On Governance, Accountability and Human Rights; the United Nations Interim Administration in Kosovo.

Didier Pacquée & Steven Dewulf*

'I pledge that all pillars of UNMIK will increase their efforts to promote human rights, both formally and informally.'[1]

1. Introduction: The Mandate and Authority of UNMIK and KFOR Pursuant to Security Council Resolution 1244

Security Council Resolution 1244 of 10 June 1999 authorised the establishment of an international civil presence in Kosovo, in order to provide for an interim administration for Kosovo. According to Resolution 1244, this interim administration would secure the people of Kosovo of substantial autonomy within the Federal Republic of Yugoslavia, and would provide 'transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo'.[2]

As stated by UNMIK Regulation 1999/1 of 25 July 1999, all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General (SRSG).[3] Moreover, Regulations issued by UNMIK shall take precedence over the laws applicable on the territory of Kosovo prior to 24 March 1999, and the SRSG may appoint any person to perform functions in the civil administration in Kosovo, including judges, or remove such person.[4] The democratic tensions inherent in such a system are clear, as the UN has placed all legislative and executive powers in UNMIK, not even allowing for an independent judiciary.[5] Therefore, some have labelled UNMIK as a 'surrogate state'.[6] It has to be noted, however, that in recent times more powers have been transferred to the Provisional Institutions of Self-Government in Kosovo ('PISG').[7]

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[1]* Researchers international and European law, University of Antwerp. The authors are grateful for the valuable comments made by Professor Koen De Feyter. In what follows 'UNMIK' is the abbreviation for the 'United Nations Mission in Kosovo' and 'KFOR' is the abbreviation for the 'NATO Kosovo Force'. This text was updated until 20 May 2006.

Bernard Kouchner, Special Representative of the Secretary-General, Foreword to OSCE Report 'Human Rights in Kosovo: As Seen, As Told. Volume II', 14 June - 31 October 1999.

[2] SC Res. 1244, 10 June 1999, S/RES/1244 (1999) at para. 10.

[3] UNMIK/REG/1999/1 on the Authority of the Interim Administration in Kosovo, 25 July 1999, *amended by* UNMIK/REG/1999/25, 12 December 1999 and UNMIK/REG/2000/54, 27 September 2000 at section 1, para. 1.

[4] Ibid at section 1, para. 2 and section 3.

[5] See David Marshall and Shelley Inglis, 'The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo', (2003) 16 *Harvard Human Rights Journal* 95.

[6] Ombudsperson Institution in Kosovo, Special Report No. 1 On the compatibility with recognised international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the Implementation of the above Regulation (hereinafter 'Special Report No. 1'), 26 April 2001, to be found on www.ombudspersonkosovo.org/doc/spec%20reps /pdf/sr1.pdf at 8, para. 23.

[7] See i.a. UNMIK/REG/2004/50 on the Establishment of New Ministries and Introduction of Posts of Deputy Prime Minister and Deputy Ministers in the Executive Branch, 2 December 2004;

KFOR on the other hand is outside UNMIK's command and has a separate mandate, which is focused on 'ensuring public safety and order'.[8] This NATO-led international force is grouped into four multinational brigades, each responsible for a specific area of operations. They all fall under a single chain of command under the authority of Commander KFOR.[9] Although 'KFOR and UNMIK are Partners in an international effort to restore Kosovo',[10] the SRSG has no authority over these troops. Moreover, it is uncertain whether there are any clear limits to the powers of KFOR, as illustrated by the fact that KFOR and its personnel shall only respect the laws applicable in the territory of Kosovo *insofar as* they do not conflict with the fulfilment of the mandate given to KFOR under Resolution 1244.[11] This makes the question of which laws are applicable very arbitrary.

According to different sources, UNMIK and KFOR have within this legal framework repeatedly violated international human rights standards, most notably in the context of executive detention orders, the right to property, respect for the home and the right to a court.[12] As UNMIK in essence exercises governmental functions in the territory placed under its administration, one would expect it to be bound by the same obligations as state actors.[13] Practice however has shown that this is not the case, as the mission in Kosovo is on the contrary conceptualised as an extended form of peacekeeping, rather than an exercise in governance by the UN itself.[14] The double standards this has created are visible on many levels; of importance here is the fact that any state would be held accountable for human rights violations, while it seems to be much more difficult to hold an international administration accountable for its acts. In this context, it is precisely the status of human rights protection *vis-à-vis* KFOR and UNMIK which is of essential importance. The uncertainty regarding this issue[15] combined with the concentration of powers in UNMIK and the fact that KFOR actions seem to go unchecked, are reasons for grave concern.

This comment will not concentrate on important issues such as democratic legitimacy, institutional power-sharing or the separation of powers. It will rather focus on the mechanisms of accountability of UNMIK and KFOR with regard to international human rights standards.

UNMIK/REG/2005/53 amending UNMIK Regulation No. 2001/19 on the Executive Branch of the Provisional Institutions of Self-Government in Kosovo, 20 December 2005.

[8] SC Res. 1244, 10 June 1999, S/RES/1244 (1999) at para. 9.

