation. Restriction of movement and political, social and economic exclusion are particularly experienced by the smaller minority groups – Bosniaks, Croats, Gorani, Roma, Ashkali and Egyptians, and Turks – as well as by Serbs and Albanians living outside the main areas of population of their respective communities.

A lack of political will among majority Albanians and poor investment in protection mechanisms have resulted in minority rights being eroded or compromised in the post-independence period. Smaller minority communities have yet to see resolution or redress for oppression and human rights violations since the late 1990s, such as attacks and occupation of the homes of Bosniaks, Croats and Gorani, and an inability to exercise their language rights in public for fear of harassment. Many smaller minorities, such as Roma, Ashkali and Egyptians, who were displaced from their homes, have faced severe difficulties in returning.

Smaller minorities also suffer from lack of access to information or to tertiary education in their own languages, and discrimination due to association with the former Serb majority. This, combined with tough economic conditions, means that some members of minority communities, including Bosniaks and Turks, are starting to leave the new Kosovo altogether.

Shortcomings in minority rights protection should be addressed by the new guarantees for minorities under Kosovo's post-independence Constitution and in the implementation of the Comprehensive Proposal for the Kosovo Status Settlement (the 'Ahtisaari Plan') by the ICR and his Office. While affirmative action policies for

under-represented communities exist in some areas, for example the judiciary, the actual recruitment of minorities in many cases is weak. The focus of the Ahtisaari Plan on local autonomy in Serb areas may also have had the effect, perversely, of entrenching segregation at the local level, creating police forces divided by ethnicity, for example, rather than an integrated force in which all communities are represented.

Far from addressing Kosovo's deep-seated problems, in the period since the declaration of independence, the actions of the new Kosovo authorities and the international community have instead created uncertainty and confusion, with increasingly complex, multi-layered executive governance structures in Kosovo. As a result there are currently numerous international and domestic actors with interrelated yet conflicting mandates operating in Kosovo. Since independence, the international community has been preoccupied with resolving legal and institutional complications surrounding the status of their international missions. Yet structures put in place have also perpetuated international actors' lack of legal accountability and complicated minorities' access to the European Court of Human Rights (ECHR) and to other international legal remedies against Kosovo authorities. They have also made engagement with and formulation of policy toward Kosovo's smaller minority communities a low priority. Given the history, the European Union (EU) and other international actors should instead accord a central role to promoting the rights of minorities in Kosovo, including by improving the critical assessment of Kosovo's record on minority protection as part of the EU accession process.

Recommendations

Kosovo has a recognized deficiency in the area of rule of law, as the EU mission devoted specifically to this issue indicates. To avoid further ethnic cleansing and grave human rights abuses, it is particularly important to examine how to address this recognized deficiency when protecting minority rights.

Recommendations by Minority Rights Group International (MRG) to improve minority protection in Kosovo include:

- Ensuring the active participation of all minority groups in all aspects of Kosovo public life, including in policy

formulation and implementation, decision-making processes, and security and law enforcement bodies. Effective political participation in the executive, legislature and judiciary will ensure ongoing protection and guarantee of rights by all arms of government.

- Strengthening mechanisms which ensure accountability and respect for the rule of law by all holders of executive power in Kosovo, both domestic and international. This includes effective implementation of the

Anti-Discrimination Law and ensuring that the operation of the Constitutional Court and the Ombudsperson's office meets international standards.

- Establishing an international human rights mechanism to fill the vacuum in effective international oversight of the actions of EULEX, the ICR, UNMIK and the Kosovo authorities, and strengthening engagement with United Nations (UN) treaty bodies and the Council of Europe human rights institutions.

Kosovo



Introduction

From 1999 until very recently, Kosovo remained officially part of Serbia, but under international protectorate of the United Nations' Mission in Kosovo (UNMIK). Minority Rights Group International (MRG) has already highlighted the failure of UNMIK policy during this period to ensure a tolerant, multi-ethnic society in which equality, non-discrimination and the rights of minority groups are protected.¹ The long-term result has been ongoing animosity and the continuation of segregation in Kosovo, leading to restriction of movement for many minorities and exacerbating pre-existing problems.²

MRG emphasized that, in order to address these problems, the active participation of all minority groups in all aspects of Kosovo public life must be ensured, including policy formulation and implementation, decision-making processes and all state apparatus. It has also been reiterated that all actors, both international and domestic, who exercise executive power in Kosovo must secure their legitimacy, and minority rights, through accountability and respect for the rule of law.³ And yet in the period since Kosovo unilaterally declared independence on 17 February 2008, the actions of the new Kosovo authorities and the international community have instead created uncertainty, confusion and increasingly complex, multi-layered executive governance structures in Kosovo. As a result, there are currently numerous international and domestic actors in Kosovo with interrelated yet conflicting mandates, whose legal basis is unclear. Structures put in place have also perpetuated international actors' lack of legal accountability, and complicated minorities' access to international legal remedies against Kosovo authorities.

In this process, the rights and concerns of Kosovo's smaller minorities such as Bosniaks, Croats, Gorani, Roma, Ashkali and Egyptians, and Turks have taken a back seat to general governance and security issues surrounding Kosovo independence. There has been limited consultation and lack of effective participation for smaller minority communities, particularly in international-level negotiations regarding legal mechanisms for the future Kosovo state.

Since independence, the international community has been preoccupied with resolving legal and institutional complications surrounding the status of their international missions. These complications have been created by compromising legal outcomes to try and force political solutions through action. Addressing these issues has left little capacity to consider the international mission's legal

accountability. It has also made engagement with and formulation of policy toward Kosovo's smaller minority communities a low priority.

As a result, it is these smaller minority groups who are seeing protection of their rights eroded or compromised in the post-independence period. There is a lack of political will and substantive investment in effective implementation of minority rights among majority Albanians. Smaller minority communities have yet to see resolution or redress for oppression and human rights violations faced due to events since the late 1990s, such as attacks and occupation of the homes of Bosniaks, Croats and Gorani, and an inability to exercise their language rights in public for fear of harassment.⁴ Many smaller minorities, such as Roma, Ashkali and Egyptians, who were displaced from their homes, have faced severe difficulties in returning.

In the new Kosovo state, smaller minorities suffer from lack of access to information or tertiary education in their own languages, and discrimination due to association with the former Serbian majority. Together with a bad economy, these conditions mean that many members of minority communities are now leaving the new Kosovo state altogether. Unless reversed, this trend will see the steady migration of minority groups who have other states to migrate to, such as Bosniaks and Turks, who have lived in Kosovo for hundreds of years. For Ashkali, Gorani and Roma, who have no such options of escape, these trends are likely to lead to ingrained poverty and further marginalization for generations to come.

In this context, this report will examine how to best protect the rights of Kosovo's minorities, particularly non-Serb minorities, in the period following Kosovo's declaration of independence. This includes considering the contentious original blueprint framework for Kosovo's future independence, 'to be supervised for an initial period by the international community', the Comprehensive Proposal for the Kosovo Status Settlement or 'Ahtisaari Plan'.⁵ The International Civilian Representative (ICR) mandated to oversee implementation of this plan with his International Civilian Office (ICO)⁶ has already been appointed.⁷ Attempts to implement the plan have also involved deployment of a European Security and Defence Policy (ESDP) Rule of Law Mission to Kosovo. Known as EULEX, this mission aims to 'mentor, monitor and advise' Kosovo institutions in the area of law enforcement, and police, customs and the judiciary.⁸ This report will

include consideration of the mandates, roles and responsibilities of these international organizations and their obligations toward minority groups, as they exercise executive authority in Kosovo.

The second section of this report ('Who are the minority groups in Kosovo?') will discuss the various minority groups in Kosovo, and each group's current major issues of concern. In the third section ('Pre-independence domestic legal measures and remedies for minorities'), the effectiveness of legal protections for minorities under the pre-independence UNMIK international protectorate will be evaluated. Against this backdrop, the fourth section ('An independent Kosovo: better protection?') will examine new guarantees for minorities under Kosovo's post-independence Constitution and Ahtisaari Plan requirements, including how well these measures address pre-existing shortcomings in minority rights protection and implementation. The focus here will be particularly on the areas of rule of law and political participation. The fifth section ('Accountability: international rule and international law') will consider the effect of the newly configured post-independence international mission in Kosovo on the protection of minority rights. This section will examine whether the new international mission has built on lessons learned during UNMIK's time to provide improved conditions for realizing minority rights. It will also consider the effect of legal and political uncertainty surrounding EULEX/ICO, UNMIK and Kosovo authorities' roles on the effective guarantee of minority rights, and each actor's international legal responsibilities towards minority groups. Finally (in the section 'The way forward'), the role the European Union (EU) and EU accession can play in ensuring

respect for minority rights in Kosovo, including economic rights, will be explored. The discussion will conclude with a set of concrete recommendations to EULEX, the ICR, the international community, Kosovo authorities, civil society and Kosovo's minorities, in order to improve realization of minority rights in Kosovo.

The focus of this report will be on rule of law and effective political participation for minority groups. This is despite many other crucial areas of minority rights in the Kosovo context, including property rights for returnees, education rights, religious and cultural rights, and the new rights of communities' law. Rule of law is the focus, first, because of the important role the EU and the international community play in this area, which is the primary focus of the EULEX mission. Second, there is a recognized deficiency in the area of rule of law, as the ESDP mission devoted specifically to this issue indicates. To avoid further ethnic cleansing and grave human rights abuses in Kosovo, it is particularly important to examine how to address this recognized deficiency when protecting minority rights. Finally, as states have recognized, democratic governance and an effectively functioning independent judiciary and rule of law are necessary prerequisites for addressing questions relating to national minorities.⁹

Political participation is examined because, without effective participation, the concerns of minority groups are not addressed or reflected, and there is less knowledge, and no ownership, of these rights by minority groups. This impedes the effectiveness and implementation of new legal provisions on minority rights. Further, minority groups must have effective political participation in the executive and legislature, to ensure ongoing protection and guarantee of rights by all arms of government.

Who are the minority groups in Kosovo?

In Kosovo minority groups have often been referred to as ‘communities’, defined in the new Kosovo Constitution as ‘inhabitants belonging to the same national or ethnic, linguistic or religious group traditionally present on the territory of Kosovo’.¹⁰ This terminology is used as the term ‘minority’ is shunned, particularly by Serbs, many of whom see Kosovo as part of Serbia and accordingly do not believe they are a minority. As Oliver Ivanovic, a Serb politician puts it: ‘We Serbs do not accept being classified as a minority. It is humiliating.’¹¹

In this report, however, the term minority is used to refer to ‘any community that lives in a situation where they are a numeric minority relative to the communities surrounding them’, in line with the position of previous MRG papers on Kosovo,¹² and the Organization for Security and Cooperation in Europe (OSCE) and UN High Commissioner for Refugees (UNHCR).¹³ At the municipal level this may include the ‘minority within the minority’, such as Albanians in Serb enclaves.

The minority groups in Kosovo include Bosniaks, Croats, Gorani, Roma, Ashkali and Egyptians, Turks and Kosovo Serbs.¹⁴ The last census took place in 1991, and was largely boycotted by Kosovo Albanians. There have also been important subsequent demographic changes in the 1998–9 war and thereafter. As a result, current demographics for the Kosovo population can only be estimated. As a general estimate, approximately 90 per cent of the 2 million people in Kosovo are ethnic Albanian,¹⁵ while 5–6 per cent are Orthodox Christian Serbs.

Bosniaks

Bosniaks are Muslim speakers of the Slavic languages (mainly Serbo-Croatian) who adopted Islam during the rule of the Ottoman Empire (1450–1912). Bosniaks were first recognized as a distinct category in the Yugoslavian census of 1961 as ‘Muslims in the ethnic sense’. The term ‘Bosniak’ was adopted by Muslims in Kosovo whose first language is Bosnian from around 1999, after Bosnian was promoted as a language distinct from Serbian and Croatian following the Bosnian war. The Bosniak population in Kosovo was estimated at more than 35,000 in 1999, and approximately 57,000 in 2005.¹⁶ Bosniaks themselves have asserted their community was 75,000–100,000 prior to 1999, but Numan Balic, a Bosniak member of the Assembly of Kosovo,

estimates that today, following 2004 attacks in which 75 Bosniaks were killed, there are fewer than 35,000 Bosniaks left in Kosovo.¹⁷

Like Turks, Bosniaks face increasingly limited recognition of their language rights. Bosnian is currently recognized for use with local authorities in only three municipalities. There is also a shortage of Bosniak textbooks for primary and secondary education, and some Bosniak children educated in Albanian have no option to learn in Bosnian or about Bosniak culture history and tradition, even in supplementary classes.¹⁸ The university in Prishtine/Pristina now only offers courses taught in Albanian, and Bosniaks are effectively excluded from attending university in Serbian in Mitrovica/Mitrovica.¹⁹ Kosovo’s only tertiary education options in Bosnian are a business school in Pêja/Peç and an education faculty in Prizren.²⁰

For these reasons, Bosniaks feel that for cultural survival, they need decentralization as much as Serbs do. Kosovo Assembly parliamentarian Numan Balic asserts that Bosniaks requested three Bosniak municipalities both from the Kosovo government and from Ahtisaari during his consultations on the Ahtisaari Plan. He notes that the Ahtisaari Plan guaranteed six Serbian municipalities, but the international community did not apply the same pressure to establish Bosniak municipalities.²¹ This is despite the Advisory Committee on the Framework Convention on National Minorities (AC FCNM) emphasizing in 2005 that decentralization and local self-government reform were clearly relevant for minority communities in Kosovo and should be carried out in a manner that involves them.²²

Like Turks, Bosniaks feel that in the newly independent Kosovo their options are to assimilate, or leave for countries such as Bosnia and Herzegovina. As Numan Balic puts it, there is discrimination against Bosniaks as ‘Albanians think Bosniaks cooperated with Milosevic. We also speak the same language....’ He adds: ‘There are too many minority communities and this is too tiring for the Albanians, so they and the international community agree on phasing out the smaller communities.’²³ Bosniaks displaced during the war have not returned for reasons similar to those of many from other smaller minority communities: a combination of bad memories, mistrust of the ability and willingness of local authorities to protect them, and lack of economic prospects in Kosovo.²⁴

Croats

Although previously a larger community, Croats residing mainly in Janjevo/Janjeva (near Prishtine/Pristina) and Letnica in the south, but also in central and eastern Kosovo,²⁵ now number no more than a few hundred. Their Catholic religious affiliation remains an important part of their identity.²⁶

Gorani

Gorani are a Slavic people who converted to Islam in the eighteenth and nineteenth centuries. Their first language is Gorani. Numbers in Kosovo are estimated at 6,000,²⁷ down from 12,000 in 2001.²⁸

In transitional Kosovo, the Gorani minority educated in Serbian have been caught in the middle of the political stand-off between Kosovo Serbs and Albanians, which has seen the effective creation of two education systems in Kosovo. Education in the Serbian language in regions where Serbs, Gorani and Roma reside is currently managed and funded by the Serbian Ministry of Education, and follows a Serbian curriculum, which differs from that in other Kosovo schools.²⁹

Until recently, Gorani were unable to receive education under the former Serbian curriculum from Kosovo educational authorities.³⁰ Samir Velija from the Humanitarian Law Center states that many Gorani also see speaking Serbian rather than Albanian as an impediment to relating to new Albanian majority national institutions.³¹

Gorani have also been hit by bad economic conditions, and Velija notes that many now live and work abroad for 11 months of the year. Their situation is exacerbated by the fact Gorani businesses are boycotted by Albanians, who see them as Serb collaborators because most are educated and speak in Serbian, and Gorani politicians were pro-Serb prior to the war.³² Like Roma and Egyptians, Gorani note that 'there is no budget for integration; this kind of work is left to NGOs'.³³ Gorani also have little faith in the ability or willingness of local institutions such as the Ombudsperson or the criminal justice system to protect their rights. As they also note, 53 bombs went off in Gorani villages but those responsible were never found; 'Gorani hope to be full citizens of Kosovo, but have bad experiences of the implementation of their rights, which has been nil.'³⁴

Roma, Ashkali and Egyptians

Roma have lived in Kosovo since the thirteenth century. In the 1991 census, 43,000 people in Kosovo identified as Roma, although some consider this an underestimate.³⁵

From the 1990s, Roma have divided into three self-identifying groups, Roma, Ashkali or Ashkaeli and Egyptians. Ashkali and Egyptians largely speak Albanian as a first language and commonly live with Albanians in urban areas and villages.³⁶ The latter differ from the former in that they consider their ancestry to be traced to Egypt. Those identifying as Roma generally speak Romany or Serbian and tend to live in mixed Serb/Roma or single-ethnic villages and enclaves scattered throughout Kosovo.³⁷

A decade after displacement during the ethnic conflict, Roma, Ashkali and Egyptians continue to face difficulties returning to their traditional Mahalla (quarter) in Mitrovica/Mitrovica, despite efforts by the Kosovo provisional government, UNMIK, the United Nations Development Programme (UNDP) and OSCE to relocate them from dire living conditions in camps for internally displaced persons.³⁸ Although some consultation took place, Roma and Ashkali representatives indicate that a lack of effective, direct consultations with affected communities has been part of the problem. Lack of effective consultation is a theme which recurs in discussions with these groups.³⁹ Thousands of other Roma, Ashkali and Egyptians displaced by destruction of their Mahalla in Prishtine/Pristina and other areas are also yet to return and still live displaced in inadequate housing.⁴⁰ Returns are not sustainable as there is no clear framework for resettlement, no housing to replace destroyed homes, and no reintegration policies.⁴¹ The Ombudsperson (an institution created in 2000, with the mandate to address alleged human rights violations or abuses of authority by public authorities, with particular priority on discrimination and violations of the rights of communities and their members) notes that even where houses are rebuilt, such as after the March 2004 attacks, many Serbs and Roma do not return due to fear of further attack.⁴²

Lack of official documentation and non-registration are also fundamental problems for many Roma, Ashkali and Egyptians. Non-documentation affects their ability to access basic economic, social and legal rights such as health insurance, social assistance, education and access to courts.⁴³ The OSCE has highlighted that lack of civil registration may even lead to statelessness.⁴⁴ Lack of registered title and documents also impedes Roma, Ashkali and Egyptian return to the informal settlements they occupied before the war.⁴⁵ The Roma and Ashkali Documentation Centre is working to address documentation issues,⁴⁶ while the Office of the Prime Minister, the UNHCR and non-governmental organization (NGO) Civil Rights Programme Kosovo have initiated a civil registration campaign.⁴⁷ This has not always been supported or implemented by municipalities however.⁴⁸

Albanians tend to see Roma as Serb 'collaborators'; as Egyptians Neziraj and Zizako put it: 'Albanians do not see

us as good people. They think we cooperate with Serbs.³⁴⁹ Roma interests also remain compromised by the results of segregation and ongoing Albanian and Serb political tensions. Roma who live in Serb enclaves rely on education, social benefits and health systems managed by Serbian authorities, as Kosovo public transport, education and municipal support in these regions is minimal.⁵⁰ This propagates segregation, as Serbian authorities providing these basic services discourage engagement with Kosovo authorities. Egyptians emphasize that: ‘Egyptians ... want to integrate. This is important for the future of Kosovo.’⁵¹ They add that UNMIK’s focus, however, has prioritized Serb reintegration. Integration is difficult due to the inability of Roma and Gorani to speak Albanian, and the resulting lack of access to information and labour markets in Kosovo, as well as the failure of Kosovo authorities to recognize parallel education systems in Serb enclaves.⁵²

Unemployment is also a pressing problem for these three communities, and is estimated at a staggering 98 per cent.⁵³ For Roma, Ashkali and Egyptians in general, and women in particular, low basic education and high levels of illiteracy (approximately 70 per cent for women) also continue to be a problem, compounded by poverty, a lack of resources and long-held cultural views on the role of women.⁵⁴ UNICEF and the Committee on Economic, Social and Cultural Rights have expressed concern over the lack of access to primary and secondary education for girls from these communities in particular.⁵⁵

To address these most pressing issues, the Office of the Prime Minister has formulated a Roma, Ashkali and Egyptian joint strategy with the support of the OSCE and the Kosovo Foundation for an Open Society, and involving representatives from these communities. Areas covered include integration, education, housing, registration and documentation, the situation of women, access to health, social welfare and information (media), political participation, etc.⁵⁶ But despite numerous previous papers and strategies, there has been little improvement in the concrete situation and access to rights for these communities over the last nine years.

