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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

DRAFT OPINION

ON HUMAN RIGHTS IN KOSOVO :

POSSIBLE ESTABLISHMENT OF A REVIEW MECHANISM

On the basis of comments by

Mr Pieter Van DIJK (Member, the Netherlands)
Mr Jan HELGESEN (Member, Norway)
Mr Giorgio MALINVERNI (Member, Switzerland)
Mr Georg NOLTE (Substitute Member, Germany)
Mr Jean-Claude SCHOLSEM (Member, Belgium)

I. *Introduction*

1. By a letter dated 13 May 2004, Mr Eduard Lintner, Chairperson of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly, requested the Commission to prepare an opinion on " the human rights situation in Kosovo[1]".

2. The Committee in particular raised three issues on which it wished to dispose of the Commission's opinion:

- *What state or other entity is responsible under international law for the protection of human rights in Kosovo? In particular, does Serbia and Montenegro's ratification of the European Convention on Human Rights without any territorial declaration make it responsible for human rights protection also in Kosovo?*

- *Would it be possible to conclude some form of agreement between the Council of Europe and the international authorities in Kosovo placing them, along with the Provisional Institutions of Self-Government which are subsidiary to the international authorities, within the jurisdiction of the European Court of Human Rights? How would such a development fit with the Court's procedures and caseload? Would it create a remedy of genuine practical value? Would it be necessary for such an agreement to be tripartite, i.e. to include also Serbia and Montenegro as the state of whose sovereign territory Kosovo is a part?*

- *Instead of bringing the international and local, provisional authorities within the jurisdiction of the European Court of Human Rights, would it be preferable to establish some form of "human rights chamber", perhaps similar to that set up in Bosnia and Herzegovina? If so, how might such a body be constituted?*

3. A Working group, composed of Messrs Van Dijk, Helgesen, Malinverni, Nolte and Scholsem was set up.

4. Messrs Van Dijk, Helgesen and Malinverni held a preliminary exchange of views in Strasbourg, on 28 May 2004. Mr Nolte submitted his preliminary comments in writing (CDL-DI (2004)002).

5. A preliminary discussion on this matter was held within the Sub-commission on International Law on 17 June 2004.

6. Messrs Helgesen, Nolte and Scholsem visited Kosovo on 1-3 September 2004 . They met with the President of the Supreme Court of Kosovo, the Ombudsperson, the UNMIK Deputy SRSG for Police and Justice, the UNMIK Legal Adviser, the OSCE Director of Human Rights and the rule of law, the KFOR Chief Legal Adviser,as well as with representatives of the UNMIK Department of Justice and Office of Returns and Communities, of UNHCR, of UNHCHR and of UNICEF.

7. The working group held a meeting in Paris on 20 September 2004.

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[1] *Territory of Serbia and Montenegro, currently under the interim administration of UNMIK in accordance with the United Nations Security Council resolution 1244 (1999).*

8. The present opinion was discussed within the Sub-Commission on International Law on … and was subsequently adopted by the Commission at its … Plenary Session (Venice, …).

II. Background

9. Following the conflict in 1999, international civil and security presences were deployed in Kosovo, under United Nations auspices and with the agreement of the then Federal Republic of Yugoslavia, pursuant to Security Council's Resolution No. 1244(1999)[2].

10. The **United Nations Interim Mission in Kosovo (UNMIK)** was thus established, and empowered, in particular, with promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo; performing basic civilian administrative functions where and as long as required; organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities; facilitating a political process designed to determine Kosovo's future status; maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo; protecting and promoting human rights; and assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.

11. Four "pillars" were initially set up by UNMIK. Currently, the pillars are:

Pillar I: Police and Justice, under the direct leadership of the United Nations

Pillar II: Civil Administration, under the direct leadership of the United Nations

Pillar III: Democratisation and Institution Building, led by the Organization for Security and Co-operation in Europe (OSCE)

Pillar IV: Reconstruction and Economic Development, led by the European Union (EU)

12. The head of UNMIK is the Special Representative of the Secretary-General for Kosovo. As the most senior international civilian official in Kosovo, he presides over the work of the pillars and facilitates the political process designed to determine Kosovo's future status.

13. The **Kosovo Force (KFOR)** is a NATO-led international force responsible for establishing and maintaining security in Kosovo. It is mandated under Resolution 1244 to:

a. establish and maintain a secure environment in Kosovo, including public safety and order;
b. monitor, verify and when necessary, enforce compliance with the agreements that ended the conflict;
c. provide assistance to the UN Mission in Kosovo (UNMIK), including core civil functions until they are transferred to UNMIK.

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[2] *Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting, on 10 June 1999*

14. KFOR contingents are grouped into four multinational brigades. KFOR troops come from 35 NATO and non-NATO countries[3]. Although brigades are responsible for a specific area of operations, they all fall "under the unified command and control" (UN SC Resolution 1244, Annex 2, para. 4) of Commander KFOR from NATO. "Unified command and control" is a military term of art which only encompasses a limited form of transfer of power over troops. Troop contributing states have therefore not transferred "full command" over their troops. When States contribute troops to a NATO-led operation they usually transfer only the limited powers of "operational control" and/or "operational command". These powers give the NATO commander the right to give orders of an operational nature to the commanders of the respective national units. The national commanders must implement such orders on the basis of their own national authority. NATO commanders may not give other kinds of orders (e.g. those affecting the personal status of a soldier, including taking disciplinary measures) and NATO commanders, in principle, do not have the right to give orders to individual soldiers (except in certain special cases, such as when soldiers are seconded to Headquarters, or when they form part of special units such as the staff of NATO AWACS reconnaissance planes). In addition, troop contributing states always retain the power to withdraw their soldiers at any moment. The underlying reason for such a rather complex arrangement is the desire of states to preserve as much political responsibility and democratic control over their troops as is compatible with the requirements of military efficiency. This enables states to do the utmost for the safety of their soldiers, to preserve their discipline according to national custom and rules, to maintain constitutional accountability and, finally, to preserve the possibility to respond to demands from the national democratic process concerning the use of their soldiers.

15. Under Sections 2 and 3 of UNMIK Regulation no. 2000/47 of 18 August 2000, KFOR, KFOR personnel, UNMIK, and UNMIK personnel "shall be immune from any legal process".

16. The Constitutional Framework for Provisional Self-government in Kosovo (see CDL(2001)56) was established through UNMIK Resolution 2001/9[4]. It set up the **Provisional Institutions of Self-government**, which are: the Assembly; the President of Kosovo; the Government; the Courts; and Other bodies and institutions set forth in this Constitutional Framework. Their areas of competence are set forth in Chapter 5.1 of the Constitutional Framework. According to UN SC Resolution 1244 (paras. 10 and 11 (c)and (d)) UNMIK has the responsibility of "organizing and overseeing the development of provisional self-governing institutions" which means that they act under the authority of UNMIK.

17. The Provisional Institutions of Self-Government and their officials must "(a) Exercise their authorities consistent with the provisions of UNSCR 1244(1999) and the terms set forth in this Constitutional Framework; (b) Promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation; and (c) Promote and respect the principle of the division of powers between the legislature, the executive and the judiciary".

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[3] The NATO member-States participating in KFOR are: Belgium, Bulgaria, Canada, Czech Republic, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Lithuania, Luxembourg, Norway, Poland, Portugal, Romania, Slovakia, Slovenia, Spain, Turkey, United Kingdom and United States. The non-NATO participating countries are: Argentina, Armenia, Austria, Azerbaijan, Finland, Georgia, Ireland, Morocco, Sweden, Switzerland, Ukraine and United Arab Emirates.

[4] UNMIK/REG/2001/9 of 15 May 2001

18. The rights of Kosovo communities and their members are listed in Chapter 4 of the Constitutional Framework. The Provisional Institutions of Self-Government must ensure that all Communities and their members may exercise these rights, while the Special Representative of the Secretary General, based on his direct responsibilities under UNSCR 1244(1999) to protect and promote human rights and to support peace-building activities, retains the authority to intervene as necessary in the exercise of self-government for the purpose of protecting the rights of Communities and their members.

19. The **Ombudsperson** Institution, established by UNMIK Regulation Number 2000/38, is an independent institution which has the role of addressing disputes concerning alleged human rights violations or abuse of authority between the individual/group of individuals/legal entities and the Interim Civil Administration or any emerging central or local institution in Kosovo. He/she accepts complaints, initiates investigations and monitors the policies and laws adopted by the authorities to ensure that they respect human rights standards and the requirements of good governance.

