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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW
(VENICE COMMISSION)

**THE HUMAN RIGHTS SITUATION
IN KOSOVO**

**Background information
and issues for discussion**

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.*

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 Helgesen, Malinverni, Nolte, Scholsem and Van Dijk, was set up.*

4. *Messrs Helgesen Malinverni and Van Dijk held a preliminary exchange of views in Strasbourg, on 28 May 2004. Messrs Nolte and Scholsem submitted their preliminary comments in writing.*

I. Background

5. Following the humanitarian tragedy which took place in Kosovo, in 1999 international civil and security presences were deployed in that region, under United Nations auspices and with the agreement of the Federal Republic of Yugoslavia, pursuant to Security Council's Resolution No. 1244(1999)¹.

6. The United Nations Interim Mission in Kosovo (UNMIK) was thus established. It is responsible in particular for:

- a. promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo, taking full account of annex 2 and of the Rambouillet accords (S/1999/648);
- b. Performing basic civilian administrative functions where and as long as required;
- c. Organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- d. Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities;
- e. Facilitating a political process designed to determine Kosovo's future status, taking into account the Rambouillet accords (S/1999/648);
- f. In a final stage, overseeing the transfer of authority from Kosovo's provisional institutions to institutions established under a political settlement;
- g. Supporting the reconstruction of key infrastructure and other economic reconstruction;
- h. Supporting, in coordination with international humanitarian organizations, humanitarian and disaster relief aid;
- i. Maintaining civil law and order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo;
- j. **Protecting and promoting human rights;**
- k. Assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.

7. In order to implement its mandate, UNMIK initially brought together four “pillars” under its leadership. At the end of the emergency stage, Pillar I (humanitarian assistance), led by the Office of the United Nations High Commissioner for Refugees (UNHCR), was phased out in June 2000. In May 2001, a new Pillar I was established. 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)

¹ Resolution 1244 (1999), adopted by the Security Council at its 4011th meeting, on 10 June 1999

8. 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.

9. 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.

10. KFOR contingents are grouped into four multinational brigades. Although brigades are responsible for a specific area of operations, they all fall under a single chain of command under the authority of Commander KFOR. KFOR troops come from 30 NATO and Non-NATO nations.

11. Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo was adopted on 18 August 2000 by the Special Representative of the Secretary General of the UN in Kosovo. It concerns "KFOR" (meaning the specially constituted force, composed by the North Atlantic Treaty Organization, including its member States, its subsidiary bodies, its military Headquarters and national elements/units, and non-NATO contributing countries), "KFOR personnel" (meaning all military and civilian personnel of KFOR), "UNMIK" (meaning the international civil presence established pursuant to Security Council resolution 1244 (1999) in the territory of Kosovo, integrating the Interim Civil Administration (United Nations); Humanitarian Affairs (UNHCR); Institution-building (OSCE) and Reconstruction (EU) components; and "UNMIK personnel" (meaning United Nations officials, experts and other persons assigned to serve in any of the components of UNMIK and holding an ID card, which indicates that the holder is a member of UNMIK, issued by or under the authority of the Special Representative of the Secretary-General).

12. It provides, insofar as relevant, as follows:

Section 2: Status of KFOR and its Personnel

2.1 KFOR, its property, funds and assets shall be immune from any legal process.

2.2 All 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).

2.3 Locally recruited KFOR personnel shall be immune from legal process in respect of words spoken or written and acts performed by them in carrying out tasks exclusively related to their services to KFOR.

2.4 KFOR personnel other than those covered under section 2.3 above shall be:

immune from jurisdiction before courts in Kosovo in respect of any administrative, civil or criminal act committed by them in the territory of Kosovo. Such personnel shall be subject to the exclusive jurisdiction of their respective sending States; and

immune from any form of arrest or detention other than by persons acting on behalf of their respective sending States. If erroneously detained, they shall be immediately turned over to KFOR authorities.

Section 3: Status of UNMIK and its Personnel

3.1 UNMIK, its property, funds and assets shall be immune from any legal process.

3.2 The Special Representative of the Secretary-General, the Principal Deputy, and the four Deputy Special Representatives of the Secretary-General, the Police Commissioner, and other high-ranking officials as may be decided from time to time by the Special Representative of the Secretary-General, shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo.

3.3 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.

3.4 UNMIK personnel shall be immune from any form of arrest or detention. If erroneously detained, they shall be immediately turned over to UNMIK authorities.

3.5 UNMIK personnel shall respect the laws applicable in the territory of Kosovo and regulations issued by the Special Representative of the Secretary-General, in the fulfilment of the mandate given to UNMIK by Security Council resolution 1244 (1999). They shall refrain from any action or activity incompatible therewith.

Section 4: Contractors

4.1 UNMIK and KFOR contractors, their employees and sub-contractors shall not be subject to local laws or regulations in matters relating to the terms and conditions of their contracts. UNMIK and KFOR contractors other than local contractors shall not be subject to local laws or regulations in respect of licensing and registration of employees, business and corporations.

4.2 KFOR contractors, their employees and sub-contractors shall be immune from legal process within Kosovo in respect of acts performed by them within their official activities pursuant to the terms and conditions of a contract between them and KFOR.

Section 5: Duration of Immunity from Legal Process

The immunity from legal process provided by the present regulation to UNMIK and KFOR personnel including their locally recruited personnel as well as KFOR contractors, their employees and subcontractors shall continue after UNMIK and KFOR's mandate expires or after such entities and/or personnel are no longer employed by UNMIK or KFOR.