[9] See http://www.nato.int/kfor/kfor/about.htm and SC Res. 1244, 10 June 1999, S/RES/1244 (1999) at para. 9 (f).

[10] Ibid.

[11] UNMIK/REG/2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo, 18 August 2000 at section 2.2.

[12] See i.a. OSCE Mission in Kosovo, Review 2: The Criminal Justice System in Kosovo (1 September 2000 – 28 February 2001), 28 July 2001, to be found on http://www.osce.org/documents/mik/2001/07/969_en.pdf; Ombudsperson Institution in Kosovo, Special Report No. 1; Elizabeth Abraham, 'The Sins of the Savior: Holding the United Nations Accountable to International Human Rights Standards for Executive Order Detentions in its Mission to Kosovo, (2002-2003) 52 *American University Law Review* 1291; David Marshall and Shelley Inglis, n. 5 above at 95.

[13] In the same sense, Ombudsperson Institution in Kosovo, Special Report No. 1, at 8, para. 24; Frederick Rawski, 'To Waive or not to Waive: Immunity and Accountability in U.N. Peacekeeping Operations', (2002-2003) 18 *Connecticut Journal of International Law* 103 at 123-124.

[14] See Carsten Stahn, 'Governance Beyond the State: Issues of Legitimacy in International Territorial Administration', working paper, to be found on http://www.sgir.org/conference2004/papers/Stahn%20-%20Governance%20Beyond%20the%20state.pdf at 10; Joel C. Beauvais, 'Benevolent Despotism: A Critique of U.N. State-Building in East Timor', (2001) 33 *NYU Journal of International Law and Politics* 1101 at 1165.

[15] Below.

2. Human Rights Law Applicable on the Territory of Kosovo

UNMIK Regulation 1999/1 already declared that all persons undertaking public duties or holding public office in Kosovo were to observe internationally recognised human rights standards and refrain from any discriminatory act.[16] Moreover, domestic law would only continue to apply in Kosovo insofar as it did not conflict with these human rights standards or the fulfilment of the mandate given to UNMIK under Resolution 1244 or any other regulation issued by UNMIK. UNMIK Regulation 1999/24 further elaborated on the obligation to respect human rights. It explicitly listed a number of regional and international instruments, such as *inter alia* the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto (hereinafter 'ECHR') and the International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto (hereinafter 'ICCPR'), that particularly reflected the internationally recognised human rights standards which all persons undertaking public duties or holding public office in Kosovo needed to observe.[17] The latter Regulation moreover created three other sources of law in Kosovo, as a consequence of which the applicable law is as follows:

(1) The law in Kosovo as it existed on 22 March 1989
(2) UNMIK Regulations
(3) The law applied in Kosovo between 22 March 1989 and 12 December 1999 (the date Regulation 1999/24 came into force) if this is more favourable to a criminal defendant or fills a gap where no law from March 1989 exists
(4) International human rights standards and laws

The supremacy of international human rights laws over domestic laws was however not expressly stated in Regulation 1999/24, whereas the supremacy of Regulations over the 1989 law was. Neither did the Regulation proclaim the direct applicability of these human rights standards, nor did it state that such standards form the framework in which the mission, and more precisely the exercise of executive and legislative authority by UNMIK, should function.[18] This evidently has created ambiguity regarding the status of these norms.

Some of these issues were solved by the promulgation of the Constitutional Framework for Self-Government by UNMIK Regulation 2001/9.[19] This Framework incorporated most of the rights and freedoms set forth in the different human rights documents,[20] and made these rights directly applicable in Kosovo. Whether or not these norms would become applicable and enforceable *vis-à-vis* UNMIK and KFOR however remained unclear. Although Security Council Resolution 1244 (1999) clearly stipulated that 'the main responsibilities of the international civil presence (…) will include protecting and promoting human rights', UNMIK itself never formally 'acceded' to human rights instruments. It is nonetheless hardly disputable that UNMIK, as a UN body, is bound by international human rights standards. This was made clear by Resolution 1244 as well as Regulation 2000/38 setting up the Ombudsperson Institution, which clearly stated that 'the Ombudsperson may provide advice and make recommendations to any person or entity concerning the compatibility of domestic laws *and Regulations* with recognised international standards', including the ECHR and the

[16] UNMIK/REG/1999/1, 25 July 1999 at section 2.
[17] Other regional and international conventions that were mentioned include i.a. the International Covenant on Economic, Social and Cultural Rights of 16 December 1966; the International Convention on the Rights of the Child of 20 December 1989. UNMIK/REG/1999/24 on the Law Applicable in Kosovo, 12 December 1999 as amended by UNMIK/REG/2000/59, 27 October 2000.
[18] David Marshall and Shelley Inglis, n. 5 above at 104.
[19] UNMIK/REG/2001/9 on a Constitutional Framework for Self-Government, 15 May 2001.
[20] With the notable exception of the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.