III. The Human Rights Instruments Applicable in Kosovo

20. In his Report of July 12, 1999, which detailed the authority and competences of the UNMIK mission, the Secretary General of the United Nations interpreted UNMIK's obligation under Resolution 1244 to protect and promote human rights as requiring it to be guided by internationally recognized human rights standards as the basis for the exercise of its authority.

21. The first UNMIK Regulation[5] made domestic law applicable only in so far as it was compatible with human rights standards and required all persons undertaking public duties or holding public office to observe internationally recognized human rights standards in the course of their functions. Moreover, it mandated non-discrimination in the implementation of public duties and official functions.

22. Under Article 1.3 of the above Regulation, "in exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in:

The Universal Declaration on Human Rights of 10 December 1948;
The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;
The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto;
The International Covenant on Economic, Social and Cultural Rights of 16 December 1966;
The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;
The Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979;
The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment of 17 December 1984; and
The International Convention on the Rights of the Child of 20 December 1989."

[5] *UNMIK/REG/1999/1 (On the Authority of the Interim Administration in Kosovo), 25 July 1999, amended by UNMIK/REG/2000/54, 27 Sept. 2000.*

23. Under Chapter III of the Constitutional Framework, the following human rights instruments must be applied and ensured by the PISG:

The Universal Declaration on Human Rights;
The European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols;
The International Covenant on Civil and Political Rights and the Protocols thereto;
The Convention on the Elimination of All Forms of Racial Discrimination; [6]
The Convention on the Elimination of All Forms of Discrimination Against Women;
The Convention on the Rights of the Child;
The European Charter for Regional or Minority Languages; and
The Council of Europe's Framework Convention for the Protection of National Minorities.

IV. The Human Rights Situation in Kosovo: An Overview of the Main Issues

24. While a full and detailed analysis of the human rights situation in Kosovo is outside the scope of this opinion, the Commission views as necessary to carry out a summary review of the main human rights problems encountered in the region since the end of the 1999 conflict, before moving on to analyse possible ways of enhancing the level of protection of the fundamental rights of the people living in Kosovo.

25. In carrying out this analysis, the Commission has relied, *inter alia*, on the annual reports of the Ombudsperson institution in Kosovo (in particular the fourth annual report of 12 July 2004[7]), the Report of 16 October 2002 by the Council of Europe Commissioner for Human Rights[8] on "Kosovo: the Human Rights Situation and the Fate of Persons Displaced from their Homes", the reports by the OSCE Mission in Kosovo, the reports by the US Department of State and the reports by Amnesty International.

26. The main human rights issues which are currently being experienced in Kosovo are listed hereafter.

a. Lack of Security

27. The security of the non-Albanian communities in Kosovo (Serbs, Roma, Ashkali, Egyptian, Bosniak and Gorani communities) has been and is seriously and continuously threatened. Numerous incidents, including fatal ones, have occurred since 1999[9]. The same situation pertains as concerns Kosovo Albanians in the territories controlled by Kosovo Serbs (northern part of Kosovo, including Northern Mitrovica).

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[6] *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo, U.N. SCOR, 54th Session, U.N. Doc. S/1999/779 (1999)*

[7] *Available at http://www.ombudspersonkosovo.org.*

[8] *CommDH(2002)11, Kosovo: the human rights situation and the fate of persons displaced from their homes", available at http://www.coe.int/T/E/Commissioner_H.R/Communication_Unit.*

[9] *For a detailed account, see the Human Rights Report for 2003 for Serbia and Montenegro of the US Department of State.*

28. On 16-18 March 2004, Kosovo witnessed an eruption of ethnic violence against the non-Albanian communities and UNMIK. The response of the international community to these riots (commonly referred to as "the March events") was inadequate. KFOR, UNMIK Police and Kosovo Police Service (KPS) proved incapable of providing a co-ordinated response to the riots and of maintaining public order.

29. According to the OMIK, as a result of this violence, 19 persons died, 954 were injured and 4100 were displaced; 550 houses and 27 churches and monasteries were burned (with 182 houses damaged)[10]. The main victims of these attacks were members of the Serb, Ashkali, Roma and Egyptian communities.

b. Lack of Freedom of Movement

30. Applicable law provides for freedom of movement and no special documents are required for internal movement.

31. Nonetheless, on account of inter-ethnic tensions and security concerns, since the conflict in 1999 it has been extremely difficult for members of non-Albanian communities, in particular the Serbian and Roma communities, to move freely in Kosovo. In certain areas, Kosovo Serbs in particular have been confined to their places of residence, relying mostly on escorted transport for occasional visits to other places in Kosovo populated by minority ethnicities or to the administrative border with Serbia and Montenegro.

32. This situation affects the possibility of having access to basic public services, such as education, medical care, justice and public utilities. Access to working places is difficult and risky for the minority members, while many owners and/or users of agricultural land are prevented from working it.

33. The same situation pertains as concerns Kosovo Albanians in the territories controlled by Kosovo Serbs (northern part of Kosovo, including Northern Mitrovica). The Municipal and District Courts being placed in Northern Mitrovica, the courts' personnel and citizens of Albanian ethnicity have to be transported by armoured KFOR or Police vehicles to the courts.

34. While It is for KFOR and the police (KPS and UNMIK police) to secure freedom of movement in general, it is extremely difficult to control violent mob of different ethinicity.

c. Insufficient Protection of Property Rights

35. The 1999 conflict forced thousands of people to leave their homes and land. Many such houses, apartments, and business premises have been illegally occupied, farmland has been cultivated by unauthorised people and buildings have been constructed illegally on other people's land.

36. In November 1999, UNMIK created the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC), with the task of regularizing housing and property rights in Kosovo and of resolving disputes over residential property. Claims raised by

[10] *OSCE Mission in Kosovo (OMIK), "Human Rights Challenges following the March Riots", Report of 25 May 2004, www.osce.org/kosovo/documents/reports, Introduction, p. 4.*

persons who were the owners, possessors or occupancy right holders of residential real property prior to 24 March 1999 and who do not now enjoy possession of the property, and where the property has not voluntarily been transferred ("informal" property transactions, loss of possession through illegal occupation of houses of displaced families after the 1999 conflict), have been placed under the sole jurisdiction of the HPD. Ordinary courts remain competent over the remainder of the property cases.

37. By 1 July 2003 (deadline for submitting repossession claims), a total of 28,899 claims had been received (of these, 93,5% are repossession claims), and by 1 July 2004, a decision was issued in respect of 54% of these claims.

38. The enforcement of these decisions (which is normally an eviction) is also entrusted in the HPD. This process has proved to be rather slow, due to the limited capacities of HPD (insufficient staff to deal with cases, due to insufficient financial means). The execution of the decisions of the HPD is often delayed for security reasons. Indeed, only some 6,200 of the decisions issued by the HPD have been implemented In addition, once the premises are vacated, the HPD does not have a mechanism to secure them against re-squatting. According to OMIK Report "Property Rights in Kosovo 2002-2003"[11], 50% of the vacated premises were subsequently re-squatted, and 30% thereof were severely damaged as a result of the eviction.

39. The decisions by HPD are final and not subject to review by any judicial or other authority in Kosovo, besides the Ombudsperson, whose office recorded 54 complaints against the HPD (in the 2003-2004 reporting period), most of them involving the length of proceedings before the HPD, and the slow or ineffective enforcement of the HPD's decisions.

40. The main problem affecting property rights in Kosovo is the illegal occupation of residential and non-residential property. With proceedings before the HPD lasting up to four years, and without any effective remedy against the length of these proceedings and/or decisions on the merits by the HPD, there is a climate of impunity for property rights violations.

41. There is an increasing number of property disputes before the competent courts concerning disputes over the application of property laws. These proceedings, however, are extremely lengthy. In addition, there is confusion about what property laws and concepts to apply.

d. Lack of Investigation into Abductions and Serious Crimes

42. The fate of thousands of Albanians who went missing before and during the 1999 war[12] is still unclear. Progress in bringing to justice those responsible for the abduction of around 1,200 Serbs, Roma and other ethnic minorities members is extremely slow.

43. The lack of effective investigation into most serious murder cases is apparent and contributes significantly to the climate of impunity in Kosovo[13].