Serbs

Serbs have lived in Kosovo since AD 1000, around the same length of time as Albanians. Kosovo Serbs complained of increasing discrimination and exclusion in the early 1980s, when Kosovo Albanians began demanding that Kosovo, part of the SFRY, become a fully independent republic.⁵⁷ Following Slobodan Milosevic’s rise to the Serbian presidency in 1989 the situation reversed and Kosovo Albanians faced increasing institutional discrimination. In 1995 the Albanian Kosovo Liberation Army began operations. Open conflict in 1998, followed by

NATO (North Atlantic Treaty Organization) bombing and massive human rights abuses against Albanians led to the ultimate establishment of the UNMIK protectorate on withdrawal of the Yugoslav forces in June 1999.

Today, the position of Kosovo Serbs is dependent on Serbia, both in terms of security and political power to oppose and boycott Kosovo institutions. As Serb politician Oliver Ivanovic puts it: ‘Whatever Serbia agrees, Kosovo Serbs will have to accept, or leave.’⁵⁸ Parallel education, health, hospital and police systems still function in northern Kosovo close to the Serbian border, in enclaves where Serbs are a majority. For Serbs who are a minority among Albanian majorities in enclaves south of the Ibar River, the need to engage with Kosovo institutions, which northern Kosovo Serbs largely boycott, is more pressing. Eight of ten Serbs serving in the Assembly of Kosovo seats reserved for Kosovo Serbs come from these southern enclaves, although they also continue to boycott parliamentary sittings and debate.

Kosovo Serb politician Ivanovic states that security is one of the main ongoing concerns for Kosovo Serbs, but Dusan Radakovic, formerly of NGO Partners Kosova (Center for Conflict Management) states that economic development, employment and education are more pressing problems. He feels that ongoing concerns about security and discrimination arise from the failure to address and clarify past crimes against Serbs and other Kosovars.⁵⁹

Radakovic believes that for internally displaced Kosovo Serbs, the main impediments to return are unemployment and the fact their houses have been destroyed. The Acting Ombudsperson (see p. 12) adds a real or perceived fear of further attack.⁶⁰ Radakovic personally states: ‘I don’t care what the national flag is, I care about freedom and security.’ He adds, however, that he believes only about 10–20 per cent of Serbs are open to learning Albanian, and they will need to be well integrated over the next 5–10 years to accept living in independent Kosovo. This may prove difficult, however, as he adds that the Kosovo government: ‘declare they care about communities because of international pressure, but there is no real compromise ... [just] lip service’.⁶¹ Ongoing language barriers and separate Albanian and Serbian health and education systems are a further complicating factor for integration, with the reality being that ‘Albanian and Serbian communities continued to live separate lives, and the situation has even worsened after the declaration of Kosovo’s independence.’⁶²

Turks

Turks have been a national minority in Kosovo since the rule of the Ottoman Empire from 1450 to 1912. Turkish community leaders estimated their community’s popula-

tion at between 12,000 and 50,000 in 1999. Since then it has substantially decreased and in 2001 the OSCE estimated it at 12,000.⁶³

Ironically, new laws enacted under UNMIK's supervision mean that Turkish minority groups now have less opportunity to speak, hear, be educated in and use their mother tongue in official capacities than they did in the pre-Milosevic Socialist Federal Republic of Yugoslavia (SFRY). Following the signing of the Law for Use of Official Languages on 2 November 2007, Turkish is no longer recognized as an official language in some municipalities where Turks have been living for centuries.⁶⁴ Under the 1974 SFRY Constitution, the Turkish language enjoyed equal status with Serbo-Croat and Albanian, but the new Kosovo Constitution only guarantees Albanian and Serbian as official national languages. The decision of whether to recognize the Bosnian, Roma and Turkish languages at the municipal level is left to the discretion of municipalities.⁶⁵ Members of the Turkish community complain that broadcasting space for Turkish-language programmes is 20 per cent of previous levels; that, unlike in the SFRY, UNMIK ID cards are not produced in Turkish; and the government is no longer supporting the previously publicly funded Turkish-language newspaper.⁶⁶ The lack of Turkish-language

options for UNMIK ID cards means that Turks cannot correctly spell their surnames in identity documentation. This is in contravention of the right to official recognition of names written in minority languages, under Article 11 of the Council of Europe's Framework Convention for the Protection of National Minorities (FCNM), applicable in Kosovo since 2001. While the right to have personal names registered in their original form is guaranteed under Kosovo's new Constitution, the use of minority alphabets in relations with the central authorities is not.⁶⁷ Together with Bosniaks, Turks also face a lack of school textbooks and official education documentation published in their own language. This is in spite of provisions in both the Law on the Use of Language and the Constitutional Framework for Provisional Self-Government in Kosovo, which supposedly guaranteed their right to mother tongue education from primary school to university.

The result, in combination with bad economic conditions and a lack of jobs in which Turkish language can be used, including in the new ICO, is that many Turks are migrating to Turkey for higher education, or permanently. Despite having lived in Kosovo for five centuries, they feel that, with the lack of official recognition of Turkish language and identity, the only other option is assimilation.⁶⁸

Pre-independence domestic legal measures and remedies for minorities

This section will examine the effectiveness of minority legal protections under UNMIK's international protectorate in the period prior to Kosovo's declaration of independence in February 2008. This analysis will allow a comparison between these prior arrangements and new minority protections enacted since independence, examined in the next section ('An independent Kosovo: better protection', p. 16).

By highlighting existing weaknesses in the effective functioning, implementation and enforcement of legal remedies enacted under UNMIK, it will become clear what measures are required from the new EULEX/ICO missions to remedy these problems. The highlighted gaps will also demonstrate the vital need for access to regional and international mechanisms for smaller minorities, as a higher level of appeal, to ensure an effective remedy where one is not available domestically. It is against this background that the serious effect on the protection and guarantee of minority rights of the post-independence 'vacuum' described in the next two sections of this report will become clear.

The Ombudsperson

An Ombudsperson institution was created in Kosovo in 2000, with the mandate to address alleged human rights violations or abuses of authority by international and local public authorities.⁶⁹ The Ombudsperson was directed to give particular priority to severe or systematic violations founded on discrimination, including allegations of violations of the rights of communities and their members.⁷⁰ Under the Anti-Discrimination Law (ADL) enacted in 2004, the Ombudsperson has also been designated as the 'authorized body to receive and investigate complaints concerning violations of rights based on discrimination'.⁷¹

Because of the personal commitment of Hilmi Jashari, the acting Ombudsperson, the institution has facilitated protection of minority rights to date, but politicization of the position now threatens both its legal effectiveness and civil society collaboration.⁷² The Assembly of Kosovo's second attempt to appoint an Ombudsperson was blocked late in 2007. The OSCE, UN High Commissioner for Human Rights and international and local NGOs had expressed concern⁷³ that short-listed candidates did not meet UNMIK Regulation 2007/15 criteria of impartiality, integrity and a demonstrated commitment to human

rights.⁷⁴ One major concern was that, with politicization, the institution would no longer meet international standards for effective national human rights institutions, embodied in the Paris Principles.⁷⁵ These Principles confirm that independence, autonomy, pluralism, adequate powers of investigation and adequate resources are necessary for national institutions to effectively promote, protect and remedy violations of human rights. It remains vital in post-independence Kosovo that the Paris Principles' criteria are met in the appointment and functioning of the Ombudsperson, to ensure the effective promotion of minority rights and investigation of alleged violations of community rights and complaints based on discrimination under the ADL.

Minority groups also state that the Ombudsperson's effectiveness is limited by its non-binding recommendations and lack of legal enforcement powers.⁷⁶ To enhance human rights protections, the Parliamentary Assembly of the Council of Europe suggested in 2005 that the Ombudsperson's authority be strengthened to require responses from authorities to its recommendations, but the proposal is yet to be acted on.⁷⁷ Serb, Roma and Ashkali representatives feel that both trust in the institution and its importance have also decreased since the international Ombudsperson left and was replaced by a local Kosovo representative, a concern also highlighted by independent observers.⁷⁸

Finally, the Ombudsperson's ability to address violations of minority community rights or discrimination by UNMIK has been compromised by UNMIK Regulation 2006/06.⁷⁹ This regulation provides that all complaints against UNMIK fall outside the scope of the new non-internationalized Ombudsperson's mandate from February 2006. UNMIK recently indicated that the Acting Ombudsperson can investigate complaints against UNMIK under Regulation 2000/38, until a new local Ombudsperson is appointed. Uncertainty around the issue, however, means that no minority or other complaints against UNMIK were investigated between mid February 2006 and April 2008.⁸⁰

Human Rights Advisory Panel

To address the above gap in UNMIK's accountability, UNMIK Regulation No. 2006/12 created a Human Rights

Advisory Panel to deal with complaints of violations of international and regional human rights instruments against UNMIK's interim administration.⁸¹ These include instruments directly relevant to minority rights guarantees, such as the International Convention on the Elimination of All Forms of Racism (ICERD) and the International Covenant on Civil and Political Rights (ICCPR). A complaint may be brought once all available domestic remedies have been exhausted.⁸² The conclusions of the panel of three international jurists with expertise in human rights will, however, remain non-binding 'recommendations' presented to the UN Secretary-General's Special Representative (SRSG).⁸³ As the SRSG has exclusive authority and discretion to decide whether or not to act on these findings, the Panel does not therefore guarantee an effective remedy to minorities where UNMIK acts have resulted in violation of their rights, as the Human Rights Committee has highlighted.⁸⁴ The Panel was only just about to become properly operational before Kosovo declared independence.⁸⁵

The Anti-Discrimination Law and international standards

Kosovo's Anti-Discrimination Law, enacted in 2004, was heralded by the Council of Europe as one of the most comprehensive in Europe.⁸⁶ Yet the acting Ombudsperson, Hilmi Jashari, acknowledges that some definitions and principles in the law remain vague.⁸⁷ There is also a lack of clarity regarding which institution is charged with the law's implementation and enforcement.⁸⁸

The law has failed to substantively improve the situation with regard to discrimination against minorities, however, due to ineffective implementation. The Ombudsperson notes that the ADL's purpose 'has so far been defeated by the lack of information in Kosovo society about the law and about discrimination as a whole'.⁸⁹ This has resulted in a low number of complaints and cases being brought so far under the ADL.⁹⁰ This problem is worse in the case of minority groups, as 'persons or groups of persons who are mostly marginalized and frequently discriminated against are in the worst position regarding information about this law'.⁹¹ A publicity campaign to promote the ADL in five languages, including Bosnian, Roma, Serbian and Turkish,⁹² was carried out but has clearly been insufficient. Further awareness campaigns are therefore crucial. Lack of means to bring cases is another obstacle for minorities. The Ministry of Justice opened District Legal Aid Offices in all five regions of Kosovo in January 2008, which should assist the most marginalized to bring cases under the ADL.⁹³ For Serbs who continue to feel unsafe moving about outside their own protected, largely single-ethnicity enclaves, lack of freedom of movement may, however, limit their ability to physically access many of these offices.

Implementation is also hampered by insufficient knowledge and training of judges and civil servants on the law's effect and application.⁹⁴ Judicial training by the international community (OSCE) has focused almost exclusively on criminal justice, to the detriment of training on civil law remedies like those under the ADL. The Acting Ombudsperson notes: 'Executive authorities do not know the content of the law and have so far not made its implementation a priority. Also, in many courts there is a limited awareness of the law and how it should be implemented.'⁹⁵ It is crucial, in order to effectively implement this law and reduce *de facto* discrimination against minorities, as the Ombudsperson recommends, that the executive and the judiciary are properly trained in how to deal with complaints under this law.⁹⁶

Civil society actors note that the same lack of awareness of standards and recourse also mean that, domestically: 'the comprehensive implementation of international standards remains to be realized',⁹⁷ despite their supposed application under Kosovo law.⁹⁸ As a member of the Kosovo Turkish community puts it: 'without proper information, remedies provided by law are not used by population itself, or by minorities'.⁹⁹

A lack of public support and political will to implement the ADL and other laws is a further problem highlighted by members of minority communities and by the AC FCNM.¹⁰⁰ Minority representatives emphasize that a lack of true commitment to minority rights by the new Kosovo government and its institutions is a major obstacle to the effectiveness of the ADL and other laws, in improving their situation and protecting their rights.¹⁰¹

Institutional shortcomings also impede minority access to prompt, effective remedies. There are cases of alleged misconduct by judges and civil servants leading to discriminatory practices, which have been submitted to the Kosovo Judicial Inspection Unit for investigation.¹⁰² The AC FCNM and legal aid NGOs also note that the huge backlog of pending cases delays judgments and access to remedies for minorities for years.¹⁰³

Structural obstacles for minorities

Fermin and Mikel Cordoba of Movement for Peace (MPDL, since March 2008 known as Centre for Legal Aid and Regional Development, CLARO) also note various obstacles for smaller minority groups, which impede their access to effective remedies. These include: (1) that minorities are not acquainted with existing legal mechanisms for protecting community rights in the municipalities; (2) language obstacles – minorities are unable to use their mother tongue with municipal authorities, or access public information and documents in that

language; and (3) limited capacity for grassroots initiatives to solve communities' economic, social and fundamental rights-related problems. They add: '[t]he establishment of institutional bodies in charge of protection of vulnerable groups does not provide in itself any guarantee unless the factors that hinder their ability to fully participate in society are addressed'.¹⁰⁴

An example is the lack of personal documents and access to habitual resident registry and civil status registry among the Roma, Ashkali and Egyptian communities, mentioned in the second section ('Who are minority groups in Kosovo, p. 8). Without documentation these individuals are not recognized before the law, which impedes access to other basic rights, including the right to vote, to participate as a candidate in elections or even to access courts.¹⁰⁵ The European Commission has also noted the inadequate translation of laws into minority languages as another problem, which would clearly impact negatively on the ability of minority communities to know and access effective remedies for violations of their rights.¹⁰⁶

As a result of these various institutional problems, in practice: 'discrimination in access to civil and political rights, as well as to economic, social and cultural rights, especially due to ethnic origin, still remain a general practice in Kosovo'.¹⁰⁷

Minority women in Kosovo: discrimination and obstacles to effective remedies

Recent cases brought before Kosovo courts by the Prishtine/Pristina legal team of MPDL/CLARO indicate how gender-based discrimination is compounded by ethnic discrimination and other forms of social exclusion for minority women in Kosovo society, and in the administration of justice. An example is the case of a Roma woman who claimed compensation for damage to her property and sought to bring criminal charges against the alleged perpetrators. Her complaints were totally ignored by the municipal prosecutor's office in Pêja/Peć. This deprived her of her right to access to claim mechanisms, an infringement of the principle of fair treatment before tribunals and other organs administering justice, under Articles 2 (a) and 4 (j) of the ADL. This discrimination was allegedly due to her ethnic origin. The prosecutor referred the claim to a municipal court only after a complaint was lodged and an investigation initiated by the Kosovo Judicial Inspection Unit for alleged misconduct.

It was recommended to the claimant that she file a discrimination claim, but she refused, due to fears of the problems such a claim may cause her with authorities in the future. She was reportedly threatened on several occasions, and this may have formed one of the deciding factors in her decision not to bring a discrimination claim.

Minority concerns at the municipal level – Community and Mediation Committees

At the municipal level, Community and Mediation Committees have been established as an anti-discrimination mechanism to ensure that every local community receives equal treatment by the municipal authority regardless of size, language, religion, ethnic origin, etc.¹⁰⁸

The OSCE Mission in Kosovo forms a distinct component of UNMIK's interim administration, mandated with institution- and democracy-building, and promoting human rights and the rule of law.¹⁰⁹ In February 2004 the OSCE assessed Community Committees as yet to be functioning effectively, 16 months after their creation.¹¹⁰ Today, despite being more established, these committees do not form part of the framework set up to tackle discrimination under the ADL. Furthermore, in correspondence with MRG, local civil society organizations in Kosovo indicate that participation by minorities in decision-making at the municipal level 'is very much limited given the lack of strong links of communication between the community committees and members of the communities that should be consulted on matters concerning them'.¹¹¹

To ensure implementation of minority rights at the municipal level, the recommendations of the Council of Europe Committee of Ministers in their resolution on the implementation of the FCNM in Kosovo should be implemented as soon as practicable. The Committee urged international and local authorities in Kosovo to 'consider ways to improve the representativeness and effectiveness of the communities committees in municipalities' in order to improve implementation of the FCNM in Kosovo.¹¹²

Impunity and failures of accountability

The failure to prosecute past grave human rights abuses against minority groups in both 1999 and 2004, combined with limited minority representation in Kosovo's police, security forces and judiciary are further impediments to the effective enforcement of minority rights in Kosovo. Under Article 6(2) of the FCNM, applicable since 2001, parties are under an obligation to 'take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity'.¹¹³ And yet, by the end of 2005, not a single domestic war crimes case had been filed in which the victims were non-Albanians, despite crimes against Ashkali, Roma,

Serb and other communities.¹¹⁴ The general failure of the Kosovo justice system to effectively prosecute war crimes, other criminal cases and ethnically motivated violence has also been widely reported.¹¹⁵

The result is that minorities are reluctant to report instances of discrimination or crimes against them due to fear of harassment, and experience of authorities collaborating, or at the very least not prosecuting crimes committed against them.¹¹⁶ This mistrust and lack of confidence in domestic law enforcement institutions among minority groups leads to ongoing fears for their security, and a lack of willingness to return among internally displaced persons. As Bosniak representatives indicate: 'Now [future] perspectives are the main reason why people do not come back ... There is no risk for their physical security, but people are still afraid.'¹¹⁷ Members of the Roma and Ashkali community also report 'high levels of unreported crimes. People are afraid of reporting because of the possible repercussions. There are few minority representatives in security institutions.'¹¹⁸ The AC FCNM noted in this regard that, in order to meet their Article 6(2) obligations (mentioned above), the recruitment of police officers from minority communities in *all* localities throughout Kosovo will be crucial.¹¹⁹

The International Judiciary and Prosecutors programme introduced international judges and prosecutors into the Kosovo criminal justice system in an attempt to address the above problems, but the programme failed to improve prosecution of ethnic crimes, or build local capacity to do so.¹²⁰ Despite international involvement, of 50,000 participants and 1,400 complaints made to police arising out of the ethnically motivated crimes during riots in 2004, a total of only 400 charges were brought.¹²¹ Sentencing was also often suspended or unlawfully lenient, with courts often failing to find ethnic motivations an aggravating circumstance.¹²² Lack of evidence and clear witness statements has limited the ability to prosecute these crimes.