ICCPR. [21] The recently created Human Rights Advisory Panel, whose task it is to examine complaints of human rights violations by UNMIK, similarly confirms the latter's duty to observe human rights.[22] This however does not mean that these rights can also be enforced at the national or international level with regard to UNMIK (below). As regards KFOR, matters are even more complex. As the SRSG has no authority for regulating the activities of KFOR,[23] and as the security mandate of KFOR clearly seems to override the applicable law,[24] human rights protection afforded by UNMIK Regulations may be inapplicable to KFOR. Moreover, the mandate of the Ombudsperson did not extend to KFOR actions.[25] Therefore, it could be argued that KFOR cannot be held accountable for human rights violations as these norms are not applicable to them. Whatever the case may be from a purely legal point of view, it cannot be denied that KFOR has stated that they are bound by international human rights law.[26] Even if this statement is not followed universally in all areas of KFOR's activities,[27] some internal mechanisms have been developed to give some sort of redress to victims of KFOR actions. It are these and other accountability mechanisms which will be scrutinised in what follows.

3. Accountability for Human Rights Violations? The Enforceability of Human Rights at the National and International Level

It has to be born in mind that the framework of international human rights law was primarily designed for states and their territories. Therefore, the question of accountability for human rights violations in cases where international organisations, as *in casu* UNMIK and KFOR, exercise *de facto* (all) governmental functions, is a difficult one. As it has never clearly been dealt with by the UN itself, international territorial administration has created a situation where solutions seem to be provided for on an *ad hoc* basis.

With reference to the comparable situation in East Timor for example, one author has stated that the United Nations Transitional Administration in East Timor in terms of accountability was essentially conceived as an act of good will for the benefit of local actors.[28] As a consequence, there were no formal or legal accountability mechanisms and the international organisations remained the sole and final arbiter regarding their policies and

[21] UNMIK/REG/2000/38 on the Establishment of the Ombudsperson in Kosovo, 30 June 2000 at section 4.3. (emphasis added)

[22] UNMIK/REG/2006/12 on the Establishment of the Human Rights Advisory Panel, 23 March 2006 at section 1. Below.

[23] The SRSG may only regulate 'within the areas of his responsibilities laid down by the Security Council in its Resolution 1244'. See Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, 12 July 1999, S/1999/779 at para. 35.

[24] As UNMIK/REG/2000/47, 18 August 2000 *itself* provides that 'KFOR personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General *insofar as* they do not conflict with the fulfilment of the mandate given to KFOR under Security Council resolution 1244 (1999)' (section 2.2, emphasis added). See John Cerone, 'Minding the Gap: Outlining KFOR Accountability in Post-Conflict Kosovo', (2001) 12 *European Journal of International Law* 469 at 473.

[25] See UNMIK/REG/2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, 30 June 2000 at section 3.4: 'In order to deal with cases involving the international security presence, the Ombudsperson may enter into an agreement with the Commander of the Kosovo Forces (COMKFOR)'. See also below as regards the Human Rights Advisory Panel.

[26] E.g. the message from the COMKFOR: '(…) it is our hallowed responsibility to support the process of justice with professionalism and an unfailing respect for human rights. This is our task, and I charge you all to remember it in everything you do.', to be found on http://www.nato.int/kfor/chronicle/2002/chronicle_14/01.htm.

[27] OSCE Mission in Kosovo, Review 1: The Criminal Justice System in Kosovo (February - July 2000) (hereinafter 'Review 1'), 10 August 2000, to be found on http://www.osce.org/documents/mik/2000/08/970_en.pdf at 19.

[28] Carsten Stahn, n. 14 above at 12.

legislation. It seems that with regard to UNMIK and KFOR much of the same criticism can be repeated.

3.1. Domestic Accountability Mechanisms

3.1.1. The issue of immunity

As stated above, the mandate of UNMIK and KFOR originates from Security Council Resolution 1244 (1999) which gave 'ultimate legislative and executive authority in Kosovo to UNMIK, of which the SRSG is the legally appointed head'.[29] Resolution 1244 (1999) delegated the power to grant and enhance immunities to the SRSG, who made use of it in his capacity of legislature, by issuing UNMIK Regulation 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo.[30]

This Regulation 2000/47 has granted broad immunities to both UNMIK and KFOR. With regard to UNMIK, it provides that:

'UNMIK, its property, funds and assets shall be immune from any legal process… UNMIK personnel, including locally recruited personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity.'[31]

This functional immunity covers both criminal and civil matters, and can only be waived by the SG in cases where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to the interest of UNMIK.[32] The SRSG himself and the four Deputy SRSGs were given absolute immunity.[33] Section 2.4 of the same Regulation granted KFOR absolute immunity from jurisdiction before courts in Kosovo for administrative, civil and criminal matters. The exclusive jurisdiction over such personnel was given to the respective sending state, and requests to waive jurisdiction over KFOR personnel have to be referred to the respective commander of the national element of such personnel for consideration.[34] Therefore any remedial action against KFOR personnel will depend on the goodwill of the sending state.