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[11] *Available on the OMIK web page*

[12] *According to the UNMIK Office of the Missing Persons and Forensics, the total number of missing persons is 3364 (2598 Albanians, 561 Serbs, 205 others). The third edition of the ICRC Book of Missing Persons in Kosovo (at www.icrc.org) contains 3,272 names of people who were reported missing to the ICRC directly by their close relatives and whose fate has still not been ascertained.*

[13] *For some examples, see Amnesty International, Report on "Serbia and Montenegro (Kosovo) – The legacy of past human rights abuses", www.amnesty.org, AI index: EUR 70/009/2004.*

e. Lack of Fairness and Excessive Length of Judicial Proceedings; Difficult Access to Courts

44. At present, Kosovo has 24 municipal courts and five district courts. The Kosovo Supreme Court is the last instance court, with jurisdiction over the courts of the PISG in the entire territory of Kosovo[14].

45. The judiciary is experiencing severe shortcomings and problems, including excessive length of proceedings, non-execution of decisions, inefficient criminal justice, coupled with frequent allegations of corruption, apparent undue interferences by the international and local executive and security risks in physical access to courts.

46. Municipal courts have witnessed a steady growth in their caseload and have proved incapable of processing cases within a reasonable time. Enforcement of the decisions is difficult and not prompt, mainly due to, in civil cases, the insufficient number of court bailiffs and the refusal by banks to allow seizures or freezing of bank accounts. Executions in respect of any former socially-owned property require the previous approval of the Kosovo Trust Agency, an administrative body. In criminal cases, non-execution is due to time-bar and insufficient capacity of prisons.

47. Several problems are reported as concerns criminal justice, varying from negligence and incompetence of individual judges to technical incapacity of supporting services, to suspected links with organised crime circles. Within the UNMIK Department of Justice, the Judicial Inspection Unit is entrusted with investigations into alleged misconduct of judges and prosecutors. If misconduct is found, the case is referred to the Kosovo Judicial and Prosecutorial Council for disciplinary proceedings. There have been more than 20 disciplinary proceedings completed so far, with imposed sanctions ranging form reprimand to dismissal. There seem to be some 70 investigations pending.

48. In addition, there existed and still exists in Kosovo a parallel court system, operating outside the UNMIK administrative structure and controlled by Serbia proper. Some of these parallel courts are located in Kosovo and others are located in Serbia proper but claim jurisdiction over Kosovo.

f. Detentions without Independent Review

49. KFOR has detained suspects on the basis of military decisions not subject to any independent review outside the chain of command and outside the administrative hierarchy.

50. According to the OMIK's Report on "The Criminal Justice System in Kosovo March 2002 – April 2003", KFOR detained up to a maximum of 200 people in summer 2001, and a cumulated total of 3563 people have been detained so far at the US KFOR Bondsteel Base.

51. The number of persons detained by KFOR with approval from UNMIK-P rose considerably after the riots of 17-18 March 2004. However, no one is currently being detained by KFOR.

[14] As regulated by the Law on Regular Courts („Official Gazette of the SAP Kosovo" Nos. 21/78, 49/79, 44/82, 44/84, 18/87, 14/88 and 2/89). There is also a system of minor offences courts in place, with municipal courts and the High Minor Offences Court as the second instance court.

g. Corruption

52. The allegations of corruption in different sectors of public life including the judiciary are widespread and severe[15]. According to public opinion surveys, Kosovars also feel that corruption is a major problem.

h. Human Trafficking

53. Kosovo continues to record high numbers of trafficked women for forced prostitution. Around 180 bars, cafes and motels where trafficked women and girls were suspected to work are enlisted by UNMIK in its "off-limits" list[16].

54. A special unit of the Police (the Trafficking and Prostitution Investigation Unit – TPIU) was formed within UNMIK CIVPOL to fight forced prostitution. In the first three years of its counter-trafficking police operations, assisted by local KPS officers, it rescued 300 trafficked victims and brought 140 charges against traffickers and other involved criminals[17]. However, trafficking for forced prostitution remains widespread, and cases of criminal prosecutions of actual victims are not rare, disclosing an inadequate response of the authorities to this issue[18].

i. Legal Certainty, Judicial Review and Right to an Effective Remedy for Human Rights Violations

55. The legal system of Kosovo is a complex mixture of SFRY legislation (laws passed until March 1989, and laws passed until 1999 if they are not discriminatory and do not contravene international human rights instruments applicable in Kosovo, and do not overlap with other laws in force), UNMIK Regulations, and Administrative Directions and Laws passed by the Kosovo Assembly. All laws passed by the Assembly or UNMIK regulations, as a rule, supersede all previous laws concerning the same matter, but therefrom does not always result a clear indication of which laws are superseded and which remain in force. In addition, there is still no official legal procedure regarding the publication of laws in Kosovo and there are often significant delays in providing the Albanian and Serbian translations of UNMIK regulations. As a result, there is a general confusion as to the legislation in force, described by the Ombudsperson as "legal chaos"[19].

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[15] *Report of the Ombudsperson, p. 7*

[16] *UNMIK Intranet, „Off-limits list", a list of premises that UNMIK staff is forbidden to access*

[17] *Since its creation in 2000, TPIU has carried out several thousand counter-trafficking operations, brought over 140 charges on trafficking in human beings, closed 83 premises, and created a database of 1,848 women and 510 men who were suspected of involvement in trafficking. During the year, TPIU conducted 2,047 raids or checks and assisted 70 victims of trafficking. At year's end, there were 200 establishments on UNMIK's list of off limits premises, with 70 percent of those in Prizren and Gnjilane, both close to the border with Macedonia and Albania (US Department of State, Human Rights Report for Serbia and Montenegro for 2003).*

[18] *Amnesty International report on "Serbia and Montenegro (Kosovo) – The legacy of past human rights abuses", www.amnesty.org, AI index: EUR 70/009/2004*

[19] *Report of the Ombudsman, p. 8.*

56. There is no Constitutional Court in Kosovo which could *inter alia* resolve conflicting decisions by lower courts. A Special Chamber of the Supreme Court for Constitutional Framework Matters is provided for in Chapter 9.4.11 of the Constitutional Framework. It would have competence to determine, *inter alia*, the "compatibility of laws adopted by the Assembly with the Constitutional Framework, including the international legal instruments specified in Chapter 3 on Human Rights, at the request of the President of Kosovo, any member of the Presidency of the Assembly, any Assembly Committee, no fewer than five members of the Assembly, or the Government". However, such special Chamber has so far not been established.

57. In respect of human rights specifically, there is no effective mechanism enabling individuals whose rights have been breached to initiate proceedings against the respondent authorities and to obtain just compensation.

58. According to the Ombudsperson, "UNMIK and KFOR have at least nominally recognised that individuals to whom they have caused injuries, damage to or loss of property should receive compensation, although neither has recognised the possibility of awarding damages. Both actors have established internal "claims offices". However, the nature of the proceedings of the UNMIK and KFOR bodies differs greatly. UNMIK provides no opportunity for individuals to be heard or represented by legal counsel in their proceedings and all decisions are taken by a panel of UNMIK staff members. The only appeal possible against this internal first instance decision is the sending of a "memorandum" to the UNMIK Director of Administration. In contrast, although first instance proceedings before KFOR call for a single KFOR officer to take a decision, the appeals process incorporates many elements of proper judicial proceedings, including an opportunity for individuals to be heard or legally represented. It remains impossible to obtain information from UNMIK about the status of pending claims or any statistical information about the number or type of claims resolved. It appears that even claims regarding which UNMIK has been found liable remain pending indefinitely, as the UN has apparently allocated no portion of its budget for the payment of such claims. KFOR, on the other hand, provides such information and has provided financial compensation in a number of cases. However, in spite of the good faith efforts of KFOR to resolve claims against them, the system still has some shortcomings. First and foremost amongst these shortcomings is the limitation of the system to claims against KFOR Headquarters in Prishtine/Pristina. Individual KFOR contingents can choose to be subject to the jurisdiction of the KFOR claims commission, but there is neither any obligation nor any general public pressure that contingents should accept this jurisdiction. Therefore, individuals wishing to ask for compensation or damages from country contingents may not be able to do so through the limited claims system established by KFOR within Kosovo."[20]

59. There is very little general knowledge, on the part of both the PISG authorities and the public, of human rights standards.