Even if some of these crimes cannot be prosecuted due to the lack of evidence and witness statements,¹²³ it is imperative that a voice be given to victims, and that mistrust, ethnic hatred and the truth regarding past crimes are addressed. Authorities in Kosovo have an obligation under Article 6(1) of the FCNM to 'encourage a spirit of tolerance and intercultural dialogue and take effective measures to promote mutual respect and understanding and cooperation among all persons living on their territory'.¹²⁴ The AC FCNM has noted that the unaddressed legacy of the past 'complicates the task ... to implement

the Framework Convention and necessitates particularly decisive measures aimed at rebuilding inter-ethnic tolerance and true and effective equality'.¹²⁵ Despite the ethnic violence of 1999 and 2004 and a decade of international engagement, a comprehensive and coherent reconciliation process is yet to be undertaken in Kosovo.

The Ahtisaari Plan also requires the Kosovo government to: (1) promote reconciliation and a comprehensive and gender-sensitive approach to dealing with the past;¹²⁶ (2) protect persons subject to or threatened with discrimination or violence as a result of their ethnic, national, religious, etc. identity;¹²⁷ and (3) promote a spirit of tolerance, dialogue and reconciliation among communities.¹²⁸ In order to meet these obligations, therefore, a truth and reconciliation commission should be convened to address past ethnically motivated crimes, including those committed in 2004. Given that a number of key figures in the post-independence Kosovo government are former leaders of the Kosovo Liberation Army, such measures may take time and will have to be handled with extreme sensitivity to ensure that the process is both conducive to reconciliation and seen as legitimate by all parties. The process may need to be convened with the assistance of an intermediary such as the ICO, OSCE or EULEX as appropriate,¹²⁹ but should involve local civil society organizations within Kosovo and necessarily involve all affected parties.

Conclusion

For minority groups, access to effective domestic remedies remains impeded by unaddressed structural inequalities, insufficient implementation, and lack of awareness of existing laws and remedies relevant to minority communities and a failure to prosecute past crimes with resulting mistrust of criminal justice authorities. These issues must be addressed in post-independence Kosovo if minority rights are to be protected. There is also need for increased training, awareness-raising and exposure to jurisprudence on the application of the newly created ADL norms for the executive and judiciary. A truth and reconciliation commission; greater political will to enforce minority rights; and mechanisms to protect minority rights which are legally enforceable, unlike the non-binding Ombudsperson and Human Rights Panel, should also be a priority. The ongoing independence and impartiality of the Ombudsperson and judiciary, and adequate financial resources for them, must also be guaranteed.

An independent Kosovo: better protection?

In this section, the new constitutional structure in force since 15 June 2008 in post-independence Kosovo¹³⁰ – much of it mandated by the international community's Ahtisaari Plan – will be examined to assess its potential effectiveness in improving the guaranteeing of minority rights.

Effective participation and consultation on the new Constitution

The AC FCNM highlighted in 2005 that ensuring *all* minority groups' effective participation in the Kosovo future status talks was one important means to ensure minorities' FCNM Article 15 right to effective participation in public affairs.¹³¹ The Human Rights Committee (HR Committee) reiterated the same point in 2006 regarding minorities' ICCPR Article 25 right to participate in the conduct of public affairs.¹³² As previous MRG reports have highlighted however, minorities were effectively excluded from deliberations and drafting of the Ahtisaari Plan and its 'final settlement' for Kosovo.¹³³

Under the Ahtisaari Plan, the Constitutional Commission drafting the new Kosovo Constitution was specifically to include at least three Serb Kosovo members, and three members representing 'other' minority communities, which include Bosniaks, Croats, Gorani, Roma, Ashkali and Egyptians, and Turks.¹³⁴ The initial working group formed prior to Kosovo's declaration of independence did in fact include one representative each from the Bosniak, Egyptian and Turkish minority communities. Serb representatives refused to participate.¹³⁵

The above arrangements, however, ensured only the participation of three individuals from three of the six Kosovo minority communities in the constitutional working group, rather than consultation with minority communities as a whole. The AC FCNM has confirmed that effective consultation with minority communities requires consultative mechanisms that are inclusive and representative, allowing different segments within minority communities, and women in particular, to be included and have an effective voice.¹³⁶ Representation of an entire community by one person can be problematic, particularly where, as the Turkish community assert, that representative 'didn't represent the concerns of the community'.¹³⁷

Neither was true participation ensured for all communities. As the explanatory note to the OSCE High Commissioner on National Minorities' (HCNM) Lund Recommendations on Effective Participation of National Minorities in Public Life clarifies, the essential aspect of participation is involvement, both as regards opportunities for minorities to contribute substantively to decision-making processes, *and* for these contributions to actually have effect.¹³⁸ Members of Roma, Ashkali and Egyptian civil society note they were not represented on the Commission, and while they received a copy of the proposed draft constitution, their comments on it were not included.¹³⁹

Further, under the Ahtisaari Plan and new Constitution, in the early post-independence transition period, the usual requirement of approval by a majority of elected Assembly representatives from minority communities before laws affecting the interests of minority communities can be passed, did not apply.¹⁴⁰ That is, both the adoption of initial laws on the rights of communities and their members, and the adoption of provisions in the new Constitution on minority rights in the nation-building phase, were exempt from the requirement to have minority representatives' approval. Laws directly affecting minorities could thus be passed without meaningful minority involvement.¹⁴¹ This measure was presumably to ensure stability and the immediate application of international human rights standards. The process however denied minority communities effective participation in decision-making which directly affects their rights and interests, circumstances in which, international standards indicate, participation for minorities is especially important.¹⁴² Furthermore, many of the laws passed during this early phase had been prepared as part of the Ahtisaari Plan proposals and status settlement negotiations, where minority communities had also not been able to participate effectively.

The combined outcome clearly alienates minority communities from any new minority protection provisions adopted in the post-independence period. As the explanatory notes to the Lund Recommendations indicate, 'good governance [decision-making] ... processes should always be inclusive of those concerned, transparent for all to see and judge and accountable to those affected. Only such processes will inspire and maintain public confidence.'¹⁴³ By having minority laws and provisions 'gifted' or 'imposed' during this transition period, it is likely to take much longer for these provisions to be understood,

let alone owned by minorities in Kosovo. It also means that ‘the protective mechanisms run the risk of not being relevant for the minority community’.¹⁴⁴ MRG recommends therefore that the effective participation of minority communities, including through the application of the constitutionally guaranteed special representation measures, should apply in all circumstances where laws being examined, passed or amended directly impact on the rights of communities, in accordance with international human rights law requirements. For those laws and provisions passed during the transition period (to which these constitutional guarantees were not applied), a periodic, non-politicized review of the laws and measures enacted should be established by agreement between EULEX, the ICR and Kosovo authorities, to take place during the next five years and prior to termination of the mandate of the ICR.¹⁴⁵ At this time, the effective participation of minority communities and their representatives must be guaranteed. This provides the requisite legal stability, while also allowing measures to be adapted and improved based on minorities’ practical experience of their implementation and effectiveness.

Minority rights protections impeded by existing problems

As the third section (‘Pre-independence domestic legal measures and remedies for minorities’, p. 12) confirmed, there are a number of problems with implementation and enforcement of minority rights in Kosovo’s legal system. This section will examine how these same problems, unless remedied, may impair the effectiveness of provisions in the new Kosovo Constitution in force since 15 June 2008, which aim to protect and promote minority rights.

Participation in public life, including politics

With regard to *central government*, the new Constitution provides mechanisms to guarantee political participation for minority communities, including a Consultative Council for Communities with representation from all communities, to facilitate their dialogue with government on governance issues at an early stage.¹⁴⁶ This appears to be in line with Lund Recommendations on the establishment of consultative bodies as channels for dialogue between government and minority communities.¹⁴⁷ The Constitution also entrenches prior arrangements under UNMIK, which are also recognized means for ensuring minority participation in central government decision-making under regional human rights law standards.¹⁴⁸ A minimum 20 of 120 National Assembly seats are reserved for representatives of minority communities. Ten are for

Kosovo Serbs, and ten for ‘other Communities’: one each for the Roma, Ashkali and Egyptian, and Gorani communities, with one additional seat between them, three for the Bosniak community and two for Turks.¹⁴⁹ Kosovo Serbs and ‘other Communities’ are also guaranteed one of five Deputy Presidents each in the Assembly Presidency.¹⁵⁰

In order to ensure effective participation of minorities in decision-making which directly affects their interests,¹⁵¹ amendment or adoption of laws on certain issues of direct concern to minority communities in the post-institution-building phase must be approved by both a majority of the Assembly *and* a majority of the parliamentary members representing non-majority communities *present and voting*.¹⁵² The latter wording prevents a boycott by minority representatives from forestalling the adoption of legislation. It also means, however, that where – like Serb representatives currently – minority representatives do boycott the Assembly, there will be no effective participation for their communities in decision-making on laws which may directly affect their interests. As the AC FCNM has noted, the limited use of possibilities to participate by Serbs ‘substantially impairs their influence in the decision-making processes at the central level’.¹⁵³ International standards clearly presume, however, that the exercise of opportunities for effective participation by minorities will be voluntary, not coerced.¹⁵⁴

The new Constitution entrenches the Committee on the Rights and Interests of Communities (CRIC) as a permanent Assembly committee consulted in respect of proposed laws that may affect the interests of minority communities. The Committee itself may also propose laws to address the concerns of communities.¹⁵⁵ The Committee is not a minority-only body; it is made up from roughly one-third each of Albanian majority, Serb and ‘other Community’ Assembly representatives,¹⁵⁶ but would appear to comply generally with possible structures suggested for minority participation in decision-making in the Lund Recommendations.¹⁵⁷

The mere existence of structures like the CRIC is not sufficient, however, to guarantee appropriate input, consideration and reflection of issues of concern to minority communities in the legislative process. As the Lund Recommendations indicate, the success of minority ‘round tables’ attached to Assembly bodies depends on their being ‘given serious attention by decision-makers’, with good governance requiring ‘positive steps on the part of the authorities to engage’ with such bodies.¹⁵⁸ As the AC FCNM has highlighted, this has not always been the case in Kosovo. To date, ministers have not shown adequate interest in taking part in CRIC meetings, or entering dialogue with its members, who felt their recommendations did not receive adequate attention.¹⁵⁹ In order for the CRIC to function effectively in protecting and promoting

the interests of minorities in post-independence Kosovo, it is vital that government ministers engage with the CRIC constructively, invite its input, refer to it as the need arises and remain committed to facilitating its effective functioning.¹⁶⁰

At the *municipal level*, guaranteed representation for non-majority communities in the municipal executive exists only where residents from minority communities exceed 10 per cent of the population. The same threshold applies for a guaranteed municipal assembly vice-president. This vice-president can assess and refer for judicial review claims that the municipal assembly has violated minority community constitutional rights.¹⁶¹ Unfortunately, for smaller minorities who do not represent 10 per cent of the population in any given municipality, this system does not ensure their representation or protect their constitutional rights at the municipal level. In this regard, the AC FCNM's opinion in 2005 highlighted the existing difficulties for numerically smaller minorities to be adequately included at the municipal level in Kosovo, noting that Roma community members, for example, were not represented at all among Kosovo municipal assembly members.¹⁶² The requirements of Article 15 of the FCNM and Article 58(4) of the Kosovo Constitution include affirmative action measures to ensure the effective equality of members of minorities in public and political life. To meet these requirements means to ensure effective representation and participation of smaller minorities at the municipal level, and to this end improvements to the representativeness and effectiveness of municipality communities committees should be formulated and implemented.

Further, as the AC FCNM has recognized, serious obstacles remain in the area of minority participation in decision-making processes at various levels.¹⁶³ Until more fundamental institutional barriers to participation are addressed, the ability of minority communities to effectively utilize the above mechanisms and opportunities will remain limited. Such obstacles include minority community sentiment that minority members of the Assembly are not representative of their communities as a whole,¹⁶⁴ and language barriers to participation for all minorities. For Roma, Ashkali and Egyptians, addressing structural inequalities such as lack of registration and documentation, and improving literacy, is also imperative. For minority women in particular, these structural inequalities should be addressed to ensure they can effectively participate in public life, including through accessing seats in the National Assembly reserved for minority groups and the one-third of political candidacies reserved for women, and access to judicial and civil service positions.¹⁶⁵ Affirmative action policies to recruit minorities to the civil service have existed under UNMIK for a number of years,

but structural inequalities have meant that positions for minorities remain unfilled.¹⁶⁶ A commitment to address multiple discrimination by developing adequate training and mentoring for women leaders from these communities is required. Possible examples include minority-specific versions of OSCE programmes which have focused on enabling women's participation in public and political life through work with local NGOs and government gender equality offices.¹⁶⁷ Further adult education to address high illiteracy rates among Roma, Ashkali and Egyptian women should also be implemented as a matter of urgency, in line with the requirements of Article 25 of the ICCPR to take positive measures to overcome specific obstacles to effective political participation.¹⁶⁸ Mechanisms to promote higher learning for minorities that would qualify them for public service positions should also be pursued.

Implementation and effective remedy for individual human rights violations

In addition to specific rights granted to members of communities in Chapter III, Chapter II of the new Kosovo Constitution sets out a raft of fundamental rights and freedoms. These include the right to legal remedies; fair and impartial trial; equality before the law; freedom of expression, election and participation, etc. These constitutional rights are guaranteed judicial protection, and the right to an effective legal remedy on violation.¹⁶⁹ They are ultimately protected by a right of appeal to the Constitutional Court after all other domestic remedies have been exhausted.¹⁷⁰

The rights and freedoms contained in several core international and regional human rights instruments are also to apply directly in Kosovo law and take precedence over other inconsistent laws under the provisions of the new Constitution. These include the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols (European Convention), ICCPR, the FCNM, ICERD, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the Convention on the Rights of the Child (CRC) and the Convention Against Torture (CAT).¹⁷¹

These international law obligations, together with the above constitutional rights and freedoms, if effectively implemented, contain provisions which will strengthen and support the protection of minority rights in Kosovo. The International Covenant on Economic, Social and Cultural Rights (ICESCR), also important for protection of minority cultural rights, is not directly applicable under the Constitution; this limitation has been criticized by the Ombudsperson and civil society, and questioned by the Committee on Economic, Social and Cultural Rights.¹⁷²

But as the discussion in the third section (Pre-independence domestic legal measures and remedies for minorities', p. 12) has shown, the enactment of comprehensive human rights standards and guarantees, on its own, does not guarantee protection or an effective remedy for vulnerable groups. Many of the instruments and standards mentioned above have, in principle, already been applicable under Kosovo law for a number of years. This has not resulted in their comprehensive implementation, however, as the Ombudsperson has noted. Ensuring the effective guarantee of these rights for minorities, as the AC FCNM and Council of Europe Committee of Ministers have recognized, will at the least require substantial improvement in the functioning of the domestic judiciary and reduced case backlogs.¹⁷³ It will also require a fully functional Constitutional Court which is robustly independent and knowledgeable regarding the international standards to be implemented – something that is yet to be achieved.

Domestic legal protection of minority rights: improving independence, enforceability and impartiality

The new Kosovo Constitution actively addresses some of the shortcomings in the domestic legal system discussed the third section of this report ('Pre-independence domestic legal measures ...', p. 12), including requiring the accountability and independence of judicial and quasi-judicial mechanisms. There are a number of provisions, for example providing for the accountability, impartiality of appointments and independent functioning of the Constitutional Court,¹⁷⁴ the Kosovo Prosecutorial Council which appoints prosecutors¹⁷⁵ and the Kosovo Judicial Council (KJC) which nominates judges.¹⁷⁶

The Ombudsperson institution

Under the new Constitution, the Ombudsperson is to be free from instruction or intrusion by state authorities,¹⁷⁷ with every institution and authority in Kosovo bound to respond to its requests, including for documentation and information.¹⁷⁸ 'Distinguished experience and knowledge in the area of human rights and freedoms' is required for eligibility to occupy the office, and the applying individual must not have any political allegiance or concurrent political, state or professional activities.¹⁷⁹ A constitutional election and dismissal procedure which ensures political independence is also entrenched.¹⁸⁰

There has been criticism that similar Ombudsperson candidate eligibility criteria in UNMIK Regulation

2007/15 were not respected, with consequent problems of politicization of the Ombudsperson's office (see p. 12). However, in the case of the above constitutional provisions, a failure to apply them during candidate selection processes can be taken before Kosovo's Constitutional Court. Under the Constitution, ten or more Assembly deputies together can contest the constitutionality of the substance and procedure of decisions by the Assembly.¹⁸¹ If actively used, these provisions are likely to maintain or improve the Ombudsperson's ability to meet the Paris Principles on independent national human rights institutions,¹⁸² and thus ensure the institution's ongoing ability to effectively promote and protect minority rights. None of these provisions however addresses the existing problem of extensive delays in the appointment of the Ombudsperson by the Assembly, another obstacle to the institution's effective functioning that is susceptible to political influence.¹⁸³

The Ombudsperson has the power under Article 133 of the Constitution to propose and administer its own budget as provided by law. This does not solve the recent problems of under-funding however, where funding proposed or ultimately approved by the Ministry of Finance and Economy for 2007 and 2008 was far less than the amount requested.¹⁸⁴ As the Paris Principles confirm, adequate funding is required for the smooth conduct of activities by institutions like the Ombudsperson, to promote human rights and provide remedies for their violation, and to ensure independence from government.¹⁸⁵ To ensure the health of independent good governance and human rights institutions in Kosovo, the OSCE has proposed a strengthened role for the Kosovo Assembly Committee on Budget and Finance in approving their budget.¹⁸⁶

To ensure compliance with international standards and effective protection of minority rights, the constitutional provisions on independence of appointment and tenure, non-politicization, and transparent, merit-based selection of the Ombudsperson need to be enforced. The Assembly should also ensure that the Ombudsperson is adequately funded, in accordance with its own proposed budget. To this end, MRG recommends that minority and other Assembly deputies: (1) play an active role in monitoring and referring Assembly practices which undermine the Ombudsperson and other independent institutions to the Constitutional Court for a determination of constitutionality; (2) members of the Committee on Budget and Finance play a more active role in reviewing and defending the budgeting for independent institutions in Kosovo.