Such privileges and immunities make accountability of these actors very difficult and make it almost impossible for individuals to defend their rights against these governmental authorities.[35] As a consequence, this immunity regime has already been criticised by various actors for obvious reasons. First of all, privileges and immunities are traditionally granted to protect international organisations against unilateral interference by the government of the territory where they operate.[36] Such justification cannot apply to the territory of Kosovo, as it is the UN itself which is *de facto* the government; the only reason for immunities therefore

[29] Bernard Kouchner, Introduction to UNMIK, Official Gazette of the United Nations Interim Administration. Mission in Kosovo, Vol 1/1999, United Nations, Prishtina Official Gazette, Vol.1, p.1, cited in Miriam Cias, 'Justice Gaps in Kosovo's Legal System', Working Paper, to be found on http://www.ksg.harvard.edu/kokkalis/GSW4/CiasPAPER.PDF.
[30] UNMIK/REG/2000/47, 18 August 2000.
[31] Ibid, at section 3.
[32] Ibid, at section 6.1.
[33] Ibid, at section 3.2.
[34] Ibid, at section 6.2.
[35] Cfr. OSCE Mission in Kosovo, Review 1.
[36] See generally on the issue of immunities in international law Michael Singer, 'Jurisdictional Immunity of International Organisations: Human Rights and Functional Necessity Concerns, (1995) 36 *Virginia Journal of International Law* 53; P. H. F. Bekker, *The Legal Position of Intergovernmental Organisations, A Functional Necessity Analysis of their Legal Status and Immunities* (Dordrecht: Martinus Nijhoff, 1994); A. Reinisch, *International Organisations before National Courts* (Cambridge: Cambridge University Press, 2000).

would amount to protecting the UN from the UN itself.[37] From a democratisation point of view, these immunities neither make sense; while the UN is demanding from the Kosovarians to adapt to a system guided by democracy, the rule of law and human rights, it has placed itself above these principals. In the same effort, it has created a 'government' which is in no way accountable to 'its people'. One author even noted that such a system is reminiscent of the 'parallel worlds', Serbian and Albanian, under which Kosovarians lived before the NATO intervention, and where Albanians where 'second class citizens'.[38] A final commentary regarding these immunities is the fact that it undermines the independence of the judiciary and the necessary separation of powers,[39] and may violate the right to a remedy.[40] In April 2002, the OSCE recommended amending Regulation 2000/47 On the Status, Privileges, and Immunities of KFOR and UNMIK and their Personnel in Kosovo, to allow local courts to review and decide on administrative actions or decisions of UNMIK authorities.[41] It was suggested that the amendment of the Regulation would define regular acts taken by UNMIK in its capacity as local administrator and to allow local courts to review and decide on administrative actions or decisions of the UNMIK authorities. No such amendment has been made up until now, as a consequence of which Kosovo still lacks a meaningful system of judicial review with respect to decisions taken by UNMIK authorities.[42]

As a result of these privileges and immunities, no accountability exists before national courts. Such could be a violation of article 6 of the ECHR, which is fully applicable on the territory of Kosovo. And the right to an effective remedy as enshrined in article 13 of the ECHR, implies that there should be a remedy before a national authority in order to have the claim decided and, if appropriate, to obtain redress in cases where an individual has an arguable claim to be the victim of a violation of the rights set forth in the Convention. The authority referred to in article 13 does not need to be a judicial authority, but if it is not, the powers and the guarantees which it affords are relevant in determining whether the remedy before it is effective.[43] Therefore it will be investigated what actions can be taken against UNMIK and KFOR, taking into account the unavailability of domestic judicial proceedings.

3.1.2. Alternative accountability mechanisms

Notwithstanding the applicable immunity regime, Section 7 of UNMIK Regulation 2000/47 states:

'Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from "operational necessity" of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.'

[37] Or as the Ombudsperson formulated it: 'The rationale for classical grants of immunity, however, does not apply to the circumstances prevailing in Kosovo, where the interim civilian administration (United Nations Mission in Kosovo – UNMIK) in fact acts as a surrogate state. It follows that the underlying purpose of a grant of immunity does not apply as there is no need for a government to be protected against itself.' Ombudsperson Institution in Kosovo, Special Report No. 1 at para. 23.
[38] Miriam Cias, n. 29 above at 6.
[39] Cfr. Ombudsperson Institution in Kosovo, Special Report No. 1 at para. 24.
[40] Below.
[41] OSCE Mission in Kosovo, Review 4: The Criminal Justice System in Kosovo (September 2001 - February 2002), 29 April 2002, to be found on http://www.osce.org/documents/mik/2002/04/965_en.pdf at 43.
[42] OSCE Mission in Kosovo, Review 7: The Criminal Justice System 1999-2005. Reforms and residual Concerns, 31 March 2006, to be found on http://www.osce.org/documents/mik/2006/03/18579_en.pdf at 48.
[43] *Leander v Sweden* (1987), No. 9248/81, to be found on www.echr.coe.int at para. 77.

Therefore, individual claims for death, personal injury and the damage, destruction or expropriation of fixed and movable property can be made before 'Claims Commissions'.[44] Any claim clearly depends on the content of 'operational necessity'. As this content is not clearly defined, the possibilities for abuse are obvious; in any case, the term does not meet the requirements of lawfulness called for whenever limiting a European Convention Right.[45] The same section also dictates the establishment of Claims Commissions by KFOR and UNMIK, according to a procedure drawn up by them. Such Commissions have indeed been established.