60. There is no independent review of acts by UNMIK and KFOR. Both UNMIK and KFOR enjoy immunity from legal process (see paras. 61-68 below). However, there exist UNMIK internal disciplinary proceedings but no possibility to issue criminal proceedings against

[20] *See the Ombudsperson's Third Annual Report (2002-2003).*

UNMIK personnel. Criminal proceedings in respect of KFOR personnel in their respective sending states remain possible[21].

V. Immunity of the International Presence

61. Under Sections 2 and 3 of UNMIK Regulation no. 2000/47 of 18 August 2000, KFOR, KFOR personnel, UNMIK, and UNMIK personnel "shall be immune from any legal process". For two reasons, this rule is relevant for the present opinion: It is a limit for reform proposals, but it is also itself a human rights concern.

62. The immunity of UNMIK and KFOR (and their personnel) is a limit for reform proposals. It is an expression of a rule which is generally agreed upon and according to which international organisations enjoy immunity from legal process by courts of member states and other international institutions. The purpose of this rule is to ensure that international organisations can perform their tasks without undue and uncoordinated interference by courts from individual states and other international institutions with their respective different legal systems. Therefore, it is with good reason that international organisations and their organs, such as the UN and UNMIK (and their personnel) or NATO and KFOR (and their personnel), are not subjected to legal processes in member states and before other international institutions.

63. Immunity of international organisations does not, however, express the judgment that everything which an international organisation does can be presumed to be legal and well-founded. This can also be inferred from Section 6.1 of the same UNMIK Regulation no. 2000/47 of 18 August 2000 which provides that the immunity "is in the interests of KFOR and UNMIK and not for the benefit of the individuals themselves. The Secretary- General shall have the right and the duty to waive immunity of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice and can be waived without prejudice to UNMIK". Section 6.2 of the Regulation provides that "requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration".

64. Both the general purpose of the immunity of international organisations as well as UNMIK Regulation no. 2000/47 of 18 August 2000 itself make it clear that immunity does not exclude the establishment of independent legal review mechanisms which are legally an integral part of the international organisation itself (this is the case, for example, of the Administrative Tribunal of the United Nations) or which are established by way of a treaty to which the international organisation concerned is party and for which it possesses a treaty-making power.

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[21] *US Department of State, Human Rights Report for Yugoslavia, Part VI, (web bannet.org): "In January [2000] authorities accused a KFOR soldier, Sergeant Frank Ronghi, of raping and killing a 12-year old Albanian girl. A military tribunal subsequently convicted Ronghi and sentenced him to life in prison."*

US Department of State, 2003 Report on Human Rights in Serbia and Montenegro: "On October 7, a former CIVPOL officer, Martin Almer, was sentenced to 3 years in prison, and two former KPS officers, Feriz Thaqi and Isa Olluri, were sentenced to 6 months in prison for causing minor injuries, forcing Gezim Curri from Gjakova to give a false statement, and for physical abuse. Almer returned to his home country immediately after the incident in February 2002 and was later sentenced in absentia."

On 8 April 2004, two Kosovo Albanians won a case for negligence and trespass to the person against the Ministry of Defence before a British Court. They had been injured by British Marines on active military service in Kosovo in July 1999 (Bici case).

65. In the following (see paras. 98-135 below) the Commission proposes the establishment of two human rights mechanisms for Kosovo, one as a most immediate solution and the other one to be realised in the longer term. The short-term solution is limited to establishing an independent review mechanism which is internal to the respective international organisation (and also merely advisory). It therefore does not raise a problem with respect to immunity.

66. The longer-term solution presupposes that UN/UNMIK and NATO/KFOR possess a treaty-making power with respect to the setting up of a Human Rights Chamber for Kosovo. Such a treaty-making power can be presumed to exist, at least as far as it does not hinder the respective international organisation to effectively perform its functions. Since UNMIK and KFOR are administering a territory to an extent which is comparable to that of a state and since a state must, in principle, grant access to courts (Article 6 ECHR) and provide effective remedies (see Article 13 ECHR), it is hard to see why the establishment of a mechanism which provides for an effective legal remedy should hinder the respective international organisations to perform their tasks.

67. On the contrary, it would seem to raise a human rights problem if an international organisation which administers a territory would not be able to set up an independent human rights mechanism, including by way of treaty. This is because, as the European Court of Human Rights has recognised in the case of *Al-Adsani v. United Kingdom* [22](paras. 52-67), (state) immunity is an implicit restriction of the right to access to a court (Article 6 ECHR). Therefore, such a restriction is only acceptable as far as it is necessary to achieve the purpose of the rule of immunity. Indeed, it would not seem possible to say that the setting up of a Human Rights Chamber as such would hinder UNMIK or KFOR and their personnel to perform their respective tasks. This could only be true if the proposed human rights mechanism would not, in some of its specific aspects, sufficiently take the particular tasks of those international institutions into account.

68. It follows that the establishment of a human rights mechanism for Kosovo is not excluded *a limine* by the rule of immunity "from any legal process".

VI. The Human Rights Situation in Kosovo: Proposals as to Possible Institutional Solutions

69. The Venice Commission has been requested by the Parliamentary Assembly to look into the human rights situation in Kosovo, with a view to designing a mechanism or mechanisms allowing for adequate remedies in respect of alleged breaches of human rights.

70. One should not underestimate the complexity of the problems Kosovo is facing today. A meaningful and effective protection of the human rights and freedoms of the people in Kosovo is only one facet of these problems. The procedural side of it is, again, only one element of this facet. The Commission is thus fully cognizant that its mandate concerns only a very limited aspect of the issues raised by the need to protect human rights in Kosovo. The Commission considers nevertheless that an adequate solution to this aspect of the problem could improve the

[22] Al-Adsani v. the United Kingdom [GC], no. 35763/97, ECHR 2001 XI

situation of the Kosovo people. In its analysis of this matter, the Commission will therefore be guided by the will to provide pragmatic proposals on how to respond to the human rights challenge in Kosovo.

71. Many of the problems in Kosovo do not call for a merely legal response and therefore fall outside of the scope of the present opinion. The Commission wishes to underline in this context that the OSCE Mission in Kosovo, Department of Human Rights and the Rule of Law, for example, is addressing these issues in an excellent and efficient manner. The compilation of a "Remedies catalogue" and the setting up of a network of human rights experts within each municipality are only the latest examples of their commendable initiatives.

72. A general and important problem which does fall within the scope of the Commission's mandate is the current lack of an adequate and consistent mechanism for the examination of alleged human rights breaches by the two "institutional" sources of potential human rights violations in Kosovo – UNMIK (as well as the Provisional Institutions of Self-Government, which act under the supervision of UNMIK) and KFOR.

A. International Review Mechanisms with Respect to Acts of UNMIK and KFOR

There is no *international* mechanism of review with respect to acts of UNMIK and KFOR.

a) Extension of the Jurisdiction of the European Court of Human Rights in Respect of the International Organisations in Kosovo?

73. In the 45 European States which are members of the Council of Europe, an international mechanism is principally provided by the European Convention on Human Rights (hereinafter "the ECHR or the Convention") and the other main Council of Europe treaties and consists of the jurisdiction of the European Court of Human Rights over alleged breaches of that Convention by any State which has ratified it, as well as of the supervisory mechanisms set up by the other Treaties..

74. According to UN SC Resolution 1244, all UN Member States are committed "to the sovereignty and territorial integrity of the Federal Republic of Yugoslavia" and they regard Kosovo as being part of the Federal Republic of Yugoslavia, now the State Union of Serbia and Montenegro. Serbia and Montenegro has ratified the European Convention on Human Rights on 3 March 2004, without any territorial reservation in respect of Kosovo. Nevertheless, by virtue of Resolution 1244, Serbia and Montenegro does not**,** as a general rule, exercise "jurisdiction" within the meaning of Article 1 ECHR over Kosovo and cannot therefore be held accountable for human rights violations stemming from acts or omissions which are outside of its control. Serbia and Montenegro remains of course accountable for any possible such violations committed in Kosovo or in respect of Kosovo people *by its own state organs* (which in the Commission's view may include a parallel court system[23]).

75. Applications for alleged human rights breaches resulting from actions or failures to act by UNMIK do not generally come within the jurisdiction of the European Court of Human Rights.