The enforceability of the Ombudsperson's recommendations, an issue raised by many minority groups, has not been improved under the new Constitution. The

Ombudsperson can now however refer questions of constitutional compatibility of laws, decrees and regulations of government, the president and the prime minister to the Constitutional Court.¹⁸⁷ This Court's decisions are then binding on all Kosovo institutions.¹⁸⁸ Where the Ombudsperson exercises these powers and the Court finds laws or regulations unconstitutional, it will have the effect of repealing the laws or acts immediately, unless the Court provides otherwise. This allows the Ombudsperson to play an important role in monitoring and ensuring the review of all laws and regulations that may be in breach of the rights of communities and international and minority human rights standards guaranteed under the Constitution.¹⁸⁹

As the section on the effect of the post-independence vacuum (p. 22) will demonstrate however, the effectiveness of all of the above guarantees to ensure minority rights is compromised by the fact that both the Ombudsperson and the Constitutional Court have no powers to examine acts by EULEX, the ICR/ICO nor, once a new Ombudsperson is appointed, UNMIK. Neither are these international actors bound by Kosovo's Constitution. Constitutional provisions in fact provide that the ICR's extensive executive powers may not be reviewed or restricted by any Kosovo authority, and that its staff have full diplomatic immunities under Kosovo law, effectively placing the institution above the law.¹⁹⁰

Improving trust in domestic law enforcement mechanisms

Increasing minority participation in the rule of law is one way to alleviate minority mistrust of law enforcement mechanisms and the lack of commitment to ensuring effective remedies for inter-ethnic crimes, mentioned in the previous section ('Pre-independence domestic legal measures ...', p. 12). Kosovo authorities have an obligation to protect persons subject to discrimination, hostility and violence as a result of their ethnic, religious, cultural or linguistic identity, under Article 6(2) of the FCNM.¹⁹¹ As the AC FCNM noted, 'recruitment of officers from minority communities' in all regions of Kosovo, not just areas of compact residency of minority communities, 'is of paramount importance' to the Kosovo police service's success in meeting this obligation.¹⁹² These measures would help address the 'high levels of unreported crimes' Roma and Ashkali community members say exist, noting that 'people are afraid of reporting because ... There are few minority representatives in security institutions.'¹⁹³ Similar recommendations were made on increasing recruitment of minorities to judicial structures, including as judges. This measure was recommended to build confidence in the judicial system among minority communities and ensure compliance

with the FCNM Article 4 obligation to pro-actively promote effective equality for minorities.¹⁹⁴

To this end, the new Constitution provides mechanisms to ensure greater recruitment of minorities in areas such as the police, the judiciary, public bodies, the KJC, the state prosecutor's office, the Constitutional Court and the Ombudsperson.¹⁹⁵

The Constitution sets out the entitlement, for example, of communities to 'equitable representation in employment in public bodies ... including in particular in the police service in areas inhabited by the respective Community'.¹⁹⁶ As the HR Committee has found, ensuring equitable representation in public bodies is in line with international obligations under Article 25 of the ICCPR, to ensure minority access to public service on general terms of equality with other citizens, including affirmative measures where appropriate.¹⁹⁷ As Egyptian Assembly of Kosovo member Xhevdet Neziraj notes, however, while laws promoting equitable representation have existed for a number of years, the problem is one of implementation.¹⁹⁸ UNMIK also concedes that while laws and guidance on implementing equitable representation of minorities in the civil service have existed since 2001 and 2003 respectively, little has been done so far to implement them, including by appointing equal opportunities officers and establishing evaluation and implementation criteria. As a result minority-reserved posts remain unfilled.¹⁹⁹ Constitutional provisions however provide the opportunity for minority groups to enforce these requirements by appealing to the Constitutional Court where their individual rights and freedoms under the Constitution are violated (for example, the right to participation in public life), or through the Ombudsperson where they feel laws decrees and regulations of government or the president are unconstitutional due to non-compliance with provisions like those mentioned above.²⁰⁰

Worryingly, while the Kosovo Security Force (i.e. army) shall 'reflect ethnic diversity of the people of the Republic of Kosovo', there are no affirmative action requirements set out to ensure that all of Kosovo's minority communities are represented within the Security Force.²⁰¹ Ensuring equitable representation in Kosovo's police and security institutions is particularly important to engender trust and as a result ensure effective remedies for Serb and smaller minority groups in Kosovo such as Roma, Ashkali and Egyptians, as these minority groups themselves have noted.²⁰² It is recommended that the Kosovo authorities, and EULEX, in its mentoring and supervisory capacity, ensure proactive recruitment from Kosovo's minority communities and the Roma, Ashkali and Egyptian communities in particular, to Kosovo's Security Force. Such measures will improve

minority community perceptions of their security, and meet obligations under FCNM Articles 4, 6 and 15, as well as Articles 58(4) and 61 of the Constitution.

The Constitution provides for affirmative action ‘as provided by law’, in appointments of prosecutors and judges from under-represented communities.²⁰³ The Ahtisaari Plan provided that affirmative action should occur until minorities represent 15 per cent of the total in both the prosecutor’s office and the judiciary.²⁰⁴ The new Constitution, however, requires 15 per cent minority judges in appeal courts only, not across the board.²⁰⁵ Constitutional provisions also ensure minority representation on the KJC itself,²⁰⁶ and seek to ensure that candidate judges for minority reserved judicial seats,²⁰⁷ and for areas with a Serbian majority population, come recommended by the relevant minority KJC representatives.²⁰⁸

However the extension of such policies on ethnic representation to the municipal level, appointing for example minority police in areas inhabited by that community, risks further entrenching ethnic segregation, officially extending it to local law enforcement institutions. This is exacerbated by constitutional provisions providing that proposals for the appointment of prosecutors, the composition of courts and the composition of police within a municipality²⁰⁹ shall ‘reflect the ethnic composition of the relevant territorial jurisdiction’.²¹⁰ By failing to work towards integration of all communities and equal representation of all groups evenly across the judiciary, police and prosecutors in Kosovo, these measures will restrict freedom of movement and access to justice for minority groups outside their local municipality. This perpetuates divisions along ethnic lines, and fear and mistrust of all local law enforcement bodies outside the local largely single-ethnicity municipality, effectively nullifying the constitutionally recognized individual right to freedom of movement, and the right to freely choose location of residence.²¹¹

Neither will these measures improve the trust and faith in criminal justice institutions for smaller minorities, whose representation will not be guaranteed in these institutions, based on this model. It serves only to recreate the problem of lack of access to representative judicial institutions for minorities, by creating new minority groups at the municipal level. As a result of this model, these ‘minorities within minorities’ – be they smaller minorities or, for example, Albanians in Serb-dominated areas – will be poorly represented in their local legal institutions. In order to ensure security, integration and freedom of movement for minorities throughout Kosovo, all minority groups must be appropriately represented among police, prosecutors and judges in all regions and at all levels across the country, in accordance with the AC FCNM’s recommendations.

The AC FCNM confirmed in its commentary on participation that guarantees on fair representation like those in the Kosovo Constitution would constitute sufficient legal basis for the proactive promotion of recruitment of persons belonging to minorities in order to achieve these aims.²¹² Actual effective recruitment will require not only provisions mandating quotas, however, but the implementation of educational, training and professional support programmes which will build capacity and enable the development of qualified minority candidates to fill these positions. Further, 15 per cent quotas for appointment of minority judges to the Supreme Court and District Courts should focus on increasing representation of smaller minority groups across all national courts, on a proportionate basis, in accordance with AC FCNM indications that composition of the judiciary should mirror that of the society to ensure minorities’ right to participate in public life.²¹³

Provisions on the new Constitutional Court seek to improve minority trust both by employing international judges, and by ensuring minority representation on the Court.

The Constitutional Court is the ultimate arbiter on questions of the legitimacy of constitutional amendments and the constitutionality of laws and acts of government. It is also the final court of appeal in respect of individual rights under the Constitution.²¹⁴ During the transitional period of the ICR and EULEX’s mission in Kosovo, three of the nine judges on this court are to be international judges, appointed by the ICR.²¹⁵ The ICR also determines when the mandate of these judges will expire, at an unspecified date in the future.²¹⁶

Two of the remaining six judges on this Court must be approved by both a majority in the Assembly *and* a majority of the reserved minority seat holders, effectively giving minority seat holders as a group the power to approve or potentially block appointments for these two judges.²¹⁷ These requirements mean that for the Court’s initial period during international involvement at least a majority of five of nine judges will be minority representative approved or international judges. This is important in engendering trust in the Constitutional Court, in the eyes of minorities. As the AC FCNM found in the case of the Ombudsperson for example, addressing inter-ethnic incidents, the concerns of minority communities and building ‘further trust among minority communities ... has been facilitated by a significant international presence’ in such institutions.²¹⁸ As with the reversion of the Ombudsperson role to a local officeholder however (see p. 12), minority mistrust concerns may return once the term of international judges expires, when minorities will only be able to have input into the appointment of two out of nine judges.

Appointing three judges experienced in the application of international and regional human rights standards should also assist the Court in applying these norms in Kosovo. It should also facilitate meeting the Constitution's Article 53 requirement to ensure that constitutional rights and freedoms are interpreted in a manner consistent with the decisions of the European Court of Human Rights (ECHR). In order for this measure to work effectively, however, it will be important that these international judges are given training on the Kosovo legal system, the provisions of the new Constitution, and local language and culture, in order to understand the legal and social context in which they are applying these laws.²¹⁹ It is also vital that these judges be well versed and experienced in international minority rights law, including conventions that the Kosovo government is bound to implement under the Constitution, such as the FCNM and the European Charter for Regional or Minority Languages,²²⁰ and the international human rights conventions which are directly applicable in Kosovo.

Worryingly, a number of the problems highlighted with the International Judiciary and Prosecutors programme²²¹ have been replicated in proposed arrangements for these international Constitutional Court judges. This includes the fact Constitutional Court judges have not been made accountable to local judicial disciplinary and regulatory bodies such as the KJC. (If employed as part of the EULEX mission, they will in fact have full diplomatic immunities under domestic law.)²²² This compromises safeguards protecting minorities' right to fair hearings by a competent, independent and impartial tribunal under Article 14 of the ICCPR (and relevant constitutional guarantees) in cases of discrimination or unprofessional behaviour by these judges. A failure to ensure that these judges are accountable to an independent and impartial body also leads to 'double standards'. The Ombudsperson has found in the past that these double standards under UNMIK 'greatly undermine[d] the efforts of UNMIK to build a legal system that is in accordance with European principles and values'.²²³ Given that EULEX is a mission whose aim is to improve the rule of law in Kosovo to bring it *closer* to European standards, this mistake should not be repeated to ensure its mission is not undermined. Implementing accountability and disciplinary requirements in line with those of their local counterparts is also in line with OSCE recommendations.²²⁴

At a minimum, Constitutional Court judges must therefore at least be subject to supervision and professional regulation of the Assembly of EULEX Judges. This body is to be established to oversee allocation of case work and disciplinary measures for other EULEX judges once EULEX's mission becomes operational.²²⁵

The effect of the post-independence vacuum: minority rights protection gaps

Critical in the current context in Kosovo is not only the guarantees of minority rights set out in the Constitution, but whether or not these guarantees are *immediately enforceable*, against *all* parties exercising executive authority in Kosovo, so as to provide minorities with an effective domestic remedy for violations. A number of factors unique to Kosovo's post-independence situation have however created a human rights protection vacuum which means this is not the case for minorities.

At the time of writing, the Constitutional Court is yet to be established, despite the Constitution coming into force on 15 June 2008. The ICO matrix on implementation of the Ahtisaari Plan indicates that a Working Group to establish the court has been appointed, but the three international judges have not.²²⁶ Uncertainty to date surrounding EULEX's authority, when it would enter its operational phase, and lack of political support among a number of Council of Europe countries for implementation of the Ahtisaari Plan has delayed the appointment of international judges.

In the meantime, there is a lack of mechanisms for Assembly minority representatives or the Ombudsperson to challenge the unconstitutionality of government acts which may contravene constitutionally guaranteed international and national minority rights obligations. Therefore, to ensure enforcement of these guarantees, now that a technical agreement has been reached to transfer law and order responsibilities from UNMIK to EULEX,²²⁷ the Constitutional Court must be established as a matter of priority, including the appointment of international judges.

Further, for violations of individual human rights guarantees under the Constitution, including for communities, the Constitutional Court is a court of final appeal when all other domestic remedies have been exhausted. As a result, the right to a prompt, effective remedy for minorities will not be met until the poor functioning, lack of awareness of the ADL and huge backlogs which exist in lower courts are addressed and improved. The vacuum created by uncertainty surrounding the legal status of EULEX and its mission have delayed implementation of improvements in this area. As EULEX's own Head of Justice, Judge Alberto Perduca notes: 'Kosovo is paying the price of a delay in the formation of a public system of legal apparatuses and services.'²²⁸ MRG therefore urges EULEX and the ICO to make implementation of judicial reforms, in cooperation with local authorities, a matter of first priority.²²⁹ Activities

must include training, awareness-raising and exposure to jurisprudence on the application of provisions of the ADL for all local judges. EULEX must also ensure that all EULEX judges and prosecutors receive specific training in minority rights (including the conventions applicable as Kosovo law) and modules on the current issues faced by all minority communities in Kosovo as part of wider human rights and Kosovo localization training.

Even once the Constitutional Court is fully functional, the above constitutional provisions as a basis for protection of minority rights only bind domestic actors. Constitutional guarantees do not apply to the ICR, staff in the ICO or EULEX staff, police, prosecutors and judges. The ICR, EULEX and its staff are not bound by the Constitution to implement or respect *any* of the minority rights guarantees it contains. The constitutional requirements bind only public authorities, state authorities and public administration, which does not include international actors. The Constitution also confirms that the ICR will have the privileges described in the Ahtisaari Plan, which include full diplomatic immunity from prosecution for all professional staff.²³⁰

This is despite an ICR mandate and powers which include the executive power to annul the laws or decisions of Kosovo authorities that contravene the law or spirit of the Ahtisaari Plan, and power to remove public officials from office for obstructing the ICR or EULEX's work.²³¹ The problem with these powers is that even if minorities (for example Serbs who may oppose the ICR or his man-

date) feel these powers have been exercised unfairly against their interests, there is no legal basis for recourse or judicial review. The ICR is 'the final authority in Kosovo regarding interpretation of the civilian aspects' of the Ahtisaari Plan, and 'No Republic of Kosovo Authority shall have jurisdiction to review, diminish or otherwise restrict' the ICR's mandate and powers.²³²

The full diplomatic immunities granted to EULEX staff are also likely to have particular implications for the rights of minority groups in Kosovo. First, this will deny members of minorities recourse or remedy for any violation of their rights by individual EULEX staff, as they carry out their duties in areas of judiciary, police, border control, customs and correctional services.²³³ Second, EULEX is notably vested with authority to ensure that war crimes and inter-ethnic crimes are properly investigated, prosecuted and adjudicated in Kosovo. EULEX is also responsible for ensuring that these decisions are properly enforced.²³⁴ However, if the ICR/EULEX fail to meet their obligations in investigating and prosecuting inter-ethnic crimes committed against minorities, or they otherwise fail to implement and observe minority rights guarantees in the conduct of their work, *minorities have no basis in domestic law to seek recourse against the ICR/EULEX or hold them accountable for the acts or omissions in breach of their duties*. This means there is no legal recourse for minorities, against breaches of their rights by the holder of the most far-reaching executive powers functioning in Kosovo today.

Accountability: international rule and international law

This section will consider the effect of the newly configured post-independence international mission in Kosovo on the protection of minority rights. First, it will consider the effect of legal and political uncertainty surrounding the respective roles of ICO, EULEX, UNMIK and Kosovo authorities. Next, it will examine whether the new international mission has learned lessons from UNMIK's protectorate, to improve on its weaknesses. Finally, each actor's international legal responsibilities towards minority groups under new post-independence arrangements, and means to enforce these responsibilities, will be considered.

The effect of legal and political uncertainty on minority rights

Why structures have been complicated

The Ahtisaari Plan originally envisioned an ESDP EULEX mission to oversee implementation of measures to improve rule of law in Kosovo, under the guidance of an EU Special Representative (EUSR). This was to be carried out alongside the ICO, which would assist the ICR to oversee implementation of the Ahtisaari Plan in general. The EUSR was to wear the 'dual hat' of ICR. This arrangement would have allowed seamless coordination between the mandates of the ICO/ICR and the ESDP mission, which would be headed by the same person. The plan foresaw these two bodies taking over from UNMIK over a 120-day period following declaration of Kosovo's independence. The plan presumed there would be a Security Council Resolution endorsing it, which would have provided the legal basis for the handover from UNMIK to EULEX/ICR of Security Council powers under Chapter VII of the United Nations Charter (maintenance of international peace and security). However, with Special Envoy Ahtisaari unable to broker a political solution, Kosovo unilaterally declared independence in February 2008 in the face of ongoing opposition from Serbia and Security Council ally Russia. Draft UN Security Council Resolutions providing the legal basis for the Ahtisaari Plan's implementation have been rejected by Russia and China.

In order to support Kosovo independence in these circumstances, an International Steering Group (ISG) made up of several EU member states and the US²³⁵ was formed without Russia. The ISG appointed and dispatched an ICR, together with EULEX staff, to attempt to begin

implementing the Ahtisaari Plan. Without a Security Council resolution clearly ending UNMIK's mandate however, and given opposition from Security Council members and some European states, UN Secretary-General Ban Ki-Moon and his spokesperson have confirmed that UNMIK's mandate under Security Council Resolution 1244 will continue until the Security Council terminates it.²³⁶ The seamless transfer from UNMIK to implementation of the Ahtisaari Plan by the ICO and EULEX thus became impossible. As a result, there was a delay in EULEX staff assuming their roles as mission operationalization was legally contingent on transfer of competence from UNMIK.²³⁷

After some six months delay, EULEX was ready to commence operation from December 2008. A technical agreement was reached with UNMIK to devolve its law and order responsibilities to EULEX, while remaining under the framework of Security Council Resolution 1244.²³⁸

How does this affect the guarantee of minority rights?

There have been numerous negative impacts on the guarantee of minority rights due to the above developments. As discussed in the fourth section ('An independent Kosovo: better protection?' p. 16), the six-month delay in the operationalization of EULEX delayed the implementation of rule of law reforms aimed at helping improve minority access to effective remedies in domestic courts. It also delayed the appointment of international Constitutional Court judges who would oversee enforcement of minority rights guarantees under the new Constitution.

