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FAILURE OF INTERNATIONAL COMMUNITY TO SAFEGUARD BASIC HUMAN RIGHTS IN KOSOVO

In recent decades, number of international human rights treaties were adopted, and different universal and regional enforcement mechanisms were established. Formally, human rights had a central role after the establishment of the UN administration in Kosovo, and the parole "Standards before Status" was a policy under which Kosovo should achieve certain level of human rights standards before the international community will begun to discuss its final status. However, this policy was forgotten and not implemented before the unilateral declaration of independence of Kosovo in February 2008.

After the unilateral proclamation of independence, some suggested that the grave violations of human rights by Serbia present a legitimate reason for losing the title over Kosovo. However, this paper will identify the position of human rights in legal document adopted in Kosovo, and find that, despite its significant place; human rights are poorly implemented in practice due to many obstacles. The author will conclude that the international community and local agents failed to protect and promote some basic human rights in Kosovo. The question is whether it is legal to unconditionally recognize a state which is not willing and able to protect basic human rights of its citizens? If the answer is positive, than the reasoning that Serbia has lost its title over Kosovo because of the human rights violations must be urgently reconsidered.

Key words: *Human rights. – UNMIK. – KFOR. – Resolution 1244. – Jurisdiction. – European Court of Human Rights. – European Convention on Human Rights. – Immunity.*

1. INTRODUCTION

In recent decades, the international law evolved from a system which primarily regulated a behavior of states to the system in which the

central focus is on the rights of individuals.[1] This change happened after the adoption of Universal Declaration of Human Rights in 1948, which emphasized in its Preamble that the "*recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family*" is "*the foundation of freedom, justice and peace in the world*." Thus, international law started to concentrate on human rights and treatment of citizens, although that area was traditionally considered to be under the realm of domestic law.[2] Number of international multilateral treaties was adopted, and universal and regional enforcement mechanisms were established.

After the end of the Cold War, international community has intervened in Bosnia, Kosovo, East Timor, Afghanistan and Iraq in order to set up "political trusteeships" where it exercises powers traditionally associated with sovereignty. In all these cases, humanitarian crisis and violation of human rights were in the focus of interventions. Formally, human rights had a central role after the establishment of the UN administration in Kosovo, and the parole 'Standards before Status' was a policy under which Kosovo should achieve certain level of human rights standards before the international community will begin to discuss its final status.[3] Finally, after the unilateral proclamation of independence, some politicians and theoreticians suggested that the grave violations of human rights can even be the reason for losing the title over certain territory, in this case Kosovo. As Koskenniemi pointed out, "*certain substantive values in contemporary international law pose real challenges to the legitimacy of statehood as a basis for international order*."[4]

However, in this paper, it will be first demonstrated that human rights have found a significant place in legal documents in Kosovo, and, second, that despite its formal proclamation human rights situation in reality is very poor. Afterwards, the main obstacles in the implementation of human rights standards will be identified, and it will be suggested that international community failed to recognize and respect some basic human rights in Kosovo. In a conclusion, if Serbia can lose its title over Kosovo because of the human rights violations, than Kosovo cannot be unconditionally recognized before the fulfillment of some basic human rights.

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[1] Antonio Cassese, Individuals, in Mohammed Bedjaoui (ed.), *International Law: Achievements and Prospects* 1991, 113.

[2] Peter. E. Quint, *International Human Rights: The Convergence of Comparative and International Law*, 36 Texas International Law Journal, 2001, 605.

[3] Standards for Kosovo, U.N. Interim Administration Mission in Kosovo, U.N. Doc. UNMIK/PR/1078, 2003.

[4] Martti Koskenniemi, *The Future of Statehood*, 32 Harvard International Law Journal, 397, 1991.

2. THE SETTLEMENT OF INTERNATIONAL CIVIL AND MILITARY PRESENCE IN KOSOVO

Following the conflict in 1999, international civil and security presences were deployed in Kosovo, under United Nations auspices and with the agreement of the Federal Republic of Yugoslavia (FRY), pursuant to Security Council's Resolution 1244, adopted on 10 June 1999. On 9 June 1999 KFOR, the FRY and the Republic of Serbia signed a 'Military Technical Agreement' (MTA) by which they agreed on FRY withdrawal and the presence of an international security force following the Resolution 1244.[5] This Resolution decided on the deployment, under UN auspices, of an interim administration for Kosovo (UNMIK). It requested the Secretary General to provide the assistance and to appoint a Special Representative to the SG (SRSG) to control its implementation. UNMIK was to coordinate closely with KFOR and comprised four pillars,[6] placed under the authority of the SRSG and headed by a Deputy SRSG. The head of UNMIK is the Special Representative of the Secretary-General for Kosovo, who is the most senior international civilian official in Kosovo and presides over the work of the pillars.