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[23] *See OSCE Mission in Kosovo/Department of Human Rights and Rule of Law, Parallel structures in Kosovo, october 2003.*

76. As to applications for alleged human rights breaches resulting from actions or failures to act by KFOR troops, the matter is very complex[24]. KFOR, unlike UNMIK, is not a UN peace-keeping mission. Therefore, although KFOR derives its mandate from UN SC Resolution 1244, it is not a subsidiary organ of the United Nations. Its acts are not attributed in international law to the United Nations as an international legal person. This includes possible human rights violations by KFOR troops. It is more difficult to determine whether acts of KFOR troops should be attributed to the international legal person NATO (in which case the jurisdiction of the ECHR could not be established against the impugned act) or whether they must be attributed to their country of origin (which means that the jurisdiction of the ECHR could be established if the state whose troops acted is a member of the Council of Europe). Not all acts by KFOR troops which happen in the course of an operation "under the unified command and control" (UN SC Resolution 1244, Annex 2, para. 4) of a NATO Commander must be attributed in international law to NATO but they can also be attributed to their country of origin (see paras. 13-14 above). Thus, acts by troops in the context of a NATO-led operation cannot simply all be attributed either to NATO or to the individual troop-contributing states[25]. There may even be difficult intermediate cases, such as when soldiers are acting on the specific orders of their national commanders which are, however, themselves partly in execution of directives issued by the KFOR commander and partly within the exercise of their remaining scope of discretion.

77. The idea of extending the jurisdiction of the European Court of Human Rights in respect of UNMIK and KFOR has been proposed. The possibility of an agreement to this end between the Council of Europe and the UN or UNMIK is being studied.

78. Such an option raises a number of questions. In the first place, the United Nations, a world-wide organization, would have to agree to becoming subject to the jurisdiction of the European Court, i.e. a regional body, while there exist specific mechanisms of supervision by the Human Rights Committee [26] and the other UN Treaty Bodies.

79. Even assuming that the United Nations wished to subject itself to the jurisdiction of the Strasbourg Court, the rather complex question of whether a treaty concluded by the United Nations and/or NATO is capable of conferring jurisdiction *ratione personae* on the Court would

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[24] It must be recognized that the question of the exact attribution of legal responsibility for acts of multinational troops, such as KFOR, within their sphere of operation has not yet been fully explored and judicially resolved. An application raising this question is currently pending before the European Court of Human Rights (No. 71412/01, Behrami v. France).

[25] It is clear, for example, that if the KFOR Commander orders different national contingents to establish a certain number of roadblocks at certain locations this measure, in itself, must be attributed to NATO. This is because the individual troop-contributing states do not have a possibility to influence such a decision by the KFOR Commander, except perhaps by expressly prohibiting their soldiers to follow the order of the KFOR commander. Therefore, should the roadblocks have been ordered for no valid reason and, as such, have caused foreseeable damage, any such damage would have to be borne by NATO and not by the state whose soldiers happened to maintain one particular roadblock. If, on the other hand, a person who happens to be searched at one of the roadblocks is mistreated by one the soldiers, it is, in principle, more plausible to attribute this act to the state of origin of the misbehaving soldiers because in the situation they acted under the supervision and the responsibility of their national commander. In such a situation it is conceivable that jurisdiction of the ECHR is ultimately esablished after an exhaustion of the judicial remedies provided in the state of the country of origin of the KFOR troops in question.

[26] Serbia and Montenegro ratified the Optional Protocol to the Covenant on Civil and Political Rights on 6 December 2001. The Commission was informed that the Human Rights Committee has recently requested UNMIK to provide a report on the situation in Kosovo.

still need to be addressed. Articles 33 and 34 of the ECHR provide that applications can only be submitted to the Court if they are directed against a State which is a contracting party to the ECHR. Quite apart from the fact that neither the United Nations (or UNMIK) nor NATO can be regarded as States, the fact of becoming parties to an agreement with the Council of Europe in connection with the ECHR will not make them parties to the ECHR itself. The latter prospect is already precluded by the fact that under Article 59 the ECHR is only open to signature by member States of the Council of Europe, and that according to Article 4 of the Statute of the Council of Europe, only European states can be members of the Council of Europe. Indeed, the preambles to the two recent agreements concluded between UNMIK and the Council of Europe relating to two other Council of Europe Conventions, the Anti-Torture Convention and the Framework Convention respectively, explicitly stipulate that the implementation of these texts will not result in UNMIK becoming a party to the two conventions in question.

80. Obviously, an agreement between the United Nations and the Council of Europe could very well result in UNMIK and the Special Representative of the Secretary General undertaking to ensure that they, and the provisional self-governing institutions operating under their authority, will respect the rights and freedoms laid down in the ECHR and its additional protocols, and in so doing to have regard to the case-law of the Court. Thus, for instance, Article 1 of the agreement concerning the Framework Convention reads as follows: "UNMIK affirms on behalf of itself and the Provisional Institutions of Self-Government that their respective responsibilities will be exercised in compliance with the principles contained in the Framework Convention". This gives concrete expression to the content of Article 3.2 of Chapter 3 of the Constitutional Framework for Provisional Self-Government and various UNMIK regulations, albeit in an area slightly less relevant to the ECHR. However, this still does not empower the Court to receive complaints directed against UNMIK and the provisional self-governing institutions.

81. The issue of jurisdiction *ratione personae* of the Court in relation to Kosovo is a very difficult one to be solved. Even if the United Nations, NATO and the non-European NATO member States would undertake the obligation to execute the Court's judgments, the question remains whether the Court would have jurisdiction to pronounce any judgment vis-à-vis these organisations and States. Under the ECHR system, this would require them to accede to the Convention, which would in turn necessitate a modification of the ECHR as well as of the Statute of the Council of Europe, as would indeed be the case in the event of accession by the European Union or the European Community. Such a drastic measure is presumably unsuited to dealing with what must be regarded as a transitional problem of limited duration.

82. For the aforementioned other two Council of Europe conventions in the human rights field, with respect to which agreements were signed recently, the matter was less problematical. The Committee of Ministers itself is responsible for monitoring implementation of the Framework Convention, assisted by an Advisory Committee operating under its authority[27]. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment which is responsible for monitoring implementation of the Anti-Torture Convention, also operates under the supervision of the Committee of Ministers, to which it submits an annual report[28]. Furthermore, the Framework Convention is also open to signature by States other than Council of Europe member States (although exclusively by States)[29]. It also expressly provides

[27] *See Article 26 of the Framework Convention.*

[28] *See Article 12 of the Anti-Torture Convention.*

[29] *Article 24 (1) of the Framework Convention.*

for the possibility of Council of Europe non-member States participating in the supervisory mechanism[30].

83. The conclusion, therefore, is that in order to establish jurisdiction *ratione personae* for the Court, the Convention would have to be amended. Proceeding to such amendment would indeed require a considerable amount of time and political will. It may be true that a similar construction has already been envisaged and studied with a view to allowing the European Communities to accede to the Convention. Even assuming that there were the necessary political will, however, ratification by all States would require a very significant amount of time.

84. The Commission considers that the possibility of the United Nations acceding to the Convention in respect of the administration of Kosovo should be pursued as an objective to be achieved in the long term, especially for reasons of principle : it is certainly unwarranted to leave the population of a territory in Europe without access to the Strasboug Court.

85. In order to avoid the complications of a (temporary) adaptation of the ECHR by an amending protocol, one could consider to establish a system for the Court's jurisdiction *in parallel to* the actual ECHR system. This would involve that the Council of Europe, with the consent of all member States (including Serbia and Montenegro), conclude an agreement with the United Nations and possibly also with NATO and those NATO States which are not Council of Europe members. Such an agreement could then lay down the obligation for UNMIK and the interim administration, and possibly also KFOR, to comply with the substantive provisions of the ECHR and its Protocols, and could also stipulate that jurisdiction be assigned to the Court concerning any complaint against UNMIK and the interim Administration, and possibly also KFOR for not complying with these provisions. If KFOR were to be included, those countries participating in the operation which are not members of the Council of Europe would need to consent to the Court's jurisdiction. Such an agreement might also regulate such matters as the composition of the Court when acting under the agreement - or even the setting up of a special section of the Court for this purpose -, the way the rule on prior exhaustion of domestic remedies should be applied, waivers of the immunity with respect to UNMIK and KFOR staff, etc. It goes without saying that the Court would also have to give its explicit consent to such an extension of its jurisdiction.