Further, the AC FCNM found that in 2005, 'the prevailing uncertainty and state of flux as regards institutional responsibilities for many issues related to the implementation of the Framework Convention' aggravated concerns of minority community members and complicated implementation of the FCNM in Kosovo.²³⁹ Uncertainty regarding the nature and legitimacy of EULEX's role, and UNMIK's residual responsibilities can only have exacerbated this situation. The Republic of Serbia and Kosovo Serbs in the north have also exploited this lack of clear mandate. While allowing KFOR (the UNMIK and NATO-led international security forces) and UNMIK to remain, they refused to deal with the ESDP mission or ICO staff, which meant EULEX was unable to enter northern parts of Kosovo to implement

that mandate in respect of police, customs and rule of law until it came under the UNMIK banner. This allowed Serbia to continue to undermine Kosovo statehood and further harden the existing 'soft partition' of Kosovo, by strengthening parallel institutions in Kosovo Serb areas.²⁴⁰

The need to place EULEX under the umbrella of UNMIK and Resolution 1244 has also further complicated its relationship with the ICO and the ICR. Having come under UNMIK's wing, EULEX has recently become, like UNMIK and Resolution 1244, a mission neutral in respect of Kosovo's current independence and future status.²⁴¹ The mandate of the ICR, Pieter Feith, is however to supervise and enforce implementation of the Ahtisaari Plan.²⁴² As a result he and his ICO must necessarily work on the basis of recognizing and facilitating Kosovo's independence. This conflict in positions between the ICR and EUSR/EULEX is likely to complicate collaboration and implementation of the mandate of both institutions, including aspects affecting minority rights.

A position of status neutrality also complicates the issue of EULEX's own sources of power and immunity in Kosovo to implement its mission. Without endorsement of the Security Council, the Ahtisaari Plan cannot provide legal legitimacy for EULEX's mission under international law. As a result, to date the Ahtisaari Plan has been implemented by the government of Kosovo providing the ICR and EULEX with the powers and immunities the Plan stipulates, under domestic laws and in the new Constitution in Kosovo.²⁴³ But if EULEX does not clearly recognize Kosovo's independence, it is difficult for it to recognize the acts of the newly independent Republic's Assembly, or its new Constitution. And yet these have been the basis for conferral of the powers and immunities which EULEX and its judges, police and personnel will need to carry out their mission.

The result of all of the above is an increasingly complex governance structure with multiple actors exercising executive powers without the scope and status of those powers or their interrelationships being clearly defined. For minorities, this raises the question of who they should appeal to for redress when their rights are violated during the interim administration. This includes both specific individual violations, and institutional failures to implement international, regional and new domestic minority rights obligations. The AC FCNM had already highlighted that, under UNMIK, 'complex and ambiguous institutional arrangements ... have at times obscured the respective authorities' responsibility and accountability for implementation of the Framework Convention, to the detriment of persons belonging to minority communities.'²⁴⁴ Even where mechanisms are set up to try and implement each organization's obligations toward minorities, the effectiveness of efforts to participate in public life

by minority communities and representatives are compromised; they are left trying to navigate numerous consultative mechanisms and processes with a confusing array of actors. In the current context these now include the OSCE (who will remain), UNMIK, EULEX and the ICO and ICR, in addition to Kosovo's central and municipal government departments and authorities.

Finally, complications in operationalization mean that EULEX and the ICR have been slow to develop new proposals on accountability for human rights violations based on their changed circumstances. EULEX and the ICR's preoccupation with resolving their reconfiguration issues have meant that developing this policy, let alone policies on engagement with smaller minority communities, have been delayed and relegated to low priority. As one member of EULEX's Human Rights and Gender Unit indicated in September 2008:

*'As the reconfiguration and the scope of executive powers (of both UNMIK and EULEX) and the sensitive issue of what the UN umbrella actually means for EULEX, are still open, we can not really finalize a new proposal on EULEX accountability ... So at this stage there is no final position on the issue of accountability. The work is in progress ...'*²⁴⁵

This means that minority communities have had no indication of how, or if, EULEX will be accountable for observing minority rights guarantees, or how it plans to engage with minority communities as it carries out its mission.

International rule – what has changed?

It is clear from the above that EULEX is likely to repeat UNMIK's highlighted shortcoming of 'dazzlingly complex' governance systems, to the detriment of minorities. This is compounded by a failure of certainty and transparency that resulted from supporting Kosovo's unilateral declaration of independence and dispatching staff immediately, while its legal status was still unclear. As a result Kosovo now has three concurrent international supervising bodies of unclear status with overlapping and conflicting mandates, as well as domestic authorities yet to be recognized by the entire international community. Access to, and the effectiveness of domestic and international mechanisms to protect minority rights have been compromised as a result.

Another problem with UNMIK's processes on minority issues has been a failure to directly involve, or ensure effective consultation with, all minority communities in respect of issues which directly affect them. The

international community repeated this mistake during discussion on the future status of Kosovo, as mentioned above. To rectify this, it is important that the EULEX mission ensure an ongoing, open channel with local minority groups which allows their needs and views to be reflected in its policies, and the two-way exchange of information with them.

MRG participation in a civil society conference hosted by the Kosovo EULEX mission in Brussels on 29 May 2008 however raised concerns not only that EULEX is not focusing on the lessons learned from UNMIK to improve implementation of minority rights, but that there is no focus on minority rights at all within the mission, outside of the Kosovo Serb/Albanian dynamic. In explaining 'the planning and the intentions of the EULEX mission, particularly in the fields of human rights, gender issues, and accountability',²⁴⁶ EULEX officials did not highlight any policies on minority issues, suggesting that in its human rights programming such planning is either non-existent or a very low priority. Discussion with EULEX officials also suggested a general lack of understanding of minority rights, and the context of smaller minorities in Kosovo. That EULEX continued the international community's tendency to hold such consultations with civil society and on Kosovo's future outside Kosovo itself, where access for the local NGOs it should be working with most closely is limited, is also disconcerting. EULEX must hold regular meetings and ensure space for dialogue with local civil society organizations, particularly those of minority communities. These organizations are necessary partners for EULEX in the implementation of their mandate, and particularly in ensuring that rule of law improvements benefit all of Kosovo society, including minorities.²⁴⁷

In order to ensure that the rule of law extends to and protects all of Kosovo's minorities, it is also vital that EULEX develop mechanisms to ensure ongoing dialogue with minority communities at the local level. This dialogue is necessary for EULEX to assess whether its rule of law measures are actually having an effect in improving the safety and security of minority communities, increasing their trust in law enforcement mechanisms and implementing minority rights. It will also provide information from smaller minority communities on their ongoing rule of law concerns, which can be incorporated to improve effectiveness as EULEX implements its mandate. A new mechanism may further stretch minority community human resources and complicate their interaction with authorities. Instead, UNMIK's local community offices could be reconfigured to take on this liaison/advisory role in interactions with EULEX. These offices should engage representatives of

each of the minority groups in Kosovo who have been actively involved in advocacy on behalf of their own communities in the past. They could also provide awareness-raising and capacity-building to minority communities in the area of rule of law, providing them with information in their own languages regarding the current activities of EULEX, how these issues affect them, and their rights under newly developing domestic legal mechanisms and laws. Measures to facilitate proactive recruitment of smaller minorities throughout EULEX and the ICO should also be implemented.

As mentioned at the end of the fourth section (pp. 22–3), EULEX also repeats UNMIK's mistake of placing international staff and administrators above the law with diplomatic immunities from local prosecution or punishment. In EULEX's case there are clear implications for the protection of minority rights when diplomatic immunities are granted, as EULEX staff have responsibilities in the area of justice, police, border control, customs and correctional services. All these areas have potential for abuse of power resulting in human rights violations. The HR Committee has highlighted past instances, for example, of excessive use of force by UNMIK, KFOR and the Kosovo police service which have not been prosecuted.²⁴⁸ As marginalized communities subject to discrimination and racism, members of minorities who come into contact with these institutions are particularly vulnerable to such abuses.

EULEX and the ICR should, as an interim measure, ensure that the Human Rights Advisory Panel (see pp. 12–13) is granted true independence and the resources to function effectively, and that complaints of human rights abuses on the part of international EULEX and ICO staff can be submitted to it effective immediately. This Panel should make recommendations for action by the EUSR/ICR regarding appropriate follow-up action.

As the HR Committee has recognized however, the Advisory Panel does not have the necessary independence and authority to ensure an effective remedy as guaranteed under Article 2(3) of the ICCPR, for the violation of human rights protected under that covenant.²⁴⁹ Remedies must not only be determined by competent judicial or administrative authorities, but must also be enforceable. Therefore, if sending states are not willing to have these issues adjudicated under Kosovo law by local courts, an alternative international tribunal should be established. This tribunal should determine, in light of the international and regional human rights standards applicable in Kosovo, complaints of acts or omissions by EULEX, ICO and UNMIK, or by their staff, leading to violation of human rights. As a mission dedicated to implementing the rule of law and guiding Kosovo toward implementation of

European standards, EULEX must be willing to commit to uphold those same standards and the rule of law itself, to avoid hypocrisy and ensure credibility.

International human rights mechanisms and the responsibilities of actors in Kosovo

Events since Kosovo's unilateral declaration of independence not only complicate the domestic implementation of international and constitutional minority rights guarantees in Kosovo, they also affect the accountability of executive and administrative actors in Kosovo under regional and international human rights mechanisms. This supranational level of review is important for minorities, as it provides a final tier of accountability on implementation of their rights. Such review is vital where domestic mechanisms are not functioning effectively to guarantee protection and remedy for violations. They have been crucial for Kosovo's minority women in particular. Reviews by human rights treaty bodies under the covenants and conventions applicable in Kosovo have forced authorities to examine important issues such as education, employment and poverty for Roma, Ashkali and Egyptian women;²⁵⁰ measures to address domestic violence and trafficking, including by KFOR and UNMIK personnel;²⁵¹ and the effect of high lead levels on the health of pregnant Roma women in camps for internally displaced persons.²⁵² Detailed consideration of women's rights in Kosovo, and the rights of minority women by the CEDAW Committee has been delayed, however, due to Kosovo's protectorate status. Serbia was reviewed in June 2007, at which time Serbia advised the CEDAW Committee that it was unable to implement its obligations to enforce and protect women's human rights in Kosovo. Serbia recommended that the CEDAW Committee request a supplementary report from UNMIK, whose mandate under Security Council Resolution 1244 includes the protection and promotion of human rights. The CEDAW Committee requested a report, prepared in cooperation with Kosovo PISG (Provisional Institutions of Self-Government in Kosovo), by June 2008.²⁵³ The report is being prepared, but in the meantime the issue of implementation of the rights of minority women under this convention have not been considered for the last nine years.

This section will therefore examine how implementation of the international obligations of all executive and administrative actors in Kosovo towards members of minority communities have been affected by Kosovo's *sui*

generis circumstances, and the existing means to enforce these obligations.

International legal accountability of Kosovo institutions

Kosovo's declaration of independence creates challenges for direct access to regional and international human rights bodies for minority groups. As the ECHR has noted, a state is not established in international law merely by a declaration proclaiming its independence, where the international community does not recognize this statehood.²⁵⁴ Further, ratification and accession to human rights treaties is confined to states under international law.²⁵⁵ Kosovo's current status is unclear – 56 countries and the International Monetary Fund now recognize Kosovo as independent, but the remaining 136 UN member states do not, and Serbia still claims Kosovo is part of its sovereign territory.

Neither does Kosovo, as the breakaway 'new state' have automatic entitlement to membership of all international organizations Serbia belongs to, as these international legal responsibilities and privileges attach to the state of Serbia.²⁵⁶ It must therefore apply for new membership to all organizations, including the UN, and be formally admitted.²⁵⁷ Kosovo's UN membership requires approval, however, by both the UN Security Council and a two-thirds majority of the General Assembly.²⁵⁸ It is precisely because membership of the UN would be clear recognition of Kosovo's statehood²⁵⁹ that membership will be opposed by states which do not wish to recognize Kosovo's independence, such as Cyprus, Russia, Serbia and Spain. Given that Russia can veto Security Council approval, this means that even if Kosovo applies, membership is not a real possibility in the near future.

Until Kosovo is recognized as a state, holding Kosovo institutions directly accountable before international or regional human rights bodies will continue to be complex. This is of serious concern to minorities, given the history of state-sponsored violence against minorities in 1999, and large-scale ethnic violence in 2004, much of which remains to be prosecuted.

To date, the implementation of minority rights under the FCNM and ICCPR by Kosovo's provisional institutions of self-government has been considered as an adjunct to consideration of UNMIK's human rights obligations. Consideration of FCNM obligations has been pursuant to a technical agreement between UNMIK and the Council of Europe, with Serbia's agreement. Consideration under the ICCPR, and the consideration of UNMIK's obligations under the ICESCR, however, have been based on Serbia's obligations to implement these covenants, including in Kosovo. Serbia has asserted before treaty bodies that it is unable to report on the discharge of

its own responsibilities regarding Kosovo's human rights situation, and has instead facilitated UNMIK submitting a 'supplementary report' on the situation in Kosovo under the ICCPR and ICESCR.²⁶⁰ In these communications, the HR Committee has acknowledged that while 'Kosovo currently remains a part of Serbia and Montenegro', UNMIK's main responsibilities in the international protectorate include 'the protection and promotion of human rights' under para. 11 (j) of Security Council Resolution 1244, and that it therefore reports on observance of the ICCPR in Kosovo on this basis.²⁶¹

In this context, the HR Committee has also noted 'the existence of provisional institutions of self-government in Kosovo that are bound by the [ICCPR] Covenant by virtue of article 3.2 (c) of UNMIK Regulation No. 2001/9', and as a result recommendations regarding implementation of the ICCPR are directed *both* to UNMIK and the PISG in Kosovo.²⁶² The post-independence Kosovo authorities have an obligation to observe the ICCPR under the new Kosovo Constitution, and so based on this logic could also be the subject of the HR Committee's examination of its implementation.

Consideration of Kosovo by the Committee on Economic Social and Cultural Rights is an interesting case in point, coming as it does after Kosovo's declaration of independence. The examination is, as a matter of form, a consideration of UNMIK's responsibilities to implement the ICESCR in Serbian Kosovo. The list of issues taken up with UNMIK, issued in June 2008, nonetheless includes questions regarding the actions of Kosovo's Assembly. These include adoption of the new Constitution, including the omission of the ICESCR from covenants which apply directly as Kosovo law, as well as activities of the PISG.²⁶³ As a result, importantly, the record of both UNMIK and the Kosovo authorities in implementing and observing minority economic, social and cultural rights since 1999 came under scrutiny.

As UNMIK will, at least in form, remain in Kosovo under Security Council Resolution 1244 for the foreseeable future (albeit in a reduced capacity), it is quite likely this kind of reporting and dialogue with treaty bodies, including regarding the actions and obligations of the newly independent Kosovo institutions, could continue as a result. This is at least one indirect way of having Kosovo's institutions' implementation and observance of minority rights examined.

Serbia has also sought an advisory opinion from the International Court of Justice, by General Assembly Resolution, on the legality of Kosovo's declaration of sovereignty.²⁶⁴ Presuming an opinion is handed down quickly, as some have predicted, this may help to confirm Kosovo's status as an independent state, which would assist minorities in being able to access international and

regional human rights mechanisms, at least with regard to scrutiny of the actions of the Kosovo authorities. Should the opinion indicate that Kosovo's declaration of sovereignty was *not* legal at international law, it may however serve to protract recognition of Kosovo as a state, or indeed defeat it. In this case, the remaining presence of UNMIK (and EULEX under its umbrella) may be the only basis on which Kosovo institutions' implementation of international treaty obligations, including toward minorities, can be at least indirectly considered at the international level (based on the above procedure).

The HR Committee has at least clarified that in its view, 'the rights guaranteed under a covenant belong to the people living in the territory of a State party' and that this protection 'devolves with territory and continues to belong to them, notwithstanding changes in the administration of that territory'.²⁶⁵ The HR Committee took the same position regarding newly declared states of Bosnia and Herzegovina, Croatia and the FRY (Serbia and Montenegro), on the break-up of the former SFRY in the early 1990s. The HR Committee thus requested information from these new states under ICCPR obligations ratified by SFRY, regarding ethnic cleansing, torture and other serious violations, even before the latter two states had formally succeeded to SFRY's human rights treaty obligations.²⁶⁶ In Kosovo's context the HR Committee has clarified that 'it follows that UNMIK, as well as PISG, or any future administration in Kosovo, are bound to respect and ensure to all individuals within the territory of Kosovo and subject to their jurisdiction the rights recognized in the covenant'.²⁶⁷ This would seem to suggest that, regardless of Kosovo's status as a state or otherwise, the HR Committee is likely to hold Kosovo authorities responsible for implementation of the covenant.

The international legal responsibility of Serbia

It may be argued that as Kosovo is not yet a state, it remains part of the sovereign territory of Serbia, as recognized in UN Security Council Resolution 1244. On this basis, the Serbian government is still arguably responsible to take the measures within its power and in accordance with international law to ensure its human rights treaty obligations are met in respect of all peoples in its territory. The logic of the ECHR's decision in *Ilaşcu and Others v. Moldova and Russia* suggests this would include Kosovo, even if Serbia does not exercise effective control in the province.²⁶⁸ As Serbia itself has asserted before treaty bodies on numerous occasions however, it is unable to discharge its responsibilities regarding human rights in Kosovo. As a result, even if this argument was used, it would be of little use in holding to account the actual international or Kosovo authorities in charge of imple-

menting minority rights in Kosovo (at least outside the northern largely Serb municipalities).

Roma and Bosniaks in northern Serb enclaves however may use the argument of effective control to hold Serbia accountable for their human rights violations, due to the parallel structures, including police, controlled by Serbia in these regions. Further, as Serbia has ratified or succeeded to individual complaints procedures under the ICCPR, CEDAW, ICERD and CAT, there is a range of individual complaints mechanisms available to these minorities where domestic remedies are not effective or have been exhausted. For other minorities in Kosovo however, trying to hold Serbia accountable could not be considered an *effective* remedy for ensuring redress for minority rights violations. For them it would be more effective to argue UNMIK's obligations to ensure human rights in Kosovo, together with PISG, on the basis of its mandate in Article 11 (j) of Security Council resolution 1244, to protect and promote human rights in Kosovo.

International legal accountability of the EU and EULEX

The ICR/EUSR and EULEX are empowered to exercise effective control over various mechanisms of state in Kosovo. These executive powers include authority and responsibility to appoint international judges and prosecutors, and to investigate, properly prosecute and enforce decisions on war crimes, inter-ethnic crimes and property return cases.²⁶⁹ These bodies will therefore directly impact on the guarantee (or breach) of, for example of minorities' ICCPR rights to public hearing by a competent, independent and impartial tribunal under Article 14, and the right to an effective remedy for violation of ICCPR rights, including judicial remedy under Article 2(3) of ICCPR. To the extent that the HR Committee has found that these rights belong to the people of Kosovo and must be guaranteed to them regardless of changes in administration, the ICR and EULEX would also be 'bound to respect and ensure to all individuals in the territory of Kosovo ... the rights recognized in the Convention'. All the HR Committee's above arguments confirming UNMIK's responsibility to ensure the rights guaranteed under the ICCPR would also apply to EULEX, as EULEX will now derive its powers from UNMIK. As a result, EULEX's implementation and respect for minority rights provisions under these conventions should be considered along with the rest of UNMIK, by the treaty bodies.