Section 6: Waiver of Immunity

6.1 The immunity from legal process of KFOR and UNMIK personnel and KFOR contractors 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 the 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 the interest of UNMIK. In relation to personnel of the Institution-building and Reconstruction

components, any waiver of immunity shall be carried out in consultation with the heads of those components.

6.2 Requests to waive jurisdiction over KFOR personnel shall be referred to the respective commander of the national element of such personnel for consideration.

6.3 Requests to waive the immunities of KFOR contractors set forth in section 4 of the present regulation shall be referred to the respective commander of the national element with which the KFOR contractor has contracted.

Section 7: Third Party Liability

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.

13. The Provisional Institutions of Self-government were established by the Constitutional Framework for Provisional Self-government in Kosovo (see CDL(2001)56). They are: the Assembly; the President of Kosovo; the Government; the Courts; and Other bodies and institutions set forth in this Constitutional Framework.

14. 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".

15. Chapter 3 ("Human Rights") of the Constitutional Framework provides as follows:

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

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

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;

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.

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

3.4 All refugees and displaced persons from Kosovo shall have the right to return to their homes, and to recover their property and personal possessions. The competent institutions and organs in Kosovo shall take all measures necessary to facilitate the safe return of refugees and displaced persons to Kosovo, and shall cooperate fully with all efforts by the United Nations High Commissioner for Refugees and other international and non- governmental organizations concerning the return of refugees and displaced persons.

16. The rights of Kosovo communities and their members are listed in Chapter 4 of the Constitutional Agreement. The Provisional Institutions of Self-Government must ensure that all Communities and their members may exercise such 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.

17. Under Chapter 5.1 of the Constitutional Framework, the Provisional Institutions of Self-Government are responsible in the following fields:

- (a) Economic and financial policy;
- (b) Fiscal and budgetary issues;
- (c) Administrative and operational customs activities;
- (d) Domestic and foreign trade, industry and investments;
- (e) Education, science and technology;
- (f) Youth and sport;
- (g) Culture;
- (h) Health;
- (i) Environmental protection;
- (j) Labour and social welfare;
- (k) Family, gender and minors;
- (l) Transport, post, telecommunications and information technologies;
- (m) Public administration services;
- (n) Agriculture, forestry and rural development;
- (o) Statistics;
- (p) Spatial planning;
- (q) Tourism;
- (r) Good governance, **human rights** and equal opportunity; and
- (s) Non-resident affairs.

18. Established by Regulation Number 2000/38, the Ombudsperson Institution 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. Through its work the institution helps to promote human rights and good governance in Kosovo.

II. The Human Rights situation in Kosovo

What is the current situation in respect of human rights protection in Kosovo? The specific problems need to be identified in order to provide the appropriate solution. For this reason, a delegation of the working group will go to Kosovo in order to ascertain what are the major needs in this respect.

III. Elements of reply to the questions raised by the Legal Affairs Committee

1. 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?

Serbia and Montenegro has territorial sovereignty but, by virtue of Resolution 1244, no "jurisdiction" within the meaning of Article 1 ECHR over Kosovo (except for possible violations committed by state organs of Serbia and Montenegro). Its ratification of the ECHR without any territorial reservation does not extend its jurisdiction.

Responsibility for human rights protection in Kosovo lies (primarily) with the international authorities.

UNMIK is a subsidiary organ of the UN Security Council. Therefore the acts of UNMIK and its agents are attributed to the international legal person "United Nations".

KFOR, on the other hand, is arguably only the name of a specific form of multinational military collaboration between different individual states.

This would mean that human rights violations by agents of UNMIK are attributable to the United Nations while human rights violations committed by KFOR troops are attributable to the state to which the soldier concerned belongs. As a general rule, violations of human rights by KFOR troops are therefore not attributable to NATO, with the exception of acts by NATO personnel proper.

2. 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?

It is foreseen to conclude "monitoring arrangements" between the UNMIK and the Council of Europe related to the Framework Convention for the Protection of National Minorities and the European Convention for the Prevention of Torture and Inhuman and Degrading Treatment or Punishment.

An agreement bringing the international authorities of Kosovo within the jurisdiction of the European Court of Human Rights raises far more complex issues.

The following issues need to be addressed in respect of such agreement :

The parties to this Agreement

- a. Council of Europe or the European Court of Human Rights ?
- b. UNMIK or UN (Does UNMIK have the necessary authority to conclude such agreement?)
- c. KFOR ?
- d. Serbia and Montenegro

The added value of this agreement

- a. Legal obstacles
- b. Political obstacles
- c. Concrete impact on the human rights situation in Kosovo

3. 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?

The Working Group is of the opinion that, in addition to and pending the conclusion of an agreement aiming at extending the competence of the European Court of Human Rights to the acts of the international administration in Kosovo, it would be appropriate to set up a local supervisory mechanism (added value: more direct knowledge of specific context of applications; speedier processing of applications; better representation of the Kosovo population and UNMIK in the deciding body; more satisfactory handling of the issues arising out of the due implementation of judgments in cases involving Kosovo).

The Human Rights Chamber of Bosnia and Herzegovina seems an interesting precedent, although there are certain substantial differences, including that the BaH Chamber was not competent to review acts by an international body.

The following issues need to be addressed in this respect:

The nature of such a body (advisory/judicial?)

The procedure for setting it up (if judicial)

The composition

(If judicial, there could be, for instance, 9 judges, 4 nationals (two ethnic Albanians and two representing ethnic Serbs and minorities), and 5 internationals, appointed by the President of the ECHR (one of which upon consultation with the Special Representative of the UN Secretary General in Kosovo - a sort of “national judge” for UNMIK)