One such Commission is the Detention Review Commission for Extra-Judicial Detentions based on Executive Orders,[46] which may review extra-judicial detentions based on executive orders by the SRSG. As however section 10 of Regulation 2001/18 stated that it would only remain in force for a period of three months, it is of limited interest. Nevertheless, although this remedy is no longer applicable, the SRSG's authority to issue executive orders to detain has not been expressly abolished and therefore the need for an appropriate remedy remains.[47]

Regarding KFOR, COMKFOR has promulgated Standard Operating Procedure 3023 for Claims in Kosovo (SOP) on 22 March 2003. The SOP is binding only on troops serving at HQ KFOR Main. The procedure provided for in Annex A makes clear that the Claims Office is responsible for investigating and adjudicating all claims against HQ KFOR. When the Claims Officer (CO) has collected all information required, he reviews the claim to determine whether it meets the requirements set out in Regulation 2000/47 at section 7 (in essence to determine subject matter jurisdiction). The individual must meet however some threshold requirements: 'To prove the claim the Claimant must prove on the balance of probabilities (51 per cent), each element, of a claim, namely did HQ KFOR owed [sic] a duty of care; was there a breach of this duty; did damage occur; and 'but for' the acts or omissions of HQ KFOR the damage occurred. If the act or omission was caused by "operational necessity," HQ KFOR is relieved of liability.' (Annex A Section 5).[48] Especially the term 'operational necessity' has been criticised, as being broader than 'military necessity' provided for in article 147 of the Fourth 1949 Geneva Convention, and as being disproportionate.[49]

If a claim is brought regarding the activities of one individual troop contributing nation, Section 6 applies, according to which each 'Troop Contributing Nation [TCN] is responsible for adjudicating claims that arise from their own activities, in accordance with their own claims rules, regulations and procedures.' The consequence is that there are as many procedures as there are nations. Moreover, as any decision is taken entirely internal to the KFOR contingent, it is clear that standards of impartiality or independence are not at all met with. The appeals procedure, created in Section 7 of the SOP, neither provides for a satisfying remedy, as it is 'a *non-binding* voluntary appeal system in which HQ KFOR Claims Office and those TCNs who wish, will participate in' (emphasis added).

A final comment should be made regarding the Institution of the Ombudsperson. Following the entry into force of Regulation 2006/6 on 16 February 2006, this Ombudsperson nowadays only has jurisdiction to receive and investigate complaints concerning acts and omissions of the Kosovo Institutions. As regards procedures for dealing with cases involving UNMIK, the Regulation merely states that the Ombudsperson 'may enter into a bilateral

[44] See also OSCE Mission in Kosovo, Remedies Catalogue, 2 September 2004, to be found on http://www.osce.org/documents/mik/2004/09/3457_en.pdf at 36.
[45] Cfr. Ombudsperson Institution in Kosovo, Special Report No. 1 at para. 43.
[46] UNMIK/REG/2001/18 on the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders, 25 August 2001 at section 4.1.
[47] See also OSCE Mission in Kosovo, Remedies Catalogue, 2 September 2004, to be found on http://www.osce.org/documents/mik/2004/09/3457_en.pdf at 16.
[48] Ibid. at 36-37.
[49] Cfr. Ombudsperson Institution in Kosovo, Special Report No. 1 at paras. 41-43.

agreement' with the SRSG.[50] Under its predecessor, Regulation 2000/38, the Ombudsperson was on the other hand able to examine complaints about UNMIK. Although it was an important step towards accountability and control, the Ombudsperson was not vested with broad powers. First of all, it lacked jurisdiction over KFOR. With regard to UNMIK, its mandate used to be quite broad, but was nevertheless deprived of any enforcing authority or possibility to make binding recommendations. The Institution was limited to investigate and mediate, publish its recommendations or draw the SRSG's attention to matters when they were ignored without any good reason.[51] Nevertheless, as one Albanian man described it to Ombudsperson Nowicki, 'since the time [that the Institution came] we do not feel alone anymore.'[52]

3.2. International Accountability Mechanisms: the European Court of Human Rights and/or the Human Rights Committee?

The internal possibilities for control thus seem to be very limited, and from a human rights perspective insufficient. What is felt to be missing is an institutionalised, regular and independent body of review, such as the European Court of Human Rights (hereinafter 'ECtHR'). The question arises though if Kosovarians can start proceedings before this Court for violations of their rights as contained in the ECHR.