As a result, EULEX, and the ICO/ICR are urged to actively engage in the process of UNMIK's reporting to UN treaty bodies. This is one way to ensure their accountability for effective implementation of minority rights in the course of carrying out their mandates.

Minority civil society organizations are also encouraged to actively engage in this process to ensure that violations and shortcomings in the realization of minority rights by EULEX and the ICR/ICO are raised and scrutinized. This should be done by the preparation of detailed shadow reports to treaty bodies, reflecting areas of concern from the perspective of minority communities.

For minorities in Kosovo, European human rights standards, in the form of the guarantees in the European Convention and the Council of Europe's FCNM are other potential means to hold EULEX accountable to uphold minority rights. The European Convention, importantly, offers the opportunity to bring individual complaints before the ECHR.

For the EU, meeting international and regional human rights standards is imperative to ensure the success of its own EULEX mission. EULEX cannot strengthen the rule of law in Kosovo and 'mentor, monitor and advise' Kosovo institutions in moving toward European and international standards successfully unless it is well versed in and actively implementing them itself. However, until conditions exist which allow the EU itself to ratify and become a party to the European Convention, the fact remains that its acts cannot be challenged before the ECHR.²⁷⁰

Furthermore, in the cases of *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, the Grand Chamber of the ECHR found that it was not competent to examine European Convention state parties' contribution to the civilian and security presence in Kosovo under the European Convention. Specifically, it was found that these acts (in failing to de-mine part of Mitrovica/Mitrovica in Kosovo) were carried out on behalf of the UN, and could not be attributed to the individual respondent states in question. Further, it was found that these acts were part of their support for implementation of the UN Security Council's responsibility to maintain international peace and security under Chapter VII of the UN Charter, and the European Convention could not be interpreted in a manner which subjected acts or omissions covered by a UN Security Council resolution to the scrutiny of the ECHR.²⁷¹ This case indicates therefore that, to the extent to which the EULEX mission will now come under the umbrella of UNMIK and Security Council Resolution 1244, it will not be possible to hold individual EU member states or their staff responsible under the European Convention before the ECHR for acts or omissions in the course of their EULEX duties. The ICR and ICO staff are also unlikely to be held accountable under the European Convention, given that they are not a party to it, and that these institutions were established by the ISG, which includes states which are not party to the European Convention.

Ensuring greater legal accountability of all actors in Kosovo

As the above discussion confirms, access to international and regional human rights mechanisms to ensure that minority rights are being protected in Kosovo remains extremely limited. UNMIK, EULEX and the Kosovo authorities' legal responsibilities to implement minority rights guaranteed under international treaties could be considered by treaty bodies under supplementary reports submitted to them by UNMIK. This situation however remains premised on the fact that UNMIK is an international protectorate while Kosovo remains part of Serbian territory, as Security Council Resolution 1244 states. This may make engaging the ICR, or making it accountable under existing mechanisms for UN treaty bodies review, problematic, as the ICR supports recognition of Kosovo's independence. The situation by which minority rights might be considered by treaty bodies thus remains both tenuous and problematic. Furthermore, this arrangement is not adequate for ensuring that individual complaints can be made by minorities regarding the violation of their rights under conventions such as the ICCPR, ICESCR, ICERD and CEDAW. While Serbia has ratified or acceded to most of these individual complaints procedures in recent years, it is highly unlikely that they could be used to bring EULEX, UNMIK, the ICR or Kosovo authorities to account when Kosovo has not acceded to these optional additional obligations. This problem will continue as long as Kosovo's statehood and membership of the UN is yet to be confirmed.

Fermin Cordoba, legal coordinator for South Eastern Europe at MPDL argues that:

'Kosovo must implement effectively all the remedies available for the protection of minorities because the

declaration of independence did not bring yet the possibility to fully participate in the international sphere, starting from being accepted as member of the United Nations.'

He emphasizes in this context that: 'The new State and all others that accorded recognition [to it] need to work now to ensure that the rights of citizens are protected.'²⁷²

It is therefore recommended that an independent international tribunal be established to adjudicate on individual complaints of violation of international minority and human rights standards in Kosovo by EULEX, UNMIK and the ICR/ICO. This body should be allowed to accept and provide its opinion on communications from individuals or groups alleging a violation of any of the rights contained in the applicable regional and international conventions by any of the above actors or their staff, once they have exhausted all *effective* domestic remedies. Such a mechanism is necessary to ensure an effective remedy for violations by international actors, as the HR Committee has pointed out. This is not only required to ensure that EULEX, UNMIK and the ICR meet their obligations to Kosovo's minorities but will also promote the effectiveness of EULEX and the ICR in implementing their mandate, by gaining the trust of local actors and guiding Kosovo toward respect for the rule of law, and observance of European human rights standards in the country.

For the same reasons, it is also recommended that the existing technical agreement between UNMIK and the Council of Europe which facilitates the AC FCNM to monitor the implementation of this convention in Kosovo²⁷³ be continued under the new reconfigured mission which includes EULEX and the ICO.²⁷⁴ UNMIK, Kosovo authorities and EULEX, where appropriate, should also take measures to ensure implementation of the recommendations of the AC FCNM and the Council of Europe Committee of Ministers as soon as possible.²⁷⁵

Ways forward

The above discussion focused on existing means to guarantee minority rights in Kosovo, and how these mechanisms, including international recourse, have been affected by Kosovo's unilateral declaration of independence. This examination has specifically considered the need for measures to address the protection gap during the interim international administration.

To best ensure protection of minority communities' rights in Kosovo, it is also necessary to consider some of the future long-term opportunities that independence brings. Perhaps one of the most important in Kosovo's case is the possibility of EU accession, which brings with it the requirement to meet the so-called Copenhagen Criteria for accession, which include the need to achieve 'stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and, protection of minorities'.²⁷⁶

The EU's Stabilization and Association Process (SAP) aims to promote stability and regional cooperation in the western Balkans, linking it to the prospect of EU accession. Under the SAP, Kosovo has already had its minority rights record separately reviewed since 2005 in Annual Reports by the European Commission (prior to 2005 it was monitored within the Serbia report).²⁷⁷ It is yet to form a contractual relationship with the EU which would place it on a clear accession track, but since its independence the European Commission has confirmed that Kosovo has 'a clear and tangible EU perspective'.²⁷⁸ Still, in the Kosovo context, the possibility of accession is likely once again to be complicated by the fact that some current EU states such as Cyprus, Romania and Spain continue to refuse to recognize Kosovo as an independent state.

Nonetheless, MRG analysis of EU progress reports has confirmed that the promise of the possibility of future accession, and ongoing monitoring of minority issues under the EU's SAP have the potential, if effectively harnessed, to bring about improvement in the lives of minorities in the country seeking accession.²⁷⁹

The European Commission referred to the Council of Europe and the OSCE's minority rights standards to develop criteria to assess candidate countries' performance in meeting the Copenhagen minority protection requirement. These standards importantly include the FCNM, discussed in the Kosovo context in the fourth section ('An independent Kosovo ...', p. 16). The Article 15 right to participate effectively in social, cultural and economic life includes the adoption of special measures where necessary

to ensure minorities' full and effective equality.²⁸⁰ This point is important when considering utilizing this process to improve the lives of minorities in Kosovo; all groups referred to social and economic hardship and exclusion as pressing contemporary concerns. Advocates for minority groups in Kosovo reiterate that economic development is 'a key factor to ensure stability in this [Kosovar] society' and that EU accession is one possible means to achieve this.²⁸¹

It should be reiterated of course that the Kosovo government has already undertaken, and is bound under its new Constitution, to apply and implement the FCNM within Kosovo. Steps to implement the recommendations of the AC FCNM and the Council of Europe Committee of Ministers do not appear to have been a high priority for UNMIK to date however. The 'carrot' of EU accession and the economic benefits to be gained may be exactly what is required, and most effective in motivating the Kosovo government to ensure effective implementation of these standards. To ensure that this opportunity is harnessed most effectively to improve Kosovo minorities' human rights situation however, a number of improvement will be needed. The EU will need to broaden and improve the attention it gives to the issues faced by smaller minorities such as Roma, Ashkali and Egyptians or Turks; introduce gender mainstreaming and analysis of multiple discrimination issues for minority women; and promote effective minority participation and consultation, in line with international minority rights standards.²⁸² Finally, the EU must ensure that assessment of minority protections in Kosovo includes examination of minority economic and social participation guarantees, so that the benefits of economic stability and prosperity as Kosovo strengthens its relationship with the EU are equally enjoyed by Kosovo's smaller minority groups.²⁸³

Conclusion

Kosovo's declaration of independence has brought some opportunities, and many potential risks for the protection of minority rights and the rights of smaller minorities in Kosovo. As exercisers of executive power in newly independent Kosovo, it is important that the EU and the international community do their utmost to facilitate the effective participation of minority communities in this new nation-building exercise, while also ensuring the guarantee of minority rights. This will not be limited to overseeing the implementation of the obligations of

Kosovo institutions toward minorities. It will also involve ensuring that the EU and ICO are themselves both actively engaged in consultation and interaction with smaller minority communities, and accountable in their actions, through mechanisms to ensure their compliance with regional and international minority rights standards.

Despite recent failures, the EU and the international community have a central role to play in ensuring that *all* of the minority communities that have lived in Kosovo for centuries should be able to continue to reside there peacefully, while freely exercising their full cultural, religious and linguistic rights.

Recommendations

To UNMIK, EULEX, ICR and Kosovo Authorities

Human rights accountability

1. The accountability of EULEX, the ICR/ICO, UNMIK and the Kosovo government for the implementation of international and regional minority and human rights standards should be ensured.
 - An independent international tribunal should be established to adjudicate on individual complaints of violation of international minority and human rights standards in Kosovo by EULEX, UNMIK and the ICR/ICO. This body should be allowed to accept and provide its opinion on communications from individuals or groups alleging a violation of any of the rights contained in the applicable regional and international conventions by any of the above actors or their staff, once they have exhausted all *effective* domestic remedies.
 - In the meantime, ensure that the Human Rights Advisory Panel established by UNMIK is granted true independence and sufficient resources to function effectively and that complaints of human rights abuses by international EULEX and ICO staff can be submitted to the Panel, effective immediately.
2. Ensure continued monitoring of the FCNM's implementation in Kosovo, including by EULEX and UNMIK, by extending the technical agreement between UNMIK and the Council of Europe to cover EULEX and the ICR/ICO. Take immediate measures to implement the recommendations of the AC FCNM and the Council of Europe Committee of Ministers to improve compliance with the FCNM.
3. Actively engage in the process of UNMIK's reporting to treaty bodies and engage in dialogue with them
4. As part of measures to meet obligations under the Ahtisaari Plan, the Constitution and in international law, initiate a truth and reconciliation process involving all parties in Kosovo and mediated with the assistance of the OSCE and/or EULEX/ICO as appropriate. This process should address Kosovo's past ethnic crimes, including those committed in 2004, and involve local civil society organizations within

Kosovo, including particularly those from minority communities.

Minority participation

5. Ensure effective participation by minority communities, including through the constitutionally guaranteed special representation measures, in all circumstances where laws being passed or amended by the Kosovo Assembly directly impact on the rights of communities.
6. Establish a periodic, non-politicized review of laws and provisions affecting minorities, enacted during the transition period (to which these guarantees were not applied), by agreement between EULEX, the ICR and Kosovo authorities as part of a review of the ICR's mandate after two years. The effective participation of minority communities and their representatives should be guaranteed in this process, and measures should be adapted and improved based on minorities' practical experience of their implementation and effectiveness.
7. Hold consultations with municipalities, all minority communities, AC FCNM representatives and relevant OSCE staff to formulate ways to ensure effective representation and participation by smaller minorities at the municipal level, including affirmative action measures (Article 15 FCNM; Article 58(4) Kosovo Constitution).
2. Ensure proactive recruitment in all regions and at all levels throughout the country of police officers, prosecutors and judges from all minority communities, including Roma, Ashkali and Egyptians.
3. Ensure proactive recruitment from Kosovo's minority communities and the Roma, Ashkali and Egyptian communities in particular, to Kosovo's Security Force (to meet obligations under FCNM Articles 4, 6 and 15, Article 61 and Article 58 sub-paragraph 4 of the Constitution).

Legal reform

4. Conduct further public awareness campaigns regarding the Anti-Discrimination Law, the rights available to all communities under the Constitution, and other existing domestic legal remedies, including in minority languages.

5. Implement judicial reforms as a matter of urgent priority, particularly reforms aimed at improving domestic judiciary functioning and reducing case backlogs, to ensure effective domestic remedies for minority communities. Conduct training, awareness-raising and exposure to jurisprudence on the application of the Anti-Discrimination Law for the executive and the judiciary.
6. Implement targeted educational, professional training and mentoring programmes (including scholarships) for minorities who are under-represented in the judiciary, particularly smaller minority groups. This is to enable development of qualified minority candidates, to meet constitutional 15 per cent quotas for appointment of minority judges to the Supreme Court and District Courts as soon as possible, on a proportionate basis.
7. Establish a Constitutional Court which is robustly independent and knowledgeable regarding international and minority human rights standards applicable in Kosovo.
 - Ensure that international and domestic judges appointed to the Kosovo Constitutional Court have specific knowledge and expertise in the area of minority rights, non-discrimination and the relevant international and regional human rights conventions listed in Articles 22 and 58 subparagraph 2 of the Kosovo Constitution, and that appropriate training is made available.
 - Ensure that international Constitutional Court judges are subject to professional regulation by the Assembly of EULEX Judges in respect of professional conduct and disciplinary proceedings.
9. Ensure the appointment of the Ombudsperson and the functioning of his/her office meets constitutional and legal requirements and follows the Paris Principles on National Institutions. Ensure adequate funding for the Ombudsperson institution.
10. Government ministers should engage constructively with the Committee on the Rights and Interests of Communities, invite its input on draft laws which may affect communities and remain committed to facilitating its effective functioning.

To the European Commission

11. When examining implementation of minority rights in Kosovo under the EU accession process, broaden and improve the attention given to issues faced by smaller minorities such as Roma, Ashkali and Egyptians or Turks; introduce gender mainstreaming and analysis of multiple discrimination issues for minority women; and assess critically the effectiveness of mechanisms for minority participation and consultation.
12. Ensure that assessment of minority protections in Kosovo includes examination of minority economic and social participation guarantees, so that the benefits of economic stability and prosperity in Kosovo are equally enjoyed by smaller minority groups.

To the OSCE Mission in Kosovo and UNESCO

13. Working together with local NGOs and government gender equality offices, provide capacity building, training and mentoring programmes for minority women specifically focused on strengthening their ability to participate in public and political life.
14. Continue to implement adult education programmes to address high illiteracy among Roma, Ashkali and Egyptian women and men.

To the Kosovo authorities

8. Ensure adequate funding for the Office of the Prime Minister's Roma, Ashkali and Egyptian joint strategy and its implementation. Consider ways to improve political commitment and effective implementation by local and national authorities, in consultation with the AC FCNM and members of the Roma, Ashkali and Egyptian communities.

Notes

- 1 See Baldwin, C., *Minority Rights in Kosovo under International Rule*, London, MRG, 2006.
- 2 *Ibid.*; on the ongoing severe problems with freedom of movement for Roma and Serbs in particular, including a lack of public transportation stopping in their residential enclaves, see Ombudsperson Institution in Kosovo, *Seventh Annual Report 2006–2007*, 11 July 2007, pp. 39–40.
- 3 Baldwin, *op. cit.*, p. 3, and recommendations, pp. 29–30.
- 4 *Ibid.*, pp. 14–15.
- 5 UN Doc. S/2007/168, 26 March 2007, p. 2. The Comprehensive Settlement is named after UN Special Envoy Martti Ahtisaari, who was appointed to determine Kosovo's future status in 2005. On his negotiations with Pristine/Pristina and Belgrade, and the resulting stalemate caused by Russia's refusal to vote in the Security Council for any resolution unacceptable to Serbia (which includes a resolution based upon implementation of the Ahtisaari Plan), see International Crisis Group, *Breaking the Kosovo Stalemate: Europe's Responsibility*, Europe Report No. 185, 21 August 2007, URL: www.crisisgroup.org (accessed 5 April 2008).
- 6 International Civilian Office, URL: <http://www.ico-kos.org/> (accessed 20 August 2008).
- 7 The ICR was appointed by an International Steering Group comprised of 22 EU states, the US, Switzerland and Turkey, which all support Kosovo independence. See: Presidency Conclusions, Brussels European Council, 14 December 2007, Doc. No. 16616/1/07 REV1, Council of the European Union, 14 February 2008, para. 70, URL: http://www.consilium.europa.eu/cms3_fo/showPage.asp?lang=EN (accessed 27 March 2008).
- 8 Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, Articles 2 and 3, *Official Journal of the European Union*, pp. 92–98.
- 9 In the Document of the Copenhagen Meeting of the Conference of the Human Dimension of the Conference on Security and Cooperation in Europe participating states 'recognize that the questions relating to national minorities can only be satisfactorily resolved in a democratic political framework based on the rule of law, with a functioning independent judiciary'; Document of the Copenhagen Meeting of the Conference of the Human Dimension of the CSCE, Copenhagen, 1990, para. 30, URL: http://www.osce.org/documents/odhr/2006/06/19392_en.pdf (accessed 30 September 2008).
- 10 Ahtisaari Plan, Annex II, Article 1.1, and Constitution of the Republic of Kosovo, Article 57 (1). Kosovo Constitutional Commission, URL: <http://www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf> (accessed 28 May 2008).
- 11 Interview with MRG, Kosovo, May 2008.
- 12 See Baldwin, *op. cit.*, p. 8.
- 13 OSCE/UN High Commissioner for Refugees, Eighth Assessment of the Situation of Ethnic Minorities in Kosovo, Pristina, OSCE/UNHCR, 2001, p. 1.
- 14 For more information on these groups and their origins, see *ibid.*
- 15 Ombudsperson, *Seventh Annual Report, op. cit.*, p. 38.
- 16 OSCE/UNHCR, Assessment of the Situation of Ethnic Minorities in Kosovo (Fourth Assessment), Pristina, OSCE/UNHCR, 2000; Serb Community Working Group, Bosniak Community Working Group, Roma Community Working Group, Ashkali/Egyptian Community Working Group, Gorani Community Working Group, FCNM in Kosovo, Shadow Report, Pristine/Pristina, 2005, p. 29, URL: http://kosovoroma.files.wordpress.com/2008/01/shadow_report_fcnm_kosovo.pdf (accessed February 2009).
- 17 Numan Balic, Party for Democratic Action and Kosovo Assembly member, interview with MRG, Kosovo 2–13 May 2008.
- 18 Examples include 1,000 Bosniak pupils educated entirely in Albanian in Prizren, and Bosniak students in Gjakovë/Djakovica where municipal authorities did not have the financial means to provide the requested supplementary classes in Bosnian; see Ombudsperson, *Seventh Annual Report, op. cit.*, p. 44.
- 19 Samir Velija interview, *op. cit.* and Ombudsperson, *Seventh Annual Report, op. cit.*, p. 44.
- 20 Ombudsperson, *Seventh Annual Report, op. cit.*, p. 45.
- 21 Numan Balic interview, *op. cit.*
- 22 AC FCNM, Opinion on the Implementation of the Framework Convention for the Protection of National Minorities in Kosovo, 25 November 2005, Doc. No. ACFC/OP/I(2005)004.
- 23 Numan Balic interview, *op. cit.*
- 24 *Ibid.*
- 25 Ombudsperson, *Seventh Annual Report, op. cit.*, p. 38.
- 26 Baldwin, *op. cit.*, p. 9.
- 27 Baldwin, *op. cit.*, p. 9.
- 28 *Ibid.*
- 29 See Ombudsperson, *Seventh Annual Report, op. cit.*, p. 43.
- 30 For more information on the implementation of the Law on the Use of Language and the failure to guarantee these education and language rights to minority groups in Kosovo, see *ibid.*, pp. 45–46; Humanitarian Law Center, *Practice of Implementing the Law on the Use of Language in the Kosovo Education Process*, July 2007, URL: <http://kosovoroma.files.wordpress.com/2008/02/hlc-implementation-of-language-law.pdf>, accessed 23 February 2008.
- 31 Interview with MRG, Kosovo, 2–13 May 2008.
- 32 *Ibid.*
- 33 *Ibid.*
- 34 *Ibid.*
- 35 Baldwin, *op. cit.*, p. 9.
- 36 Ombudsperson, *Seventh Annual Report, op. cit.*
- 37 Baldwin, *op. cit.*, p. 9; and Ombudsperson, *Seventh Annual Report, op. cit.*, p. 44 (noting the impact on Serbian-speaking Roma of the need to attend parallel schools managed and funded by Serbian authorities in order to receive education in their first language).
- 38 For a critique of these efforts, see 'Romani return to the Mitrovica Mahalla marred with problems – news roundup: snapshots from around Europe, Kosovo', *Roma Rights*, 1–2 (on 'Social Assistance'), 2007, European Roma Rights Centre, URL: <http://www.errc.org> (accessed 18 April 2008).
- 39 *Ibid.* and MRG interview with Xhevdet Neziraj, Egyptian member of the Assembly of Kosovo, and Astritt Zizako of the NGO New Bridge, Kosovo; and Bekim Syla, Roma and Ashkali Documentation Centre and Bashkim Ibishi, NGO Centre for International Integration and Kosovo RAE Forum, Kosovo, 2–13 May 2008.
- 40 OSCE Communities Division, 'Durable solutions are still pending: unsolved challenges, impending property restitution and sustainable return of Roma, Ashkali and Egyptians', in OSCE, Mission in Kosovo, *You Are Displaced, Your Rights Are Not:*