Resolution 1244 also provided for the establishment of a security presence (KFOR), which is a NATO-led international force responsible for establishing and maintaining security in Kosovo. Its mandate is to establish and maintain a secure environment in Kosovo, (including public safety and order), to monitor, verify and when necessary, enforce compliance with the agreements that ended the conflict, and to provide assistance to the UNMIK. KFOR consists of "*Member States and relevant international institutions*", "*under UN auspices*", with "*substantial NATO participation*," which is under "*unified command and control*".[7] KFOR troops come from 35 NATO and non-NATO countries and its contingents are grouped into four multinational brigades.[8] These troop contributing

[5] Military Technical Agreement between the KFOR and the Governments of the FRY and the Republic of Serbia, 9 June 1999, (1999) 38 International Legal Materials 1217.

[6] Pillar I concerned humanitarian assistance and was led by UNHCR before it was phased out in June 2000. A new Pillar I (police and justice administration) was established in May 2001 and was led directly by the UN, as was Pillar II (civil administration). Pillar III, concerning democratisation and institution building, was led by the Organisation for Security and Co-operation in Europe ("OSCE") and Pillar IV (reconstruction and economic development) was led by the European Union.

[7] Resolution 1244, Annex 2, para. 4.

[8] 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.

states have not transferred full command over their troops, and they have only the limited powers of operational control. This power is vested with the NATO commander who has right to give orders to the commanders of the national units, who must implement orders based on their own national authority. Other powers, such as disciplinary measures or orders to individual soldiers are vested with the national states.

3. THE IMPORTANCE OF HUMAN RIGHTS STANDARDS IN DIFFERENT LEGAL DOCUMENTS ADOPTED IN KOSOVO AFTER 1999

Human rights,[9] *rule of law and minority rights were supposed to play a major role in building the standards necessary for the final status of Kosovo, and they were perceived as indispensable elements of any settlement.*[10] The importance of the respect of human rights can be seen in a number of provisions in different legal documents, beginning with the Resolution 1244. In Preamble of this Resolution it was emphasized that one of the purposes of the adoption of this instrument is "*to provide safe and free return of all refugees and displaced persons to their homes.*" Article 9 (c) further provides that international community is obliged to "*establish a safe and secure environment in which refugees and displaced persons can return home in safety*." Also, Article 11 (k) guarantees "*the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo*". Moreover, Resolution proclaims under Article 10, that international community must secure "*conditions for a peaceful and normal life for all inhabitants of Kosovo*". Importantly, Security Council decides that the main responsibility of the international civil presence is to protect and promote human rights (point 11 (j)).

UNMIK has adopted Regulation on the Authority of the Interim Administration in Kosovo in 1999, which said that domestic law is applicable only if it is in accordance with international human rights standards.[11] It required from all public officials to observe these standards and

[9] There are three laws pplicable in Kosovo: the legislation of the Socialist Federal Republic of Yugoslavia (SFRY) and Serbian municipal statutes, the body of UNMIK regulations and administrative directions as well as those laws passed by the Kosovo Assembly which were subsequently promulgated by the SRSG, and the instruments of international law imported into the domestic legal order. See UNMIK Regulation no.1999/1.

[10] See Wolfgang Benedek, Final Status of Kosovo: The Role of Human Rights and Minority Rights, Chicago Kent Law Review, vol. 80, p. 215, 2005, Michael P. Sharf, Earned Sovereignty: Judicial Underpinnings, 31 Denver Journal of International Law and Policy, 2003, 373, Paul R. Williams, Earned Sovereignty: The Road to Resolving the Conflict over Kosovo's Final Status, 31 Denver Journal of International Law and Policy, 422, 2003.

[11] UNMIK/REG/1999/1, 25 July 1999 (amended by UNMIK/REG/2000/54, 27 September 2000), Section 2.

proclaimed the principle of non-discrimination in the implementation of public duties and official functions.[12] In particular, those standards are enshrined in the following international instruments: Universal Declaration on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, International Covenant on Economic, Social and Cultural Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on Elimination of All Forms of Discrimination Against Women, Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment, and the International Convention on the Rights of the Child.[13] These enumerated international instruments present the core human rights documents.

Two years later, the UN promulgated the Constitutional Framework for Self Government,[14] which established a mechanism of dual-key governance in which competencies are successively transferred from an international agent to local agents. The Constitutional Framework established the Provisional Institutions of Self-government (PISG), such as the Assembly, President, Government, Courts and other bodies and institutions.[15] This arrangement constitutes a *sui generis*, loosely bounded political system in which policy is made by both the UNMIK and the PISG.[16] PISG act under the authority of UNMIK, which is responsible to organize and oversees "*the development of provisional self-governing institutions*".[17] They must exercise their authorities consistent with the Resolution 1244

[12] *Ibid.*

[13] See UNMIK Regulation No. 2000/59 Amending UNMIK Regulation 2000/24 on the Law Applicable in Kosovo, UNMIK/REG/2000/59, 27 October 2000, Section 1.3.