Kosovo itself has no legal personality and is not – nor can it become at this time – a Party to the ECHR.[53] Yet articles 33 and 34 of the ECHR clearly stipulate that only applications directed against a Contracting Party to the ECHR can be submitted to the Court. According to Security Council Resolution 1244 (1999) however, all UN Member States regard Kosovo as a part of the FRY, now the State Union of Serbia and Montenegro.[54] The latter did ratify the ECHR in 2004, without making any territorial reservation with regard to Kosovo.[55] Nevertheless, this does not automatically entail the possibility for Kosovarians to file cases with the ECtHR. Although Serbia and Montenegro is a Party to the Convention, it does not exercise 'jurisdiction' over the Kosovarian territory within the meaning of article 1 ECHR (see Resolution 1244 (1999)). It is therefore in principle not possible to hold Serbia and Montenegro accountable for violations of human rights in Kosovo.[56]

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[50] UNMIK/REG/2006/6 on the Ombudsperson Institution in Kosovo, 16 February 2006, at sections 3 and 19.6 (see however also the transitional provisions in the same section).

[51] Moreover, the SRSG could remove the Ombudsperson from office at any time for 'failure in the execution of his or her functions', UNMIK/REG/2000/38, 30 June 2000 at sections 4.11 and 4.12 and section 8.1 (c).

[52] Defending Human Rights in Kosovo: Interview with Marek Antoni Nowicki, to be found on http://www.balkanalysis.com/modules.php?name=News&file=article&sid=510

[53] Iliriana Islami, 'The insufficiency of international legal personality of Kosova as attained through the European Court of Human Rights: a call for statehood', (2005) 80 *Chigaco Kent Law Review* 83 at 84.

[54] The exact status of these territories however will be decided after the referendum in Montenegro on 21 May 2006.

[55] See also European Commission for Democracy Trough Law, Opinion no. 280/2004 on Human Rights in Kosovo : Possible Establishment of Review Mechanisms ('Report of the Venice Commission'), 11 October 2004, CDL-AD(2004)033 at para.77.

[56] Ibid, at paras. 77 and 144. A reservation should be made however: it is possible to hold Serbia and Montenegro accountable for violations in Kosovo by its own state organs, e.g. by its parallel court system in Kosovo. See also Council of Europe Committee on Legal Affairs and Human Rights, Report on the Protection of Human Rights in Kosovo ('Report of the Legal Affairs and Human Rights Committee'), 6 January 2005, Doc. 10393 at paras. 16 to 18; Council of Europe Parliamentary Assembly, 25 January 2005, Resolution 1417 (2005) at para. 1. See also the advisory opinion of the ECtHR in appendix to Council of Europe Committee of Ministers, reply to recommendation 1691(2005), 13 September 2005, Doc. 10665.

UNMIK on the other hand, is as such neither a party to the ECHR. As the Venice Commission of the Council of Europe[57] considered in its report, one cannot assert that UNMIK is to be viewed as a 'care-taker' for Serbia and Montenegro. It is not possible to state that the ECtHR has jurisdiction over cases originating in this region for the reason that UNMIK would have assumed (or even succeeded in) the obligations of Serbia and Montenegro under the European Convention.[58] Hence no option exists for individuals to appeal to the ECtHR for possible violations of their rights by UNMIK. This nonetheless did not stop the European Roma Rights Centre from filling an application with the ECtHR on 26 February 2006, on behalf of Romani residents in northern Kosovo, against UNMIK as the acting government or 'state' in Kosovo.[59]

As far as KFOR is concerned, matters are more difficult. Not all acts of troops in the context of a NATO-led operation can simply be attributed either to NATO or to the state(s) that contributed the troops. Thus, when human rights are violated by KFOR troops, it first has to be determined whether the act should be attributed to NATO or to the country of origin of the troops. In the former case, once again no proceedings can be brought before the ECtHR since NATO is a separate international legal person, not a Party to the ECHR. In the latter case, however, there is an actual possibility to file a lawsuit with the European Court should the troops concerned belong to a state that is Party to the European Convention.[60] Indeed, the ECtHR has already accepted that in exceptional cases extra-territorial acts of Contracting Parties can be recognised as an exercise of jurisdiction within the meaning of article 1 ECHR for which they are accountable. For example, the responsibility of a Party can be engaged when it exercises all or some of the public powers normally exercised by a government, through the effective control over an area outside its national territory as a consequence of military action.[61] Nevertheless, determining if the acts in question are attributable to NATO or to one or more troop-contributing states will often be very difficult.[62] And even if it is possible, and the state concerned would be Party to the ECHR, the applicant would still first have to exhaust all the judicial remedies provided for in this foreign state. Only in a (very) limited number of cases does therefore a (theoretical) possibility exist to go to the Strasbourg Court.

Similar considerations can be made as regards the ICCPR and the possibility of lodging an appeal with the Human Rights Committee for alleged breaches of the Covenant in Kosovo. The State Union of Serbia and Montenegro did become Party to the ICCPR in 2001 but once more does not have the required jurisdiction over Kosovo. The Committee itself might have stated that this convention is fully applicable on Kosovarian territory,[63] no individual complaints can be brought before the Committee against UNMIK as it is not – nor can it become – a Party to the Covenant and its First Protocol. And as for KFOR, although one might contemplate the commencement of proceedings against a troop-contributing state