- Compendium on Sustainable Property Restitution and Solutions to Displacement in Kosovo during Transition*, March 2008, p. 23, URL: http://www.osce.org/publications/mik/2008/03/30236_1082_en.pdf (accessed 29 September 2008).
- 41 OSCE, Mission in Kosovo, *You Are Displaced, Your Rights Are Not ...*, *op. cit.*, p. 2.
- 42 Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 40.
- 43 *Ibid.*, pp. 42–3 and note 21.
- 44 OSCE, Mission in Kosovo, *You Are Displaced, Your Rights Are Not*, *op. cit.*, p. 2. Noted also in MRG interview with Bashkim Ibishi and Bekim Sylja, *op. cit.*
- 45 OSCE Communities Division, ‘Durable solutions are still pending’, *op. cit.*, p. 23.
- 46 Interview with Bekim Sylja and Bashkim Ibishi, *op. cit.*
- 47 Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 43.
- 48 *Ibid.*
- 49 Interview with MRG, Kosovo, 2–13 May 2008.
- 50 Ombudsperson, *Seventh Annual Report*, *op. cit.*, pp. 38–43.
- 51 MRG interview with Xhevet Neziraj and Astritt Zizako, *op. cit.*
- 52 *Ibid.*; MRG interview with former OSCE Mission in Kosovo staff member, 19 August 2008.
- 53 Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 41.
- 54 MRG interview with Bekim Sylja and Bashkim Ibishi, *op. cit.* See also Ombudsperson, *Seventh Annual Report*, *op. cit.*, pp. 44–5, on the impact of poverty on access to education and the effect of high school drop-out rate of Roma, Ashkali and Egyptians on their employability.
- 55 *Focus Kosovo*, vol. 37, January 2008, p. 4, UNMIK, URL: <http://www.unmikonline.org> (accessed 4 July 2008).
- 56 Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 43.
- 57 *Ibid.*, p. 7.
- 58 Interview with MRG, Kosovo, 2–13 May 2008.
- 59 *Ibid.*
- 60 Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 40.
- 61 Interview with MRG, Kosovo 2–13 May 2008.
- 62 Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 38.
- 63 MRG, ‘Kosovo overview’, in *World Directory of Minority and Indigenous Peoples*, URL: www.minorityrights.org (accessed 4 July 2008).
- 64 Email to MRG, 3 April 2008. Provisions of the Law on the Use of Languages, on the right of minority communities to use their language before public bodies, are also not implemented for the Turkish and other minorities in some municipalities; see Humanitarian Law Center, ‘Kosovo institutions applying the Law on the Use of Languages’, October 2007, URL: http://www.humanrightspoint.si/files/att/wb/Kosovo_Institutions_Applying_the_Law_on_the_Use_of_Languages,_October_2007%5B1%5D.pdf (accessed 23 February 2009); and Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 45.
- 65 Constitution of the Republic of Kosovo, Article 5.
- 66 Interview with MRG, Kosovo, 2–13 May 2008.
- 67 See Constitution of the Republic of Kosovo, Article 59(6) and (8). The use of minority alphabets is guaranteed only with municipal authorities and local offices of central authorities ‘in areas where they [i.e. a minority or minorities] represent a sufficient share of the population in accordance with the law’. The Ombudsperson also notes it is rare for municipalities to respect the spelling of names in Serbian, Bosnian or Turkish, *Seventh Annual Report*, *op. cit.*, p. 46.
- 68 Interview with MRG, Kosovo, 2–13 May 2008.
- 69 UNMIK Regulation No. 2000/38 on Establishment of the Ombudsperson Institution in Kosovo; Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 10.
- 70 UNMIK Regulation No. 2000/38, *op. cit.*; Section 3 and Chapter 10 of the Constitutional Framework for Provisional Self-Governance in Kosovo, promulgated through UNMIK Regulation 2001/9 on 15 May 2001.
- 71 Anti-Discrimination Law, Law No. 2004/3, Article 10, URL: <http://www.UNMIKonline.org/civpol/gender/doc/Anti-Discrimination-Law-in-Kosovo-2004.pdf> (accessed 3 April 2008); see below, note 86.
- 72 Email from MPDL to MRG, 8 April 2008
- 73 See e.g. ‘Kosovo (Serbia): the Ombudsperson should guarantee the human rights of all persons in Kosovo’, Amnesty International public statement, News Service No. 196, 12 October 2007, URL: <http://www.amnesty.org.ru/library/Index/ENGEUR700132007?open&of=ENG-375> (accessed 28 September 2008).
- 74 Para. 1.2, Regulation No. 2007/15, amending Section 6 of UNMIK Regulation No. 2006/6 on the Ombudsperson Institution in Kosovo, URL: http://www.unmikonline.org/regulations/unmikgazette/02english/E2007regs/RE2007_15.pdf (accessed 28 September 2008).
- 75 United Nations Principles (Paris Principles) relating to the status of national institutions for the promotion and protection of human rights, General Assembly Resolution, A/RES/48/134, 20 December 1993, URL: <http://www.un.org/documents/ga/res/48/a48r134.htm> (accessed 28 September 2008).
- 76 Oliver Ivanovic and Samir Velija, interview with MRG, *op. cit.*; MRG interview with Turkish minority representatives, Kosovo, 2–13 May 2008.
- 77 Resolution 1417(2005), Protection of Human Rights in Kosovo, Parliamentary Assembly of the Council of Europe, 25 January 2005.
- 78 Oliver Ivanovic, interview with MRG, and MRG interview with Bekim Sylja and Bashkim Ibishi, *op. cit.* See also AC FCNM, Opinion on Kosovo, *op. cit.*; Waters, C.P.M., ‘Nationalising Kosovo’s Ombudsperson’, 12(1) *Journal of Conflict and Security Law* 139, 2007.
- 79 Regulation 2006/6 on the Ombudsperson Institution in Kosovo, URL: http://www.unmikonline.org/regulations/unmikgazette/02english/E2006regs/RE2006_06.pdf (accessed 28 September 2008).
- 80 Email from MPDL, 8 April 2008. See also Human Rights Watch, Amnesty International and the Norwegian Helsinki Committee, ‘Kosovo: EU should ensure international mission is accountable’, 10 March 2008, URL: http://hrw.org/english/docs/2008/03/10/serbia18233_txt.htm (accessed 28 September 2008).
- 81 Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, URL: <http://www.eupt-kosovo.eu/training/hrgi/docs/7.pdf> (accessed 28 September 2008). For a list of the regional and international human rights instruments covered by the Panel’s jurisdiction see section 1.2 of this regulation.
- 82 *Ibid.*, section 3.1.
- 83 *Ibid.*, sections 4.3 and 17.1.
- 84 *Ibid.*, section 17.3. For the HR Committee’s views see below, note 132.
- 85 Email from MPDL, 8 April 2008.
- 86 The law prohibits discrimination on grounds of racial, ethnic, gender, language, physical and mental disability, sexual preference, nationality, political affiliation or conviction, religion or belief, property and other bases. It covers both the private and public sectors, legal and natural persons and prohibits direct and indirect discrimination, including harassment, victimization and segregation. The guarantee of equal treatment is enforced in respect of any right set forth by law. See Anti-Discrimination Law, *op. cit.*, Articles 2, 3, 4.
- 87 Jashari, H., ‘Kosovo’s Anti-Discrimination Law and the Ombudsperson’s role in it’, in OSCE Mission in Kosovo, *Implementing the Anti-Discrimination Law*, June 2007, p. 25.
- 88 The law envisages the establishment of a Centre for Equal Treatment to administer funds collected from sanctions imposed on those violating provisions of the ADL. There is confusion and concern from the Ombudsperson over the extent to which the Centre’s mandate will duplicate the Ombudsperson’s role under the ADL. This problem has not

- been entirely resolved by the subsequent enactment of Administrative Instruction No. 04/2006; Correspondence to MRG from MPDL, 8 August 2007
- 89 Jashari, *op. cit.*, p. 25.
- 90 *Ibid.*, p. 22; AC FCNM, Opinion on Kosovo, *op. cit.*, para. 22.
- 91 Jashari, *op. cit.*
- 92 See Hajredini, H., 'Implementation of the Anti-Discrimination Law', in OSCE Mission in Kosovo, *Implementing the Anti-Discrimination Law*, *op. cit.*, p. 9.
- 93 Correspondence from Mikel Cordoba Gavin, head of MPDL for Serbia and Kosovo, and Fermin Cordoba, MPDL South Eastern Europe legal coordinator, to MRG, 8 April 2008.
- 94 Correspondence to MRG from MPDL, 8 August 2007.
- 95 Jashari, *op. cit.*, p. 25.
- 96 *Ibid.*
- 97 Kosovo Women's Network, 'Monitoring implementation of UNSCR1325 in Kosovo', p. 10, URL: http://unifem.at/pdfs/KWN_UNSCR1325.pdf (accessed 3 April 2008).
- 98 The previous constitutional framework of legislation in force, for example, included the Universal Declaration on Human Rights, the ICCPR, CEDAW in addition to the Anti-Discrimination Law; see OSCE Mission in Kosovo, *Implementing the Anti-Discrimination Law*, *op. cit.*, p. 8.
- 99 Email to MRG, 3 April 2008.
- 100 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 22.
- 101 MRG interviews, Kosovo, 2–13 May 2008.
- 102 Correspondence from MPDL, 8 April 2008.
- 103 MPDL correspondence of 8 August 2007; AC FCNM, Opinion on Kosovo, *op. cit.*, paras 37 and 133.
- 104 MPDL correspondence, 8 April 2008.
- 105 OSCE Communities Division, 'Durable solutions are still pending', *op. cit.*, p. 23.
- 106 European Commission, Progress Report, Kosovo 2006 and 2007.
- 107 Communication between Fermin Cordoba and MRG, 8 August 2007. See also Ombudsperson, *Seventh Annual Report*, *op. cit.*, p. 63, noting: 'The different treatment of people in essentially similar situations due to their background, financial and social status, ethnicity, gender, or physical capacity or appearance is a continual problem in Kosovan society.'
- 108 UNMIK Regulation 2000/45 on Self-Government of Municipalities in Kosovo.
- 109 For more details on the OSCE's mandate and responsibilities in Kosovo, see OSCE Mission in Kosovo, URL: <http://www.osce.org/kosovo/13197.html> (accessed 3 July 2008).
- 110 OSCE Mission in Kosovo, Department of Democratization, *Assessment of Municipal Communities Committees*, February 2004.
- 111 Email from Mikel Cordoba Gavin and Fermin Cordoba, MPDL, 8 April 2008, *op. cit.*
- 112 Council of Europe Committee of Ministers, Resolution CNM(2006)9 on the implementation of the FCNM in Kosovo (Republic of Serbia), 21 June 2006, http://www.coe.int/t/e/human_rights/minorities/ (accessed on 29 September 2008).
- 113 Council of Europe, Framework Convention for the Protection of National Minorities, European Treaty Series No. 157, Strasbourg, 1.II.1995, Article 6(2).
- 114 Human Rights Watch (HRW), *Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004*, May 2006, p. 21, URL: <http://www.hrw.org/reports/2006/kosovo0506/kosovo0506web.pdf> (accessed 3 April 2008).
- 115 See e.g. Amnesty International, *Serbia (Kosovo): The Challenge to Fix a Failed UN Justice Mission*, 29 January 2008; HRW, *Not on the Agenda ...*, *op. cit.*; HRW, *Kosovo Criminal Justice Scorecard*, March 2008; OSCE Mission in Kosovo, Monitoring Department, Legal System Monitoring Section, *Four Years Later: Follow-up of March 2004 Riots Cases before the Kosovo Criminal Justice System*, July 2008.
- 116 An example of the result is the 40 members of the Ashkali community in Vushtrri/Vučitrn who were injured parties or witnesses to ethnic violence during the 2004 riots, who did not appear before court trials when summonsed. See OSCE Mission in Kosovo, *Four Years Later...*, *op. cit.*, p. 6.
- 117 MRG interview with Numan Balic, *op. cit.*
- 118 MRG interview with Bekim Sylja and Bashkim Ibishi, *op. cit.*
- 119 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 56.
- 120 See OSCE Mission in Kosovo, *Four Years Later...*, *op. cit.*
- 121 *Ibid.*, p. 3.
- 122 *Ibid.*
- 123 *Ibid.*
- 124 FCNM, Article 6(1).
- 125 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 20.
- 126 Ahtisaari Plan, *op. cit.*, Article 2.5.
- 127 *Ibid.*, Article 2, Annexe II.
- 128 *Ibid.*
- 129 The AC FCNM has noted, for example, that the building of trust between key institutions and minority communities has been facilitated in cases like the Ombudsperson institution 'by a significant international presence'; AC FCNM, Opinion on Kosovo, *op. cit.*, p. 4. As such trust would be imperative for truth and reconciliation initiatives to be successful, international authorities viewed as impartial and trustworthy by all parties should also facilitate this process.
- 130 Constitution of the Republic of Kosovo, Article 162.
- 131 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 109.
- 132 Concluding Observations of the Human Rights Committee: Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1, 14 August 2006 at para. 21.
- 133 Baldwin, *op. cit.*, p. 23.
- 134 Ahtisaari Plan, Article 10.
- 135 European Commission, Progress Report, Kosovo, 2007; MRG interviews with Oliver Ivanovic and Samir Velija, and with Turkish minority representatives, *op. cit.*
- 136 AC FCNM, Commentary on Participation of Persons Belonging to National Minorities in Cultural, Social and Economic Life and Public Affairs, 27 February 2008, para. 26.
- 137 MRG interview, Kosovo, 2–13 May 2008.
- 138 OSCE High Commissioner on National Minorities, Lund Recommendations on the Effective Participation of National Minorities in Public Life, Foundation on Interethnic Relations, September 1999, p. 18.
- 139 MRG interview with Bekim Sylja and Bashkim Ibishi, *op. cit.*
- 140 Kosovo Constitution, Article 149; cf. Article 2, Annexe XII, Comprehensive Proposal for the Kosovo Status Settlement UN Doc. S/2007/168/Add.1.
- 141 Kosovo Constitution, Article 149
- 142 See e.g. FCNM, Article 15; HCNM, Lund Recommendations, *op. cit.*, explanatory note, p. 13; United Nations Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities, adopted 18 December 1992, GA Res. 47/135 Annex, UN Doc. A/Res/47/135/Annex, Article 2(3); HR Committee, General Comment 23(50), The Rights of Minorities (Article 27), UN Doc. CCPR/C/21/Rev.1/Add.5 (26 April 1994) at para. 7; *Mahuika et al. v. New Zealand* (Communication 547/1993), UN Doc. CCPR/C/70/D/547/1993, 27 October 2000, para. 9.5, etc.
- 143 OSCE HCNM, Lund Recommendations, *op. cit.*, p. 16, para. 5.
- 144 Bieber, F., *Balancing Political Participation and Minority Rights: The Experience of the Former Yugoslavia*, Central European University Center for Policy Studies, 2002/2003, p. 5.
- 145 See Ahtisaari Plan, Annex IX, Article 5.
- 146 Kosovo Constitution, Article 60.
- 147 OSCE HCNM, Lund Recommendations, *op. cit.*, para. 12.
- 148 *Ibid.*, para. 6.
- 149 Kosovo Constitution, Chapter IV, Article 64.