[14] Constitutional Framework for Provisional Self-Government, UNMIK/REG/2001/9, 15 May 2001. "Constitution of Kosovo" was ratified on April 9 2008 and came into effect on 15 June 2008. In Article 21 it is guaranteed that "human rights and fundamental freedoms are indivisible, inalienable and inviolable and are the basis of the legal order" in Kosovo. Article 22 further provides that human rights guaranteed in Universal Declaration of Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, International Covenant on Civil and Political Rights and its Protocols, Council of Europe Framework Convention for the Protection of National Minorities, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child; and Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment are directly applicable and in the case of conflict "have priority over provisions of laws and other acts of public institutions". Text is available at *www.kushtetutakosoves.info/repository/docs/Constitution.of.the.Republic.of.Kosovo.pdf,* last visited on 29 November 2008.

[15] Their area of competence is set forth in Chapter 5.1 of the Constitutional Framework.

[16] See more at Bernhard Knoll, Legitimacy and UN-Administration of Territory, 8 *German Law Journal,* no. 1, 2007, 1.

[17] Resolution 1244, paras. 10 and 11 (c) and (d).

and the Constitutional Framework. Importantly, they must promote and fully respect the rule of law, human rights and freedoms, democratic principles and reconciliation.[18]

The Special Representative of the Secretary General has the authority to intervene as necessary in the exercise of self-government for the purpose of protecting the rights of Communities and their members. Another organ, the Ombudsperson Institution is established as an independent institution to address disputes concerning alleged human rights violations, or abuse of authority between individuals, groups and legal entities and the Interim Civil Administration or any emerging central or local institution in Kosovo.[19] It will "*give particular priority to allegations of especially severe or systematic violations and those founded on discrimination*".[20] Ombudsman 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. In particular, human right standards enshrined in the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights must be respected.[21]

The Constitutional Framework extends this list of core international documents and proclaims that human right standards enshrined in the following international instruments must be taken into account: Universal Declaration on Human Rights, European Convention for the Protection of Human Rights and Fundamental Freedoms, International Covenant on Civil and Political Rights, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination Against Women, Convention on the Rights of the Child, European Charter for Regional or Minority Languages, and the Council of Europe's Framework Convention for the Protection of National Minorities.[22]

The Constitutional Framework also directly addresses the 'Rights of Communities and their Members', charging the PISG with the responsibility of ensuring that communities and their members should have the right to: use their own language and alphabets before courts and other public bodies; receive education and access to information in their own

[18] However, this complicated system became even more complicated after the adoption of the Kosovo Constitution which was proclaimed on June 15 2008, and after this date very few executive decisions have been issued by the Special Representative of the Secretary General.

[19] UNMIK Regulation no. 2000/38 on the Establishment of the Ombudsperson Institution in Kosovo, 30 June 2000.

[20] *Ibid*, Section 3.1.

[21] *Ibid*, Section 1.1.

[22] Constitutional Framework for Provisional Self-Government, Preamble.

language; enjoy equal opportunities with respect to employment in public bodies and access to public services at all levels; further rights relating to association, the media, religion and the preservation of religious institutions.[23] The PISG was also charged with the administration of public services and with specific responsibility for the promulgation of legislation to protect the rights of minority groups in accordance with international standards, including legislation envisaged to protect the right to freedom of expression and prohibit the use of hate speech in the mass media.[24]

Finally, the SRSG has signed an agreement with the Council of Europe reincorporating the Framework Convention of National Minorities into Kosovo's applicable law. Agreement between UNMIK and the Council of Europe on Technical Arrangements Related to the Framework Convention for the Protection of National Minorities was signed on 23 August 2004.[25] This agreement was signed although Article 3.2 (h) of the Constitutional Framework already incorporates the Framework Convention into Kosovo's municipal legal system. While the Preamble of the agreement explicitly states that the agreement 'does not make UNMIK a Party to the Framework Convention', UNMIK affirms 'on behalf of itself and the PISG' in Article 1 "*that their respective responsibilities will be exercised in compliance with the principles contained in the Framework Convention*."[26] The same agreement was concluded between UNMIK and the Council of Europe on Technical Arrangements Related to the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 23 August 2004.[27] These agreements present a concrete expression to the above mentioned content of the Constitutional Framework's enumeration of human rights instruments, which are supposed to be applicable in the territory of Kosovo.

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[23] *Ibid*, Chapter IV. It must be said that the UNMIK Department of Civil Administration and the Office of Communities, Returns and Minority Affairs have ceased their activities after June 15, in anticipation of their amalgamation into the Mission's Office of Political Affairs.

[24] To date, the PISG has not taken such measures.

[25] The Council of Ministers authorized the Secretary General to conclude such agreement at its 890th Meeting (30 June 2004).

[26] UNMIK committed itself to submit full information to the Committee of Ministers on the legislative and other measures taken to give effect to the Framework principles. (Article 2 (2)). The reporting schedule, which remains in force for the duration of UNMIK's mandate, provides that UNMIK submit reports on a 'periodic basis' and whenever the Committee of Ministers so requests (Art. 2(3)). UNMIK shall participate, in an observer capacity, in the Council of Minister's meetings in which information on compliance with the Framework Convention are considered (Art. 2(5)).