86. However, even the conclusion of an agreement as described above would take a long time to achieve, if the parties concerned managed to agree on it at all. Furthermore, it would also probably take a long time for the Court to reach its first decision on an application against UNMIK or the interim administration, or possibly against KFOR. There is also the question whether the judicial infrastructure in Kosovo is sufficiently developed to offer the prospect of adequate domestic judicial procedures prior to the procedure before the Court. After all, the Court is not intended to function as the one and only judicial instance within any given State, but rather as an organ to judge on the compatibility with the ECHR of the outcome of domestic procedures, including decisions of domestic courts. This is why a temporary alternative might still be needed, which would be more tailored to the current situation and needs in Kosovo and capable of providing a reasonable chance of a speedy and effective result.

87. The Commission therefore finds that, today, it would be more appropriate to focus on the setting up of *specific* mechanisms of independent review of UNMIK acts and regulations and of

[30] *See Article 24 (2) of the Framework Convention.*

KFOR acts, rather than focusing on the establishment of jurisdiction by the European Court of Human Rights.

B. Specific Mechanisms

88. It is worth underlining at the outset that the main obstacle to setting up a mechanism of review of UNMIK and KFOR is their character as international organisations (see below V.). Such character prevents ordinary courts in Kosovo from exercising such a review. Nevertheless, it must be recalled that in Kosovo UNMIK and KFOR carry out tasks which are certainly more similar to those of a State administration that those of an international organisation proper. It is unconceivable and incompatible with the principles of democracy, the rule of law and respect for human rights that they could act as State authorities and be exempted from any independent legal review. Yet, due consideration must be given to their legal nature.

a) The Existing Situation

89. It might be argued that there is no need for supervision of acts by UNMIK, as UNMIK is fully committed to respecting human rights. The Commission considers however that the fullest commitment can not rule out the possibility of making mistakes. Review of UNMIK acts thus remains necessary.

90. First of all, the legal basis of UNMIK's commitment is incomplete. This is so even though UNMIK's obligation under Resolution 1244 to "protect and promote human rights" requires it to be guided by internationally recognized human rights standards as the basis for the exercise of its authority[31], and irrespective of the fact that the first UNMIK Regulation[32] made domestic law applicable only in so far as it was compatible with human rights standards and required all persons undertaking public duties or holding public office to observe internationally recognized human rights standards in the course of their functions, and it mandated non-discrimination in the implementation of public duties and official functions.

91. Moreover, even though UNMIK *regulations* are inspired by human rights standards and designed to respect them, this does not rule out the possibility that in practice a regulation may breach individual rights. The need for an effective and independent remedy in such cases therefore remains, irrespective of the undoubtedly high quality of the internal mechanisms of control of human rights compatibility.

92. Most importantly, although UNMIK or KFOR *acts* are generally deemed to be respectful of those standards, there have been numerous occasions on which the Ombudsperson – the only existing body which has competence to address human rights issues in respect of UNMIK - has noted that they were not. In this context, the Commission wishes to underline that while it was reasonable to expect and accept that UNMIK's of KFOR's accountability was limited in the initial phases of the interim administration, such accountability has nowadays, in the Commission's opinion, become essential.

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[31] *See the Report of the UN Secretary General of 12 July 1999.*

[32] *UNMIK/REG/1999/1 (On the Authority of the Interim Administration in Kosovo), 25 July 1999, amended by UNMIK/REG/2000/54, 27 Sept. 2000.*

93. In the Commission's opinion, it is therefore important that a system of independent review of UNMIK and KFOR acts for conformity with international human rights standards be established as a matter of urgency.

94. The Commission notes that currently there exists a "Human Rights Oversight Committee" (HROC), which was set up in June 2002 and charged with "considering and agreeing on actions and policies to enhance human rights protection in Kosovo and ensuring that the actions and policies of all UNMIK Pillars and Offices are in compliance with international human rights standards" and "to make recommendations to the SRSG."

95. The scope for consideration and action by the Committee includes systematic problems affecting human rights protection in Kosovo that need resolution; draft regulations, administrative directions, instructions, orders and other legislative, executive or administrative documents to ensure conformity with international human rights standards; individual cases of high importance that have not been resolved at a lower level; and response to criticisms of UNMIK's human rights records by other organisations.

96. The HROC is composed of the Principal Deputy SRSG, the Heads of the four Pillars, the Legal Adviser, the Director of UNMIK of Public Affairs, the Director of UNMIK Office of Returns and Communities, the Head of Office of the UN High Commissioner on Human Rights, the Chief of UNMIK Office of Gender Affairs, the Deputy Commander of KFOR (Observer) and the Department of Human Rights and Rule of Law of OMiK. The deliberations of the Committee are confidential and may not be the subject of public reporting. Draft UNMIK legislation and other documents identified as sensitive may not be published in internal or external reporting or used for purposes outside of the scope of the responsibilities of the Committee.

97. On account of its composition this Committee does not represent an *independent* review body. In addition, while this body is in principle useful as a means of streamlining human rights in policy development, in the light of its informal and non-public working methods the Commission does not view it as a sufficient or satisfactory review mechanism.

b) Establishment of a Human Rights Chamber for Kosovo

98. The Legal Affairs Committee of the Parliamentary Assembly has mentioned the idea of establishing a local human rights chamber, perhaps similar to the Human Rights Chamber for Bosnia and Herzegovina.

99. The latter Chamber was set up by virtue of Annex 6 to the Dayton Agreements of 14 December 1995[33] as one of the two components, alongside the Ombudsperson, of the Human Rights Commission for Bosnia and Herzegovina. The Chamber had 14 members, 4 of whom were appointed by the Federation of Bosnia and Herzegovina, 2 by the Republika Srpska and 8 by the Committee of Ministers of the Council of Europe, which meant that the membership was half international. The Committee of Ministers made its appointments on the basis of Resolution 93 (6) of 9 March 1993, Article 1 of which provides that the Committee, at the request of a European State that is not yet a member of the Council of Europe, can designate

[33] *Published in Human Rights Law Journal 18, nos. 5-8 (1997), pp. 310 ff.*

individuals to sit in a court or on another body responsible for monitoring respect for human rights as established by the State within its judicial system[34].

100. This Chamber had jurisdiction to consider complaints about violations of the ECHR and its Protocols, including discrimination in the enjoyment of rights and freedoms under fifteen other human rights treaties. Applications could be submitted by the Ombudsperson, any natural or legal person or group of persons, and either one of the entities (the Federation of Bosnia and Herzegovina and the Republika Srpska) against either of the entities or against the State itself. The judgments of the Chamber were binding and irrevocable, and could also provide for friendly settlements of disputes[35].

101. An agreement could similarly be concluded between the United Nations (UNMIK) and possibly NATO (including NATO member States), on the one hand, and the Council of Europe on the other, on the setting up of a provisional *ad hoc* court to deal with complaints about violations of the ECHR and its Protocols by UNMIK, the Provisional Institutions of Self-Government and possibly NATO (including NATO member States), also stipulating that the *ad hoc* court should base its procedures and case-law on those of the European Court. If such an *ad hoc* court is to wield sufficient national and international authority, it must also have a mixed, mainly international membership, with a minority of the candidates (e.g. 4) being nominated half by the Albanian community and half by the Serbian and other national minorities, and the majority (e.g. 5) by the Committee of Ministers of the Council of Europe, by an instrument analogous to Resolution (93) 6. The nomination for one of the latter five judges should be effected in agreement with the Special Representative of the Secretary General, similarly to the "*juge national"* in the European Court. The judges could be appointed by the European Court or its President, in order to indicate that the *ad hoc* court is a kind of predecessor to the European Court guided by the latter's case-law.

102. Unlike the Human Rights Chamber for Bosnia and Herzegovina, the *ad hoc* court for Kosovo should be empowered to accept applications lodged either by individuals or by the Ombudsperson on their behalf concerning actions and omissions by the *international* authorities in Kosovo (when reviewing acts or omissions by UNMIK, the Chamber would have to sit in an exclusively international composition) and the agreement should therefore comprise a specific provision concerning the waiving of the immunity of the Special Representative and UNMIK personnel, and possibly also that of NATO. It would be a new phenomenon for a (quasi-) international court to hold jurisdiction over an international organisation to which it does not belong. However, the situation would be the same if the European Court were granted jurisdiction over UNMIK, or possibly KFOR, or for that matter if the European Union or European Community were to accede to the ECHR.

103. If KFOR is also included in the agreement, or else in a separate instrument, any States which are not Council of Europe members would also need to be involved.