- 150 *Ibid.*, Article 67.
- 151 For the international law sources of this right, see note 142 above.
- 152 Kosovo Constitution, Chapter IV, Article 81. The laws in question include those on the rights of communities, use of language, local elections, protection of cultural heritage, education, the use of symbols, religious freedom, and laws on municipal boundaries municipal powers and cross-border relations.
- 153 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 110.
- 154 See e.g. OSCE HCNM, Lund Recommendations, *op. cit.*, explanatory note, p. 13 and FCNM, Article 5(2) prohibiting assimilation.
- 155 Kosovo Constitution, Article 78, sub-paragraph 4.
- 156 *Ibid.*, Article 78, sub-paragraph 1.
- 157 Lund Recommendations, *op. cit.*, para. 6.
- 158 Lund Recommendations, *op. cit.*, explanatory note, p. 22, paras 12 and 13.
- 159 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 111.
- 160 *Ibid.*, 'Recommendations', para. 166.
- 161 Kosovo Constitution, Article 62. The minority municipal assembly vice-president can review claims that communities' constitutional rights have been violated by the municipal assembly, and refer the act or decision in question back to the municipal assembly and ultimately to the Constitutional Court where not resolved.
- 162 AC FCNM, Opinion on Kosovo, *op. cit.*
- 163 *Ibid.*, para. 137.
- 164 MRG interviews with Turkish community representatives, Samir Velija (Gorani), Numan Balic (Bosnian), Oliver Ivanovic (Kosovo Serb), *op. cit.*
- 165 Following a 2002 decision by the Central Elections Commission, one-third of the candidates of all political parties must be women. Principles of gender equality are also referred to in constitutional provisions on the appointment of judges and prosecutors (Kosovo Constitution, Article 104, sub-paragraph 2, Article 109, sub-paragraph 4) and composition of the Assembly (Article 71, sub-paragraph 2) and civil service (Article 101).
- 166 See UNMIK's report to the Committee on Economic, Social and Cultural Rights, Core Document Forming Part of the Reports of States Parties: Kosovo (Serbia), UN Doc. HRI/CORE/UNK/2007, 15 January 2008, paras 205–10, particularly para. 208.
- 167 See e.g. OSCE, 'OSCE Kosovo Mission helps get women involved in local politics', URL: <http://www.osce.org/item/32033.html> (accessed 11 July 2008).
- 168 See HR Committee, General Comment 25 (57), UN Doc. CCPR/C/21/Rev.1/Add.7 (1996) at para. 12: 'Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively.'
- 169 Kosovo Constitution, Article 54.
- 170 *Ibid.*, Article 113, sub-paragraph 7.
- 171 *Ibid.*, Article 22.
- 172 Committee on Economic, Social and Cultural Rights, List of Issues to be taken up in connection with the consideration of the document on Kosovo (Serbia), UN Doc. E/C.12/UNK/Q/1, 11 June 2008 at para. 2.
- 173 See AC FCNM, the Acting Ombudsman and Council of Europe Committee of Ministers recommendations (under Remedies and Law Enforcement) in this regard; AC FCNM, Opinion on Kosovo, *op. cit.*, para. 145; Council of Europe Committee of Ministers, Resolution CNM(2006)9 on the implementation of the FCNM in Kosovo, *op. cit.*
- 174 Kosovo Constitution, Article 112, sub-paragraph 2.
- 175 *Ibid.*, Article 110, sub-paragraph 1.
- 176 *Ibid.*, Article 108, sub-paragraph 2.
- 177 *Ibid.*, Article 133, sub-paragraph 1.
- 178 *Ibid.*, Article 132.
- 179 *Ibid.*, Article 134.
- 180 Article 134 sub-paragraphs 1 and 5 require that the Ombudsman be elected by a majority, and dismissed by a two-thirds majority of all deputies in the Assembly of Kosovo, who represent the people.
- 181 Constitution of Kosovo, Article 113, sub-paragraph 5.
- 182 See e.g. principle 6 on guaranteeing methods of appointment which ensure independence; Paris Principles, *op. cit.*
- 183 UNMIK Regulation No. 2006/6 on the Ombudsman Institution in Kosovo. See also 'Kosovo: Ombudsman Institution helps to ensure protection of human rights', UNMIK/PR/1719 – UNMIK Countdown #34, ReliefWeb, URL: <http://www.reliefweb.int/rw/RWB.NSF/db900SID/EGUA-7APN84> (accessed 11 July 2008).
- 184 OSCE Mission in Kosovo, 'Independent agencies and institutions in Kosovo democracy', December 2007, p. 5.
- 185 See principle 5 on adequate funding to ensure independence; Paris Principles, *op. cit.*
- 186 OSCE Mission in Kosovo, 'Independent agencies and institutions', *op. cit.*
- 187 Kosovo Constitution, Article 113, sub-paragraph 2.
- 188 Article 116, sub-paragraph 1.
- 189 Article 116.
- 190 Kosovo Constitution, Articles 146 and 147.
- 191 See also *ibid.*, Article 58(3).
- 192 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 57.
- 193 MRG interview with Bekim Sylja and Bashkim Ibishi, *op. cit.*
- 194 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 37, and recommendations at para. 145. The AC also mentioned recruitment of minorities to the judiciary in the context of the Article 15 obligation to create the conditions necessary for effective participation of minorities in Kosovo's economic life; para. 114. These obligations also exist under the new Kosovo Constitution, see Article 58, subparagraph 4.
- 195 At least one Deputy Ombudsman is to be a member of a minority community; Kosovo Constitution, Article 133, subparagraph 2.
- 196 *Ibid.*, Article 61.
- 197 See HR Committee, General Comment 25(57), The Right to Participate in Public Affairs, Voting Rights and the Right of Equal Access to Public Service (Art. 25), UN Doc. CCPR/C/21/Rev.1/Add.7 (12 July 1996), para. 23 and regarding Kosovo minorities specifically, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1, 14 August 2006, para. 21.
- 198 Interview with MRG, Kosovo, 2–13 May 2008.
- 199 See UNMIK's report to the Committee on Economic, Social and Cultural Rights, *op. cit.*, paras 206–8.
- 200 See Kosovo Constitution, Article 113.
- 201 Article 126, sub-paragraph 4.
- 202 *Ibid.*
- 203 Kosovo Constitution, Article 110, sub-paragraph 2 and Article 108, sub-paragraph 2.
- 204 Annex IV, Article 1.
- 205 Article 103, sub-paragraph 3, 6. For courts without appeal jurisdiction, the Kosovo Judicial Council (KJC) should 'ensure that the Kosovo courts are independent, professional, impartial and fully reflect the multi-ethnic nature of Kosovo'; Article 108, sub-paragraph 2.
- 206 At least two of the KJC's thirteen members are to be appointed by Assembly deputies from the Serb and 'other Communities' respectively; Article 108, sub-paragraph 6 (3) and (4).
- 207 Only a majority of the four KJC members appointed by the Serb and 'other Communities' can recommend candidates for minority reserved judicial appointments; Article 108, sub-paragraph 9.
- 208 For judicial appointments to areas with a Serb majority population, only the two KJC members elected by Serb Assembly

- deputies, acting jointly, can recommend candidates. Other KJC members may recommend candidates, however, where these two members fail to do so for two KJC sessions; Article 110, sub-paragraph 10.
- 209 Article 128, sub-paragraph 4.
- 210 Articles 104 and 110, sub-paragraph 3.
- 211 Kosovo Constitution, Article 35.
- 212 AC FCNM, Commentary on Participation ..., *op. cit.*, para. 35.
- 213 *Ibid.*, para. 34.
- 214 Kosovo Constitution, Article 144 and Article 113
- 215 *Ibid.*, Article 152, sub-paragraph 4; Ahtisaari Plan, Annexe I, Article 6.1.3.
- 216 Kosovo Constitution, Article 152, sub-paragraph 5.
- 217 *Ibid.*, Article 114, sub-paragraph 3.
- 218 AC FCNM, Opinion on Kosovo, *op. cit.*, executive summary, p. 4 and paras 38, 39.
- 219 See the recommendations made in Amnesty International, *Serbia (Kosovo)*, *op. cit.*
- 220 Article 58, sub-paragraph 2 of the Kosovo Constitution.
- 221 See Amnesty International, *Serbia (Kosovo)* ..., *op. cit.*, note 219.
- 222 Ahtisaari Plan, Annexe IX, Article 2.3 and Article 4.6. This provision has been made part of Kosovo domestic law through enactment by the Kosovo Assembly of the Law on the Status, Immunities and Privileges of Diplomatic and Consular Missions and Personnel in Republic of Kosovo and of the International Military Presence and its Personnel, Law No. 03/L-033.
- 223 Ombudsperson letter to Jean-Christian Cady, the Deputy Special Representative of the UN Secretary-General for Police and Justice, October 2004. Available online, Ombudsperson Institution in Kosovo, URL: <http://www.ombudspersonkosovo.org/> (accessed 11 July 2008).
- 224 OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Kosovo – Review of the Criminal Justice System (September 2001–February 2002), p. 43; OSCE Department of Human Rights and Rule of Law, Legal Systems Monitoring Section, Kosovo Review of Criminal Justice System 1999–2005: Reforms and Residual Concerns, March 2006, p. 63.
- 225 See Law on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges in Kosovo recently passed by the Kosovo Assembly, Law No. 03/L-053, URL: <http://www.gazeta.zyrtare.com/> (accessed 11 July 2008).
- 226 International Civilian Office Kosovo, 'Implementation of the Comprehensive Settlement Proposal – state of implementation', URL: [http://www.ico-kos.org/d/CSP%20Matrix%20081121ENG\(1\).pdf](http://www.ico-kos.org/d/CSP%20Matrix%20081121ENG(1).pdf) (accessed 11 July 2008).
- 227 'UNMIK, EULEX sign Kosovo memorandum', BalkanInsight.com, 19 August 2008, URL: <http://balkaninsight.com/en/main/news/12465/> (accessed on 12 October 2008).
- 228 'EULEX chief magistrate previews mission, notes probing war crimes on agenda', *La Stampa* (Turin), 1 March 2008.
- 229 MRG welcomes the indication that rule of law will be a priority area of work for the ICO; International Civilian Office, Fifth Meeting of the International Steering Group for Kosovo, 12 September 2008, Pristina, Republic of Kosovo, URL: <http://www.ico-kos.org/> (accessed 13 October 2008).
- 230 Ahtisaari Plan, Annexe IX, Article 4.6, and Kosovo Constitution, Article 146, sub-paragraph 1.
- 231 Ahtisaari Plan, Annexe IX, Article 2.1 and Kosovo Constitution, Article 146, sub-paragraph 1.
- 232 Kosovo Constitution, Article 147.
- 233 See Ahtisaari Plan, Annexe IX, Article 2.3.
- 234 *Ibid.*
- 235 International Crisis Group, *Breaking the Kosovo Stalemate*, *op. cit.*
- 236 *Koha Ditore* (The Daily Time) newspaper and the BBC, cited in OSCE Mission in Kosovo, Office of Press and Public Information, *Monitor Final Edition: Pristina Media Highlights*, 30 May 2008.
- 237 Council Joint Action 2008/124/CFSP, *op. cit.*, Article 5.1.
- 238 'UNMIK, EULEX sign Kosovo memorandum', BalkanInsight.com, *op. cit.*
- 239 AC FCNM, Opinion on Kosovo, *op. cit.*, Executive Summary and para. 17.
- 240 See International Crisis Group, *Breaking the Kosovo Stalemate*, *op. cit.*
- 241 Kurti, A., 'ICO and EULEX, powers, chain of command and accountability', *New Kosova Report*, 3 July 2008, URL: <http://www.newkosovareport.com/200807031019/Veteven-dosje/ICO-and-EULEX-Powers-Chain-of-Command-and-Accountability.html> (accessed February 2009).
- 242 Ahtisaari Plan, Article 11 and Annexe IX.
- 243 For example, the new Constitution obliges all authorities in Kosovo to take all actions necessary for the Plan's implementation (Article 143, sub-paragraph 1), gives the Plan precedence over all other laws in Kosovo (Article 143, sub-paragraph 2) and invests the ICR, EULEX and all other actors outlined in the Ahtisaari Plan with the legal capacities, privileges and immunities set out in that Plan (Article 146).
- 244 AC FCNM, Opinion on Kosovo, *op. cit.*
- 245 Email to MRG, 9 September 2008.
- 246 Final Programme for the Civil Society Conference on the EULEX Mission in Kosovo, Brussels, 29 May 2008, Annexe A.
- 247 Recent visits to Nis, in southern Serbia by EULEX to explain its role in Kosovo to an NGO are welcome, but must also be extended to all local Kosovo NGOs working with smaller minority communities; 'Justice component visits Nis to explain EULEX mandate', EULEX Kosovo, 19 September 2008, URL: <http://www.eulex-kosovo.eu/?id=8&n=24> (accessed 14 October 2008).
- 248 Concluding Observations of the Human Rights Committee: Kosovo (Serbia), UN Doc. CCPR/C/UNK/CO/1, 14 August 2006, para. 15
- 249 *Ibid.*, para. 10.
- 250 UNMIK's report to the Committee on Economic, Social and Cultural Rights, *op. cit.*, para. 202
- 251 Concluding Observations of the Human Rights Committee: Kosovo (Serbia), *op. cit.*, paras 11, 16.
- 252 AC FCNM, Opinion on Kosovo, *op. cit.*, para. 46.
- 253 Concluding Comments of the Committee on the Elimination of Discrimination Against Women: Serbia, UN Doc. CEDAW/C/SCG/CO/1, 11 June 2007, para. 7.
- 254 *Loizidou v. Turkey (preliminary objections)* 23 March 1995 at p. 18, *Loizidou v. Turkey (merits)* p. 2231; *Cyprus v. Turkey*, 10 May 2001, p. 13, para. 61. The court found that in light of UN Security Council Resolutions etc. condemning the proclamation of the establishment of the Turkish Republic of Northern Cyprus, this entity had not been recognized as a sovereign state by the international community.
- 255 Clapham, A., *Human Rights Obligations of Non-state Actors*, Oxford, Oxford University Press, 2006, p. 91.
- 256 Shaw, M.N., *International Law*, 5th edn, Cambridge, Cambridge University Press, p. 878. For the position of the UN General Assembly, see the comments of its Sixth (Legal) Committee in UN Doc. A/CN.4/149 at p.8, noting that a state which is a member of the UN 'does not cease to be a member simply because its Constitution or frontier has been subject to changes'.
- 257 See e.g. the principles enunciated by the Sixth (Legal) Committee of the General Assembly in UN Doc. A/CN.4/149, p. 8, which note that 'when a new state is created, whatever may be the territory and the populations from which it comprises and whether or not they formed part of a state member of the United Nations, it cannot under the system of the Charter

- claim the status of a member of the United Nations unless it has been formally admitted as such in conformity with the provisions of the Charter’.
- 258 Charter of the UN, Chapter II, Article 4 and Chapter IV, Article 18(2). Article 4(2) reads: ‘The admission of any such state to membership in the United Nations will be effected by a decision of the General Assembly upon the recommendation of the Security Council.’
- 259 Admission to the UN is tantamount to recognition of the member admitted as a state since statehood is a requirement for admission to the UN; Advisory Opinion of the ICJ on Conditions of Membership in the United Nations (1948), ICJ Rep.
- 260 Concluding Observations of the Human Rights Committee: Serbia, UN Doc. CCPR/CO/81/SEMO, 12 August 2004, para. 3.
- 261 *Ibid.*
- 262 See Concluding Observations of the Human Rights Committee: Kosovo (Serbia), *op. cit.*
- 263 Committee on Economic, Social and Cultural Rights, List of Issues to be Taken Up ..., *op. cit.*; Concluding Observations of the Committee on Economic, Social and Cultural Rights: Serbia, UN Doc. E/C.12/UNK/CO/2, 1 December 2008.
- 264 ‘Backing request by Serbia, General Assembly decides to seek International Court of Justice ruling on legality of Kosovo’s independence’, General Assembly Department of Information, 8 October 2008 (63rd General Assembly 22nd meeting), URL: <http://www.un.org/News/Press/docs/2008/ga10764.doc.htm> (accessed 15 October 2008).
- 265 Concluding Observations of the Human Rights Committee: Kosovo (Serbia), *op. cit.*, para. 4.
- 266 UN HR Committee, Comments of the Human Rights Committee: Republic of Bosnia-Herzegovina; Comments of the Human Rights Committee: Croatia; and Comments of the Human Rights Committee: Federal Republic of Yugoslavia (Serbia and Montenegro), CCPR/C/79/Add. 14–16, 28 December 1992.
- 267 Concluding Observations of the Human Rights Committee: Kosovo (Serbia), *op. cit.*, para. 4.
- 268 This reasoning was applied to Moldova in the ECHR decision of *Ilașcu and Others v. Moldova and Russia*, 8 July 2004, where it was found that even in the absence of effective control over the Transdniestrian region, Moldova still had a positive obligation under Article 1 of the European Convention of Human Rights to take the measures in its power and in accordance with international law, to secure the rights guaranteed under the Convention to the applicants.
- 269 Ahtisaari Plan, Annexe IX, Article 2.
- 270 *Matthews v. United Kingdom*, judgment of 18 February 1999, at para. 32. See also Clapham, *Human Rights Obligations*, *op. cit.*, p. 186.
- 271 *Behrami and Behrami v. France and Saramati v. France, Germany and Norway (admissibility)*, 2 May 2007.
- 272 Email to MRG, 7 April 2008.
- 273 See AC FCNM, Sixth Activity Report (1 June 2006–31 May 2008), Doc. ACFC/INF(2008)001, 28 May 2008, para. 25.
- 274 On the detailed rights provided for in the FCNM and their application in the Balkans, see Bokulič, S. and Kostadinova, G., *Pushing for Change? South East Europe’s Minorities in the EU Progress Reports*, London, MRG, 2008.
- 275 To date the Council of Europe has sent two letters to SRSB in Kosovo, Joachim Rücker, seeking further information on their implementation, but as at 28 May 2008, no reply had been received; see Bokulič and Kostadinova, *op. cit.*
- 276 Presidency Conclusions of the Copenhagen Council, 21–22 June 1993.
- 277 A detailed assessment of the consideration of minority issues in these reports can be found in *Ibid.* from page 21 onwards.
- 278 Communication from the Commission to the European Parliament and the Council, Western Balkans: Enhancing the European Perspective, COM (2008)127, March 2008, cited in Bokulič and Kostadinova, *op. cit.*, p. 21.
- 279 Bokulič and Kostadinova, *op. cit.*
- 280 FCNM, Article 4.
- 281 Email from MPDL to MRG, 8 April 2008.
- 282 See the discussion of these issues and recommendations made in Bokulič and Kostadinova, *op. cit.*, pp. 21 and 33.
- 283 *Ibid.*, pp. 22, 34.

working to secure the rights of minorities and indigenous peoples

minority
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Filling the Vacuum: Ensuring Protection and Legal Remedies for Minorities in Kosovo

Since Kosovo's declaration of independence on 17 February 2008, there has been a vacuum in effective international protection for minorities in Kosovo. A lack of certainty over the status of the territory has limited the practical application of international human rights law. There is a danger that the new international organizations operating in Kosovo will compound the failure of the United Nations' Mission in Kosovo to ensure a tolerant, multi-ethnic society in which equality, non-discrimination and the rights of minority groups are protected.

Under an international protectorate since 1999, Kosovo has suffered engrained hostility between ethnic Albanian and Serb communities and continued segregation. Restriction of movement and political, social and economic exclusion are particularly experienced by the smaller minority groups, as well as by Serbs and Albanians living outside the main areas of population of

their respective communities. A lack of political will among majority Albanians and poor investment in protection mechanisms have resulted in minority rights being eroded or compromised. Smaller minority communities have yet to see resolution or redress for oppression and human rights violations faced due to events since the late 1990s.

This report discusses the various minority groups in Kosovo, and each group's current major issues of concern. It gives an account of pre-independence legal remedies for minorities and looks at how best to protect the rights of Kosovo's minorities in the current transition period, including the role of the new EU Rule of Law Mission and the International Civilian Representative. Finally, the report offers a set of concrete recommendations to improve realization of minority rights in Kosovo.