[27] Under this agreement, the relevant CoE Committee will obtain direct access to places where persons are deprived of their liberty by UNMIK (Art. 1(2)).

4. HUMAN RIGHTS SITUATION IN KOSOVO

There are a number of reports suggesting that human rights situation in Kosovo is very poor. In its report from 2004, the Venice Commission was asked to provide report on this matter,[28] which relied on its independent research, but also on several other reports, such as the annual reports of the Ombudsperson institution in Kosovo,[29] the reports by the OSCE Mission in Kosovo, the reports by the US Department of State and the reports by Amnesty International, including also the information provided by UNMIK, KFOR, OSCE and OHCHR.[30] In this report, it was found that there is a lack of security of the non-Albanian communities in Kosovo, lack of freedom of movement for Serbian and Roma communities which results in limited access to basic public services, such as education, medical care, justice, public utilities and working places, insufficient protection of property rights, lack of investigation into abductions and serious crimes, lack of fairness and excessive length of judicial proceedings, difficult access to courts, detentions without independent review,[31] corruption that is widespread and severe, human trafficking, and lack of legal certainty, judicial review and right to an effective remedy for human rights violations.[32] In another report from 2004, Amnesty International claimed that, "*despite the mandate of the international community ... to protect and promote human rights and the incorporation of international human rights standards into applicable law, minorities in Kosovo continue to be denied access both to their basic human rights, and to any effective redress for violations and abuses of these rights*."[33] Denial of basic civil, political, social, economic and cultural rights of minorities is produced by the climate of fear, insecurity and impunity. This prolonged situation results in non-return of internally displaced persons and refugees. Amnesty International further acknowledges that "*[s]ince the deployment of UNMIK and KFOR, serious crimes and human rights abuses have continued to be perpetrated at a disturbing rate in Kosovo*." Impor-

[28] The Venice Commission was asked to provide report by the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe. European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, Opinion no. 280, 11 October 2004, 60th Session.

[29] It was particularly relied on its fourth annual report from 12 July 2004.

[30] *Ibid*, para. 25.

[31] Particularly by KFOR which detained suspects on the basis of military decisions not subject to any independent review outside the chain of command and outside the administrative hierarchy.

[32] *Ibid*, paras. 27–61.

[33] Amnesty International, Serbia and Montenegro (Kosovo/Kosova), "*Prisoners in our homes*": *Amnesty International's concerns for the human rights of minorities in Kosovo/Kosova*, 29 April 2003.

tantly, delays in establishing a criminal justice system which is consistent with international human rights standards and the policy of impunity for serious acts is contributing to the creation of a climate in which some people in Kosovo believe that they may commit crimes and abuse the human rights of others with impunity.[34]

Another respected NGO, Human Rights Watch, in report released after the march violence in 2004 noted that "*the international community appears to be in absolute denial about its own failures in Kosovo*."[35] Two days violence left 19 persons dead, 954 wounded, forced out the entire Serb population from a number of locations and at least 550 homes and 27 Orthodox churches and monasteries were burned, leaving around 4,1000 Serbs and other non-Albanian minorities displaced.[36] Human Rights Watch judged that the UNMIK and NATO "*failed catastrophically in their mandate to protect minority communities*" during this violence.[37]

In report that was released in February 2008, just several days before the unilateral declaration of independence, Human Rights Watch acknowledged that Kosovo is a place where human rights are frequently violated.[38] It, therefore, recommended urgent action to improve the following areas: to establish an independent judicial system, to combat abuse of women, to protect minorities from violence, to allow refugees and displaced persons to return safely to their homes, to improve the living condition of the Roma, Ashkali and Egyptian communities, to ensure that the EU-led mission is transparent and to respects human rights and promote reconciliation.

In her latest book "Hunt", Carla Del Ponte is explaining allegations concerning the possible trafficking of prisoners' organs from a mysterious yellow house near the Albanian town of Burrel, where doctors extracted the captives' internal organs. These organs were then transported out of Albania via the airport near the capital Tirana. According to her revelations, these events took place after June 12, 1999, when NATO and UNMIK were established in Kosovo, and when NATO was in Albania too.[39] These organizations share a responsibility to investigate what happened in areas under their control, and how around 400 non-Albanians disap-

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[34] *FRY (Kosovo): Amnesty International's Recommendations to UNMIK on the Judicial System*, AI Index: EUR 70/06/00, February 2000.

[35] Human Rights Watch, *Failure to Protect: Anti-Minority Violence in Kosovo*, March 2004, July 200, vol. 16, no. 6, 3.

[36] *Ibid*, 2.

[37] *Ibid.*

[38] Human Rights Watch, *A Human Rights Agenda for a New Kosovo*, February 2008, no. 1, 2.