[57] The Venice Commission is the advisory body of the Council of Europe on constitutional matters.
[58] Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at para. 78. See also Report of the Legal Affairs and Human Rights Committee, 6 January 2005, Doc. 10393 at para. 33; Report submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the human rights situation since June 1999 – Kosovo (Serbia & Montenegro) (hereinafter 'UNMIK Report'), 15 February 2006, CCPR/C/UNK/1 at para. 124.
[59] See X., 'Victims of Kosovo Poisoning Bring Lawsuit at European Court of Human rights', to be found on www.errc.org/cikk.php?cikk=2519.
[60] Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at para. 79.
[61] See i.a. *Banković and others v Belgium and 16 other Contracting Parties* (2001), No. 52207/99, to be found on www.echr.coe.int, at paras. 67-71. See also Iliriana Islami, n. 53 above at 94.
[62] Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at para. 79 (especially footnote 26). Report of the Legal Affairs and Human Rights Committee, 6 January 2005, Doc. 10393 at paras. 33 and 35.
[63] Concluding Observations of the Human Rights Committee: Serbia and Montenegro, 12 August 2004, CCPR/CO/81/SEMO at para. 3.

on similar grounds as before the ECtHR, this would equally be an option in only a vast minority of cases.[64]

3.3. Human Rights Advisory Panel

Given these substandard circumstances in Kosovo, an active search had been going on for ways to improve this unsatisfactory situation. Thus the above-mentioned Venice Commission examined the option of extending the jurisdiction of the ECtHR in respect of UNMIK and/or KFOR. It also contemplated establishing a jurisdiction of the Court in parallel to the system of the Convention. UNMIK and/or KFOR could be obligated to respect the provisions of the ECHR through an agreement concluded between the Council of Europe and the UN and/or NATO. Such agreement could then assign jurisdiction to the Court concerning complaints against UNMIK and KFOR for violations of these provisions. In both cases however, the Commission concluded that various drastic steps would have to be taken, making both options as good as unrealisable. [65] In its opinion, the most appropriate way to act, was setting up a specific mechanism of independent review. It suggested establishing a special Human Rights Court for Kosovo, after the example of the Human Rights Chamber for Bosnia and Herzegovina, to examine cases lodged by individuals or by the Ombudsperson on their behalf regarding actions and omissions of the international authorities in Kosovo.[66] The Parliamentary Assembly of the Council of Europe shared this view and recommended in January 2005 that the Council commenced work, in co-operation with UN(MIK) and NATO/KFOR, towards the establishment of such a Human Rights Court.[67]

Pending the creation of this Human Rights Court – an undertaking that would obviously take some time – the Venice Commission advised to establish specific *interim* review mechanisms. With respect to KFOR, it suggested to create an advisory board to give COMKFOR counsel on the application of proper human rights standards by KFOR. The board should be competent to review all cases of detention by KFOR troops, and possibly even all allegations of serious violations of fundamental rights by those troops. The board should also be able to provide redress or compensation. As regards UNMIK, the Venice Commission found it appropriate to set up an advisory panel as a provisional short-term solution. This would examine complaints lodged by persons alleging that their fundamental rights and freedoms had been breached by acts, Regulations, decisions, etc. by UNMIK, but only in cases where the Ombudsperson would find human rights breaches. The Commission stipulated that the panel should have an advisory function, but UNMIK should nonetheless commit itself to accept its findings, apart from exceptional circumstances in which the SRSG personally determines that there are extraordinary reasons that make it impossible to do so.[68] These suggestions met with the consent of the Parliamentary Assembly of the Council of Europe. Concerned however that the latter panel for UNMIK would undermine the status and influence of the Ombudsperson Institution, the Rapporteur of the Legal Affairs and Human Rights Committee proposed to give this body a slightly different form as well as tasks that were distinct to those of the Ombudsperson. The Parliamentary Assembly consequently

[64] See i.a. S. Vité, 'Re-establishing the Rule of Law under Transitional Administration', in A. Bryden and H. Hänggi (eds.), *Security Governance in Post-conflict Peacebuilding* (Geneva: DCAF, 2005) at 192-193.

[65] Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at paras. 80-89. See also Report of the Legal Affairs and Human Rights Committee, 6 January 2005, Doc. 10393 at paras. 35 and 54-57.

[66] Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at paras. 101-112.

[67] See Council of Europe Parliamentary Assembly, 25 January 2005, Resolution 1417 (2005) at para 4; Council of Europe Parliamentary Assembly, 25 January 2005, Recommendation 1691 (2005) at para. 2. Interestingly, the Parliamentary Assembly at the same time recommended UNMIK and KFOR to co-operate with the Council on a study of possible *interim* extension of the jurisdiction of the ECtHR to all inhabitants of Kosovo.