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[34] *See Resolution 96 (8) of 12 March 1996.*

[35] *For further information see R. Aybay, "A New Institution in the Field: the Human Rights Chamber of Bosnia and Herzegovina", Netherlands Quarterly of Human Rights 15 (1997) pp. 529-545; M. Nowak, "The Human Rights Chamber for Bosnia and Herzegovina adopts its First Judgments", Human Rights Law Journal 18 (1997), pp. 174-178; M. Semith Gemalmaz, "Constitution, Ombudsperson and Human Rights Chamber in Bosnia and Herzegovina", Netherlands Quarterly of Human Rights 17 (1999), pp. 291-329.*

104. The setting up and operation of such an *ad hoc* court will obviously encounter difficulties. However, such obstacles would be less formidable and could be sooner overcome than if the European Court itself were assigned jurisdiction, subject to the agreement of all States party to the ECHR.

105. Obviously, creating a special court would be more expensive than extending the European Court's jurisdiction. This additional cost would have to be covered as part of the implementation of Security Council Resolution 1244 (1999) regarding Kosovo. Experience with the special Human Rights Chamber for Bosnia and Herzegovina shows that all the parties involved have to be committed to the creation of the *ad hoc* court, including to guaranteeing a sound financial basis[36].

106. The Commission views the setting up of a Human Rights Chamber as an appropriate and necessary step towards ensuring an adequate level of human rights protection in Kosovo. Such setting up should be planned in the context of the foreseen restructuring of the provisional administration of Kosovo and amendment of the Constitutional Framework (and a possible amendment of the terms of Resolution 1244).

107. Since the Commission considers that such restructuring is certainly also going to take a considerable amount of time, it is appropriate, in the light of the urgent need of addressing the issue of the lack of remedies for alleged human rights violations, including on the part of UNMIK and KFOR, to also envisage provisional, short-term solutions.

B. Provisional Review Mechanisms, to be Realised in the Short Term

108. In the Commission's opinion, each of the three main sources of potential human rights violations in Kosovo – UNMIK, KFOR and the Provisional Institutions of Self-Government - calls for a specific interim review mechanism.

a) Provisional System of Independent Review of the Compatibility of UNMIK Acts or Omissions with Human Rights Standards

109. Pending the establishment of a Human Rights Chamber for Kosovo, the Commission considers that it would be appropriate to establish a provisional mechanism of review of human rights violations allegedly committed by UNMIK.

110. This could be done through the setting up of an independent advisory body which would be competent to examine any complaint lodged by any person claiming that his fundamental rights and freedoms have been breached by any acts, failures to act, laws and regulations emanating from UNMIK, but only after a complaint to the Ombudsperson has not resulted in UNMIK recognising its responsibility for a human rights violation. Indeed, the Ombudsperson is already competent to receive individual applications concerning alleged human rights violations or abuse of authority in respect of the Interim Civil Administration: the Commission is of the view that the role of the Ombudsperson should not be undermined or duplicated.

[36] *Cf. Nowak, ibid., p. 176 and footnote 5.*

111. The possibility for the individual (or the Ombudsperson on behalf of applicants) to apply to the panel would provide UNMIK with the possibility of receiving confirmation through its own body of independent experts that a situation is indeed in breach of human rights standards. The Commission considers that UNMIK should commit itself to accepting the finding should *its own panel* express the view that UNMIK is violating human rights.

112. The panel would be competent to examine the compatibility of any UNMIK regulation or administrative direction with human rights standards. In this respect, provision should be made that ordinary PISG courts, when called upon examining, in a given case, the compatibility of an UNMIK general act, would have to suspend examination of the case and refer the matter to the panel. It would seem appropriate for the panel to deal with these issues by way of priority, in order not to prolong unduly the proceedings before the courts. The possible finding by the panel that a regulation is incompatible with human rights standards would of course have no legal effect, until UNMIK would produce such legal effect (see para. 118 below). Accordingly, the court would have to await a decision by UNMIK before resuming examination of the case.

113. This panel would be set up by an UNMIK Regulation. It would be composed of three (six/nine, depending on the workload) independent international experts with demonstrated expertise in human rights (particularly the European system). The members of the panel would be formally appointed by the SRSG upon the proposal of the President of the European Court of Human Rights. The experts should be available in Pristina.

114. The panel would be set up for a minimum period of four years. The mandate of the members of the panel would be of four years.

115. The panel would be assisted by a Secretariat, adequately staffed and funded, and guided by adequate rules of procedure so as to allow for the swift translation and processing of the applications.

116. The panel would express an opinion, by majority vote, as to whether or not there has been a breach of the applicant's fundamental rights and freedoms. Such determinations would be rendered in English, Albanian and Serbian and would be promptly made public.

117. The panel would have advisory functions. Nevertheless, in the regulation setting up the panel, UNMIK would commit itself to accepting the panel's finding, except if the SRSG personally determines that extraordinary reasons require that this is not possible.

118. This would mean that UNMIK should commit itself to the following:

a) f the finding of a violation concerns a general act or regulation, UNMIK should take the appropriate legal action (e.g. repeal or amend the regulation);
b) If the finding concerns an individual case, UNMIK should provide appropriate redress (ranging from public recognition of the violation, to *restitutio in integrum*, and to possible compensation). In this respect, the Commission considers that the UNMIK regulation setting up the panel should also explicitly provide for the possibility of the applicants to seek appropriate individual measures from UNMIK, following the panel's finding of human rights breaches in their own case.
c) Should UNMIK, in exceptional cases, disagree with the findings of the panel, it should give reasons for such disagreement.

119. The Commission is conscious that this panel would not offer the same guarantees as an independent judicial body such as the Human Rights Chamber. It considers however that it would constitute a significant improvement as would provide the public with a visible sign that UNMIK does not shield its acts from scrutiny by a body of independent members of a human rights panel. In this respect, it seems essential that, as suggested above, the decisions by the panel should be translated into both Albanians and Serbian and be promptly made public. It would be equally important that UNMIK commit itself to giving reasons – in due time and publicly – why it would exceptionally not follow the finding of the panel.

b) Supervision of the Compatibility of KFOR Acts or Failures to Act with Human Rights Standards

120. KFOR has the authority and responsibility under UN SC Resolution 1244 to ensure "security" in Kosovo (see paras 12-14 above). This authority includes both measures which, under regular circumstances, would be exercised by police forces, as well as extraordinary military measures in emergency situations. In practice, KFOR has since 1999 gradually reduced its involvement in maintaining security in Kosovo in favour of UNMIK and KPF police forces. Currently KFOR troops largely limit themselves to maintaining checkpoints where persons may be searched, to searches of houses and to occasional detentions of persons. Although these activities only represent a small part of the overall police function in Kosovo they are sufficiently sensitive in human rights terms as to warrant reflection. The sudden outburst of violence in March 2004 demonstrates that the continuing residual responsibility of KFOR for the overall security situation may well have to be exercised more broadly again.

121. Any suggestion concerning the establishment of a possible human rights mechanism with respect to KFOR must take into account the existing international legal framework for KFOR, in particular UN SC Resolution 1244, and the requirement that KFOR must be able to efficiently perform its important task.

122. It is in the interest of individuals, as potential victims of human rights violations, and of KFOR itself (NATO and troop contributing countries), that there exists a uniform supervisory mechanism which makes the determination of the complicated questions relating to the responsibility for acts of KFOR troops (see footnote 25 above) unnecessary. The interest of individual persons to have some form of review of any acts by KFOR troops is obvious. Given the risk of judicial intervention by national courts, as in the Bici case (see footnote 21 above), with respect to acts which can arguably be attributed to the individual troop-contributing state, these states as well as the KFOR commander himself should prefer to have a mechanism "on the ground" which is specifically fitted to operational requirements, in particular to military efficiency, and which national courts might regard as a sufficient and legitimate alternative to their own intervention. The KFOR commander should even have an interest to have some sort of review mechanism in place with respect to acts which are attributed exclusively to himself, and thus to the international legal person NATO.

123. There are, however, limits to any possible review mechanism. As long as SC Resolution 1244 is not modified, it is the KFOR Commander who must retain ultimate responsibility for his or her decisions. He or she must determine what constitutes military necessity. His or her acts must not be annulled by another body. In addition, the immunity of process granted to KFOR must be respected (UNMIK Regulation 2000/47). In these circumstances, it must be excluded to vest jurisdiction over acts by the KFOR Commander in national courts or in courts created by UNMIK, be they composed by local or by international judges.