[39] In 2008 the Parliamentary Assembly of the Council of Europe authorized Carla del Ponte to lead a formal investigation on this matter.

peared in this period.[40] Unfortunately, noting was seriously done to improve the human rights situation after 1999, and human rights were just a proclamation without real effort and sincere will to protect population in Kosovo. On 4 April 2008, the Human Rights Watch requested Hashim Thaci and Sali Berisha to open investigations in order to investigate these allegations, but both ignored the letters and publicly rejected these claims. However, a month later, Human Rights Watch confirmed that "*serious and credible allegations have emerged about horrible abuses in Kosovo and Albania after the war*."[41]

Finally, inter-ethnic violence is still on-going, having in mind incidents of stone-throwing between Kosovo Serbs and Kosovo Albanians in the ethnically mixed villages of Berivojca and Suvi Do, and some other places in Kosovo.[42] Also, "*the number of returns has declined sharply in comparison with previous years and remains disappointing*".[43] It is interesting to note that Serbs constitute only 24 per cent of the total number of returnees in 2008, compared with an average of 43 per cent since 2000,[44] meaning that no effort was undertaken to improve the situation that will enable displaced to return to their homes.

5. OBSTACLES IN IMPLEMENTATION OF HUMAN RIGHTS STANDARDS IN KOSOVO

One of the main obstacles in implementation of human rights standards in Kosovo is that the Constitutional Framework does not provide any judicial review mechanisms through which individuals and groups could enforce their constitutional rights. Also, there is a lack of accountability of members of UNMIK, the absence of an independent regulatory body competent to investigate allegations of professional misconduct, including KFOR officials. Neither the Human Rights Advisory Panel, nor the Ombudsperson Institution, is competent to investigate complaints against KFOR. Thus, the accountability of KFOR depends on the measures taken by troop-contributing countries to KFOR to ensure that allegations of human rights violations are fully investigated. Finally, to fully implement human rights standards, it is important to establish the human rights culture in one society and to constantly educate citizens of

[40] Fred Abrahams, Kosovo Must Come Clean on Missing Serbs, Balkan Insight, 19 May 2008.

[41] Fred Abrahams, K. Serbs abduction claims authentic, B 92 News, 5 May 2008.

[42] See Report of the Secretary– General on the United Nations Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, par. 6.

[43] *Ibid*, par. 11.

[44] *Ibid.*

their basic rights. However, the Ombudsperson found in one of his reports that there is very little general knowledge, on the part of both the PISG authorities and the public, of human rights standards.[45] Furthermore, the Human Rights Oversight Committee (HROC) was established in 2002 to consider and agree 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*." However, this body is not independent and does not meet on a regular basis.

5.1. Immunities

As it was said above, there is no effective mechanism enabling individuals whose human rights are breached in Kosovo to initiate proceedings against the respondent authorities and to obtain just compensation. In particular, KFOR, KFOR personnel, UNMIK, and UNMIK personnel is "*immune from any legal process*", and not subject to any independent review.[46] The immunity of UNMIK and KFOR is in accordance with international rule that international organizations enjoy immunity from legal process by courts of member states and other international institutions, in order to ensure performance of their tasks without undue and unnecessary interference by domestic courts. However, immunity of international organizations cannot be understood that every decision or act of international organization is legal and allowed. This is of particular importance for individual acts that violate human rights. Therefore, UNMIK Regulation provides that immunity does not benefit to the individuals, but to KFOR and UNMIK, and that the Secretary General has the right and duty to waive immunity of any UNMIK personnel in any case where, in his opinion, the immunity would impede the course of justice, whilst waiver of jurisdiction over KFOR personnel will be "*referred to the respective commander of the national element of such personnel for consideration*".[47] Moreover, the immunity of international organization does not exclude the establishment of independent legal review mechanisms which are an integral part of the international organizations itself, such as the UN Administrative Tribunal. It must be emphasized that some authors clearly argue that immunity from judicial process is in violation with human rights standards,[48] and it can lead to the denial of justice and denial of acceess to the court, which is one of the core human rights today.

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[45] Third Annual Report of the Office of the Ombudsperson, 2002–03, 8.

[46] UNMIK Regulation no. 2000/47 of 18 August 2000 on the Status, Privilegies and Immunities of KFOR and UNMIK and their Personnel in Kosovo, Sections 2 and 3.

[47] *Ibid*, Sections 6.1 and 6.2.

[48] Carsten Stahn, *The United Nations Transitional Administration in Kosovo and East Timor: A First Analysis*, in Jochen A. Frowein, Rudiger Wolfrum (eds.), 5 Max Planck Yearbook of United Nations Law, 105, 159–161, 2001.

The European Court of Human Rights (ECtHR), deciding about the immunity of the European Space Agancy (ESA) from German jurisdiction in cases *Beer and Reagan v. Germany,*[49] and *Waite and Kennedy v. Germany*[50] held that the rule of immunity from jurisdiction is legitimate because the attribution of privilegies and immunities to international organizations is an essential mean of ensuring their proper functioning. However, it further said that any limitation on the right of access to court guaranted by Article 6, par. 1 of the ECHR had to be grounded in "*a legitimate aim [and have] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved*."[51] However, the Court was clear that the immunity is only permissible if there is a reasonable alternative means to protect effectively rights set up in the European Convention.