[68] Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at paras. 114-133.

recommended creating a panel competent to address human rights issues *other* than individual complaints.[69] Subsequent discussions took place in 2005 between UNMIK and the Council of Europe. This finally resulted in the promulgation by the SRSG of Regulation 2006/12 on 23 March 2006, establishing a Human Rights Advisory Panel, which was *inter alia* based on the recommendations made by the Venice Commission. Since recent alterations were made to the duties and powers of the Ombudsperson, making it only competent for complaints concerning the Kosovo Institutions, this Panel will actually examine complaints from individuals or groups claiming that UNMIK has violated their rights. It shall have its seat in Pristina and it will consist of three members that are appointed by the SRSG upon proposal of the President of the ECtHR for a renewable period of two years. All members are to be international jurists of high moral character, impartiality and integrity with a demonstrated expertise in human rights. On the plus side, the setting up of this Panel will address the lack of jurisdiction of the ECtHR over UNMIK. Moreover, its mandate is not limited to breaches of the rights set forth in the ECHR and its Protocols, but the Panel can also assess violations of the rights contained in the ICCPR and other human rights instruments. Not only the complainant himself, but also a family-member, a NGO or a trade union may submit the complaint on behalf of the complainant. If the Panel has reliable information that a violation of human rights has occurred, it can even appoint an *ex officio* representative to submit a complaint and act on behalf of a suspected victim or victims. But then there are also downsides: the Panel will have no jurisdiction over KFOR, and what is more, its findings – which may include recommendations – are only of an advisory nature. The SRSG will have exclusive authority and discretion to decide whether to act on these findings, making it hard to speak of a full remedy. The envisaged Human Rights *Court* that can make binding decisions has not yet come to be. Moreover, the Panel in principle only has jurisdiction over complaints relating to violations that occurred after 23 April 2005.[70] The establishment of this much awaited organ is therefore an improvement, but does not solve all problems. On a more fundamental level, it furthermore remains to be seen what the future will bring for UNMIK and this Panel. Should the establishment of this last organ truly be regarded as a leap forward – the recognition at last that the human rights situation needed to be addressed? Or is UNMIK planning on leaving in the nearby future, hence making the creation of this Panel more or less a futile realisation?[71]

Another recent development, which was initiated by the Human Rights Committee, is also illustrative of this current evolution in which UNMIK is seemingly moving towards greater acceptance of international human rights norms and accountability for the implementation of such norms. The Committee requested UNMIK in July 2004 to submit a report on the human rights situation in Kosovo. In February 2006, UNMIK finally voluntarily presented this report. [72] At first sight this might not appear to be of great importance, but it is nevertheless a significant step towards improving the human rights situation in Kosovo. UNMIK now has to contemplate on human rights issues in Kosovo and its own impact thereon.

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[69] Council of Europe Parliamentary Assembly, 25 January 2005, Resolution 1417 (2005) at para 5 (as regards reforming/establishing the advisory board of KFOR, see para. 6); Council of Europe Parliamentary Assembly, 25 January 2005, Recommendation 1691 (2005), 25 at para. 2; Report of the Legal Affairs and Human Rights Committee, 6 January 2005, Doc. 10393 at paras. 39-47 (as regards KFOR, see paras. 19-22).

[70] The Panel does have jurisdiction over complaints relating to facts prior to 23 April 2005, *if* these facts give rise to a continuing violation of human rights. UNMIK/REG/2006/12, 23 March 2006 at sections 1, 2, 4, 5, 10 and 17.

[71] The Venice Commission interestingly added in its report that '[a]t the time when UNMIK and KFOR are replaced by other international institutions, the foregoing recommendation [regarding the establishment of a Human Rights Court] also applies, mutatis mutandis, to such other institutions.' Yet all the work would have to be done all over again. Report of the Venice Commission, 11 October 2004, CDL-AD(2004)033 at para. 111.

[72] UNMIK Report, 15 February 2006, CCPR/C/UNK/1.

4. Conclusion

Until now, granting immunity to international organisations has been considered as a cornerstone of international law. However, as the role of these organisations on the international scene alters and evolves, so also must one question if their immunities can remain untouched, especially when organisations take up tasks and functions of governments. If organisations such as UNMIK and KFOR start acting like a state, should they not obey the same principles and rules that apply to states and limit their action? As they are essentially given statelike powers, should they not bear the same responsibilities? When a state violates human rights, the affected individual can go to court and claim redress. Yet an equivalent protection does not exist when UNMIK or KFOR infringe upon fundamental rights of Kosovarians. As this paper has indicated, the internal appeal mechanisms set up by UNMIK and KFOR are insufficient, and the possibilities to start proceedings against these organisations before the ECtHR and the Human Rights Committee are as good as non-existing. The establishment of the Human Rights Advisory Panel is certainly a step in the good direction but one can still not speak of an ideal situation. This matter however cannot remain unsolved. As the Ombudsperson himself said, when stating that the general level of human rights protection is still far below international minimum standards and agreeing that a Human Rights Court is necessary, '[a]ll people in Kosovo must have guaranteed basic rights and freedoms that most other parts of Europe have long taken for granted'.[73] And in any case, since missions similar to those of UNMIK and KFOR in Kosovo may take place elsewhere in the future, it is of the utmost importance that the UN and NATO reflect in a fundamental manner on the issue of human rights and their enforceability *vis-à-vis* themselves.

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[73] M.A. Nowicki, statement to the Parliamentary Assembly of the Council of Europe, 25 January 2005, to be found on www.coe.int/T/E/Com/Files/PA-Sessions/janv-2005/20050125_disc_nowicki.asp.