124. The ultimate responsibility of the KFOR Commander and KFOR's immunity of process do not exclude, however, that KFOR establish review procedures within its own organisational structure which ensure some form of independent quasi-judicial review. Indeed, in his Detention Directive[37] the KFOR Commander has already provided for an embryonic form of review procedure by requiring that any decision on extending detention beyond an initial period of 72 hours must be made upon a request by the Legal Adviser. The disadvantage of this review procedure is not so much that it is purely advisory, but that the review is conducted only by a soldier who remains within the chain of command and within the administrative hierarchy. It is therefore currently not institutionally ensured that the Commander receives an independent legal advice, although experience shows that most Legal Advisers perform admirably in their position.

125. It therefore seems advisable to strengthen the role of the Legal Adviser by adding two independent lawyers to his function as provided for in the Detention Directive and thereby to constitute an Advisory Board. These independent lawyers should not be members of the military and not within the chain of command or within the administrative hierarchy. Their inclusion would institutionally ensure that the KFOR Commander receives independent advice and would thereby reassure the public (in Kosovo and beyond) that proper human rights standards are applied by KFOR. These two independent lawyers should preferably be experienced judges. They should be readily available, which means that they should be permanently present in Kosovo. It is conceivable that such lawyers could be drawn from among the international judges who already work in Kosovo within the areas for which UNMIK is competent. In that case they would be "wearing two hats". These independent lawyers could be appointed by the KFOR Commander upon the proposal of the President of the European Court of Human Rights or another appropriate institution. It could be provided that the UN SRSG and/or the President of the ECHR would propose one European and one non-European person to serve in the envisaged three person panel with the KFOR Legal Adviser.

126. One additional safeguard should be contemplated. Justice must not only be done but must also be seen to be done. It would therefore be desirable if the advice which the KFOR Commander receives from the envisaged Advisory Board would be notified to the detainee concerned and, upon his informed consent, to the public. On the other hand it is clear that the KFOR Commander may have valid reasons for keeping certain sensitive information from being known by concerned individuals and by the public. The problem is well-known within national legal systems. It should therefore be provided that the KFOR Commander retain the power to declare certain pieces of information which he deems sensitive not to be communicated to a detainee or to the public. This power would enable the Commander to provide the Advisory Board with all relevant information which it would then, in part, treat confidentially and *in camera* in order to form its opinion.

127. The suggested Advisory Board should be competent to review all cases of detention by KFOR troops. In addition it could be made competent to review all cases of allegations of serious human rights violations by KFOR troops. Such allegations would include complaints against house searches and physical mistreatment of persons. On the other hand it would not seem to be necessary to grant a possibility to review KFOR acts which are typically of a minor

[37] *Last amended on 12 July 2004.*

routine nature, such as the setting up of roadblocks as such. The Board should be competent to provide appropriate redress or compensation.

C. Supervision of the Compatibility with Human Rights Standards of Acts or Failures to Act by the Provisional Institutions of Self-Government of Kosovo

128. The Provisional Institutions of Self-Government of Kosovo have competence in numerous fields: Economic and financial policy; Fiscal and budgetary issues; Administrative and operational customs activities; Domestic and foreign trade, industry and investments; Education, science and technology; Youth and sport; Culture; Health; Environmental protection; Labour and social welfare; Family, gender and minors; Transport, post, telecommunications and information technologies; Public administration services; Agriculture, forestry and rural development; Statistics; Spatial planning; Tourism; Good governance, human rights and equal opportunity; and Non-resident affairs.

129. Judicial supervision is nowadays only foreseen in respect of the compatibility of laws adopted by the Assembly, including the international legal instruments specified in Chapter 3 on Human Rights, with the Constitutional Framework.

130. However, the Special Chamber of the Supreme Court for Constitutional Matters, provided for in the Constitutional Framework, has so far not been set up.

131. In the Commission's view, it is urgent to proceed with the setting up of this Special Chamber.

132. It needs to be underlined that laws adopted by the Assembly are promulgated by the SRSG. In practice, it is not uncommon that, when the SRSG refuses to promulgate a law, instead of sending it back before the Assembly, he proceeds himself with the necessary amendments. This practice - about which the Commission has certain reservations – raises the question of whether the thus amended laws can still be considered as "Assembly laws" and thus be subjected to review by the Special Chamber of the Supreme Court. The Commission is of the view that, inasmuch as the content of a law stems directly from UNMIK, the review of such law would have to be carried out by the UNMIK Advisory Panel (see paras. 109-119 above). The Commission is cognizant of the fact that even the mere promulgation implies that the SRSG is convinced that the law in question complies with, inter alia, human rights standards; it considers nevertheless that this should not lead to depriving the Special Chamber of jurisdiction over all Assembly Laws.

133. It would also seem necessary to extend the Special Chambers' jurisdiction over individual human rights cases, i.e. over allegations by any individual that his/her human rights have been breached on account of any act or failure to act by any Provisional Institution of Self-Government. This would, however, require the agreement of the SRSG, under whose authority these institutions still function. Indeed, this possibility would complement the right to appeal to the panel which is competent in respect of acts of UNMIK and the right to have a decision by KFOR on continued detention reviewed by the KFOR Advisory Board: People in Kosovo would then have a remedy against acts by any authority in Kosovo.

134. It would seem appropriate that the Special Chamber be composed of five judges – 3 local (2 from the majority and 1 from the minority communities) and 2 international judges. The latter

could be proposed by the President of the European Court of Human Rights and nominated by UNMIK.

135. This Special Chamber would have to be adequately staffed and funded, in order for it to process the human rights applications promptly and without neglecting its other tasks under Chapter 9.4.11 of the Constitutional Framework.

VII. Possible Establishment of Review Mechanisms: The Role of Serbia and Montenegro

136. The Parliamentary Assembly has requested the Commission to address the question whether the State Union of Serbia and Montenegro would need to be a party to an agreement extending the jurisdiction of the European Court of Human Rights over the international civil administration in Kosovo. This question is part of the more general question of the role of Serbia and Montenegro with impact to the possible establishment of human rights review systems for Kosovo.

137. In the Commission's opinion, the role of Serbia and Montenegro with respect to the possible establishment of a human rights mechanism for Kosovo depends on what kind of arrangement is envisaged.

138. UNSC Resolution 1244 reaffirms that Serbia and Montenegro is the territorial sovereign over Kosovo but, at the same time, it excludes Serbia and Montenegro from exercising jurisdiction over Kosovo (see paras. 9-10 above). Serbia and Montenegro is a member of the Council of Europe and a state party to the European Convention of Human Rights. This means that the realization of every proposal which would either affect the territorial status of Kosovo or would require an amendment of the European Convention of Human Rights at present requires the consent of Serbia and Montenegro.

139. Since the Commission does not consider that it is advisable, at present, to envisage providing access from Kosovo to the European Court of Human Rights as a matter of priority, the question of a possible amendment of the European Convention of Human Rights, and of a requirement of agreement by Serbia and Montenegro does not arise.

140. The Commission has rather suggested to pursue a short-term and a long-term solution.

141. The proposed solution to be realised in the short term consists in essence, as explained above, in establishing independent quasi-judicial advisory panels which are competent to review acts by UNMIK, KFOR and such acts by KFOR troops which may not be attributed to KFOR as an entity. Since such panels are, from a legal point of view, not only advisory but also internal to UNMIK or KFOR and are only competent to review acts by UNMIK or KFOR (including KFOR troops), which derive their authority from UN SC Resolution 1244, these panels do not affect the status of Kosovo and therefore no international legal position of Serbia and Montenegro.

142. The proposed solution to be achieved in the longer term consists in setting up a Human Rights Chamber for Kosovo (see paras. 98-107). This can be done on the basis of a UN SC Resolution or by way of an international treaty. A UN SC Resolution would obviously not require the consent of Serbia and Montenegro. An international treaty would only require the participation of Serbia and Montenegro as far as it would affect the status of Kosovo and

therefore an international legal position of Serbia and Montenegro. Since the proposed solution is limited to establishing a competence to review acts by UNMIK, KFOR and KFOR troops, a participation of Serbia and Montenegro is not, from a strictly legal point of view, required. From a political point of view, however, it does seem strongly advisable to include Serbia and Montenegro in any arrangement which can be viewed as having to be taken into account when the question of the long-term status of Kosovo is addressed.