5.2. The lack of enforcement mechanisms

Another problem in the realization of human rights standards, despite their formal proclamation in Kosovo, is certainly the lack of appropriate enforcement mechanisms. One of the ideas was to establish a Human Rights Court for Kosovo, by the agreement of UNMIK and NATO on the one hand, and the Council of Europe on the other. This body would deal with complaints about the alleged violations of the ECHR and its Protocols by UNMIK, the Provisional Institutions of Self-Government and NATO (including NATO member States). The procedure and case-law of this body would be based on those of the European Court, and it will be composed of mixed membership.[52] However, this idea was never realized.

In relation to external enforcement mechanism, this problem is illustrative in *Behrami* and *Saramati* case, which will be explained and analyzed below.

5.2.1. Behrami[53] and Saramati[54] case

Two Albanian boys, Gadaf and Bekir Behrami, were living in the municipality of Mitrovica in Kosovo. On 11 March 2000, they were play-

[49] ECtHR, App. no. 26083/94, 18 February 1999.

[50] ECtHR, App. no. 28934/95, 18 February 1999.

[51] See Human Rights Case Digest, Martinus, Nijhoff Publishers, vol. 10, numbers 1–3, 1999, 29–32.

[52] See more Committee of Ministers, Resolution (93) 6, Opinion on the Setting up of the Human Rights Court of the Federation of Bosnia and Herzegovina, 1997.

[53] ECtHR, *Behrami and Behrami v. France*, App. no. 71412/01, 31 May 2007.

[54] *Saramati v. France, Germany and Norway*, App. no. 78166/01, 31 May 2007.

ing with another six boys and they came upon a number of undetonated cluster bomb units (CBUs) which had been dropped during the bombing by NATO in 1999. There was no sign of danger and believing it was safe, one of the children threw a CBU in the air which detonated and killed Gadaf Behrami and seriously injured Bekim Behrami who was disfigured and now is blind.

UNMIK police investigated the case and reported that detonated site had been marked out by KFOR the day after the accident, and that KFOR was aware of the unexploded CBUs for months, but did not consider it as a high priority. The UNMIK Police report of 18 March 2000 concluded that the incident amounted to "*unintentional homicide committed by imprudence*".[55] Agim Bekrami, the father of two boys complained to the Kosovo Claims Office (KCO) that France had not respected Resolution 1244, and this complaint was forwarded to the French Troop Contributing Nation Claims Office (TCNCO) which rejected the complaint. It reasoned that the Resolution 1244 had required KFOR to supervise mine clearing operations until UNMIK could take over, and that such operations had been the responsibility of the UN since 5 July 1999.

Relying on Article 2 (the right to life) of the ECHR, Agim Behrami and Bekim Behrami complained before the ECtHR that the explosion took place because French KFOR troops failed to mark or defuse the undetonated bombs, despite being aware of their presence.

In another case, Saramati[56] was arrested by UNMIK police on 24 April 2001 on suspicion of attempted murder and illegal possession of a weapon. On the next day, an investigating judge ordered his pre-trial detention and investigation of the charges. On 23 May 2001, a prosecutor filed an indictment and on 24 May 2001 the District Court ordered his detention to be extended. On 4 June 2001, the Supreme Court allowed Saramati's appeal and he was released. However, a month after his release, UNMIK police informed him by telephone that he had to report to the police station in Prizren in order to collect his money and belongings. This station was in the sector assigned to MNB Southeast, leaded by Germany.[57] When he came to the station, UNMIK police officers arrested him by order of the Commander of KFOR, who was a Norwegian officer

[55] *Ibid*, par. 6.

[56] Saramati was born in 1950 and also of Albanian origin living in Kosovo.

[57] KFOR contingents were grouped into four multinational brigades (MNBs) each of which was responsible for a specific sector of operations. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

at the time.[58] His imprisonment was extended by the Commander for another 30 days.

When this time expired, Saramati's representatives challenged his detention, but KFOR Legal Adviser advised that KFOR had the authority to detain under the Resolution 1244 as it was necessary "*to maintain a safe and secure environment*" and to protect KFOR troops.[59] This position was based on the information that Saramati was involved with armed groups operating in the border region between Kosovo and the Former Yugoslav Republic of Macedonia (FYROM) and that he represented a threat to the security of KFOR and to those residing in Kosovo. On 11 August 2001, his detention was again extended by order of Commander of KFOR, whilst a month later his case was transferred to the District Court for trial. During trial hearings from 17 September 2001 to 23 January 2002, Saramati's representatives requested his release based on the decision of the Supreme Court in June 2001, but District court repeated every time that his detention was entirely the responsibility of KFOR.

Finally, on 23 January 2002, Saramati was convicted of attempted murder and he was transferred by KFOR to the UNMIK detention facilities in Pristina. However, on 9 October 2002 the Supreme Court of Kosovo quashed his convictions and ordered his release from detention. Saramati complained that his detention at the hands of KFOR between July 2001 and January 2002 breached Article 5 (the right to liberty and security) and Article 13 (the right to an effective remedy) of the ECHR.

The applicants argued that they fell under the jurisdiction of the respondent States, within the meaning of Article 1 of the ECHR, which says that "*[t]he High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms*" set up in this Convention.' Also, they emphasized that the acts and omissions in question had to be attributed to France and Norway. In the first case, the applicants argued that the KFOR's failure to act had to be attributed to France in its capacity as the State controlling the Multinational Brigade Northeast, in charge of the Mitrovica sector.[60] In the second case, the final decision regarding Saramati's detention lay with the Commander of KFOR, who was not dependent on or accountable to NATO for that decision. In other words,

[58] On 3rd October 2001, a French General was appointed to the position of COM-KFOR.

[59] *Ibid*, par. 11.

[60] KFOR contingents were grouped into four multinational brigades ("MNBs") each of which was responsible for a specific sector of operations. They included MNB Northeast (Mitrovica) and MNB Southeast (Prizren), led by France and Germany, respectively. Given the deployment of Russian forces after the arrival of KFOR, a further agreement on 18 June 1999 (between Russia and the United States) allocated various areas and roles to the Russian forces.

his acts had to be attributed directly to Norway. The applicants further claimed that nothing in Security Council Resolution 1244 required them to act inconsistently with the ECHR, and that Contracting Parties to this Convention are entitled to transfer their sovereign powers to an international organization which must protect fundamental rights in a manner equivalent to the protection given by this instrument.[61] This position was particularly underlined by Louis Arbour at the Opening of the Judicial Year 2008 of the European Court of Human Rights, when she suggested that "*the UN should ensure that its own operations and processes subscribe to the same standards of rights protection which are applicable to individual States. How to ensure that this is so, and the setting up of appropriate remedial measures in cases of default, would benefit immensely from the inputs of legal scholars and policy makers, if not of the jurisprudential insight of the courts*."[62] However, this protection was not offered by NATO or KFOR in Kosovo.

On the other hand, the respondent States, France and Norway, denied that the applicants came within their jurisdiction and argued that the cases were inadmissible *ratione loci* and *ratione personae*.[63] They emphasized that the applicants were not present on their respective national territories at the relevant time, and did not reside in the 'legal space' of the ECHR. Moreover, they pointed out that it was the UN which had effective control of Kosovo and that KFOR, and not the individual commanders of KFOR, exercised control over Saramati. They took the position that described acts and omissions could not be attributed to them, and argued that KFOR is an international force with a single chain of command ran from the Security Council.[64] Thus, national contingents acted in accordance with the operation plan approved by NATO and not in accordance with national instructions.

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[61] *Bosphorus Hava Yollari Turizm Ve Ticaret Anonim Sirketi v Ireland* (2006) 42 EHRR 1, par. 155. See Banner and Thomson, Human Rights Review of State Acts Performed in Compliance with EC Law – *Bosphorus Airways v Ireland*, (2005) 6 European Human Rights Law Review*,* 649; Hoffmeister, '*Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirket v. Ireland*. App. No. 45036/98', (2006) 100 American Journal of International Law 442; Costello, 'The *Bosphorus* Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe', (2006) 6 *Human Rights Law Review,* 87; and Parga, '*Bosphorus v Ireland* and the Protection of Fundamental Rights in Europe', (2006) 31 European Law Review, 251.

[62] Louis Arbour, United Nations Commissioner for Human Rights, Opening of the Judicial Year 2008 of the European Court of Human Rights, Strasbourg, 25 January 2008–11–02.

[63] *Behrami and Saramati* case, The submission of the respondent States, paras. 82–95.

[64] Third party observations were submitted to the ECtHR by the Governments of Denmark, Estonia, Germany, Greece, Poland, Portugal and the United Kingdom as well as by the UN.

5.2.2. The decision of the European Court

In order to decide the case, the Court recalled that Article 1 requires Contracting Parties to guarantee Convention rights to individuals falling with their 'jurisdiction'.[65] Therefore, the question was whether the applicants came within the extra-territorial jurisdiction of the respondent States.[66] Resolution 1244 provides that 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 Serbia) which has ratified the European Convention on Human Rights and Fundamental Freedoms (ECHR) on 3rd March 2004, without any territorial reservation in respect to Kosovo. However, Serbia cannot exercise 'jurisdiction' within the meaning of Article 1 ECHR over Kosovo and thus, cannot be responsible for human rights violations committed on a territory that is outside of its effective control.[67] Therefore, the question is whether the Respondent States exercise extra-territorial jurisdiction over Kosovo and whether they can be accountable for the violations of Articles 2, 5 and 13 of the ECHR?

Interestingly enough, the Court held that the question here "*is less whether the respondent States exercised extra-territorial jurisdiction in Kosovo but far more centrally, whether this Court is competent to examine under the Convention those States' contribution to the civil and security presences which did exercise the relevant control of Kosovo*."[68] To answer this question, the Court must consider whether or not the acts and omissions could be attributed, in principle, to the UN. In deciding the case, the ECtHR reviewed the relevant legal instruments and subsequent arrangements between KFOR and UNMIK to determine which of the two entities had a mandate to detain individuals and to carry out demining activities in Kosovo. It held that the arrest and detention of Saramati came within the security mandate of KFOR, while the supervision of demining activities fell within the mandate of UNMIK.

It reasoned that in carrying out their mandate, both KFOR and UNMIK were exercising powers delegated to them by the Security Council

[65] *Behrami and Saramati* case, par. 69.

[66] In *Loizidou*, the Court held that 'jurisdiction' "*is not restricted to the national territory of the Contracting States. Accordingly, the responsibility of Contracting States can be involved by acts and omissions of their authorities which produce effects outside their own territory*." The Court further concluded that Contracting Party can be responsible for military actions when "*it exercises effective control of an area outside its national territory*." See *Loizidou v. Turkey*, App. no. 15318/89, 18 December 1996, par. 52. See also *Bankovic and Others v. Belgium and 16 other Contracting States*, App. no. 52207/99, 12 December 2001, par. 71.

[67] Serbia can be accountable only for violations committed in Kosovo or in respect of Kosovars by its own state organs.

[68] *Ibid*, par. 71.

within the framework of Chapter VII of the Charter.[69] As regards UNMIK, the ECtHR noted that the Mission was a subsidiary organ of the UN and therefore its conduct was, in principle, attributable to the UN. As regards KFOR, the ECtHR took the position that the Security Council, by authorizing the Member States of the UN and relevant international organizations to establish an international security presence in Kosovo, delegated to the States and international organizations concerned "*the power to establish an international security presence as well as its operational command*".[70] KFOR was therefore operating 'on the basis of UN delegated, and not direct, command', which must remain sufficiently limited to be compatible with the Charter and to permit the attribution of KFOR's conduct to the UN. The ECtHR reasoned that the fact that contributing States retained some authority over their forces, for instance in disciplinary matters, was compatible with the effectiveness of NATO's operational command.

Having established that the acts and omissions of KFOR and UNMIK were attributable to the UN, the ECtHR finally considered whether it was competent *ratione personae* to review any conduct found to be imputable to the UN. Referring to the relevant case law of the International Court of Justice (ICJ) on the primacy of the Charter as well as to the objectives of the UN, the Court held:

"*Since operations established by UNSC Resolutions under Chapter VII of the UN Charter are fundamental to the mission of the UN to secure international peace and security and since they rely for their effectiveness on support from member states, the Convention cannot be interpreted in a manner which would subject the acts and omissions of Contracting Parties which are covered by UNSC Resolutions and occur prior to or in the course of such missions, to the scrutiny of the Court. To do so would be to interfere with the fulfillment of the UN's key mission in this field including, as argued by certain parties, with the effective conduct of its operations*."[71]

In the ECtHR's view, this reasoning applied with equal force to voluntary acts performed by the respondent States, such as the contribution of troops to peacekeeping missions, because of their critical role in enabling the Security Council to carry out its mandate under Chapter VII of the Charter. The ECtHR also rejected the applicants' submissions that KFOR failed to protect fundamental rights in a manner at least equivalent

[69] *Ibid*, par. 128.

[70] *Ibid*, par. 129. According to the ECtHR, the Security Council did retain such ultimate authority and Resolution 1244 imposes clear limits on the exercise of delegated powers and requires the leadership of the military presence to report to the Security Council.

[71] *Ibid*, par. 149.

to the ECHR on the basis that the circumstances of the present case differed essentially from those in the *Bosphorus* case.[72] Accordingly, the ECtHR concluded, by a majority, that the applicants' complaints were incompatible *ratione personae* with the provisions of the ECHR, and that actions of UNMIK and KFOR "*were directly attributable to the UN, an organisation of universal jurisdiction fulfilling its imperative collective security objective."*[73]

5.2.3. Commentary on this decision

To decide the Case, ECtHR examined whether KFOR and UNMIK operated in the framework of Chapter VII of the Charter, and whether their acts and omissions could be attributed to the UN in accordance with the rules of international law governing the responsibility of international organizations. However, before the enquiry into the attributability of the alleged wrongful conduct to particular States, the first matter that was logically to address is the existence of a jurisdictional link between the applicants and the respondent States is a preliminary matter that must be addressed.[74] Then, the Court should have found whether national personnel operating as part of KFOR and UNMIK carried out their functions in a national or an international role. This dual national and international function implies that every act or omission of national personnel taking part in an international operation has to be examined to determine in what capacity it was performed. Depending on the finding, it will be decided whether there is a jurisdictional link under Article 1 of the ECHR.[75]

Moreover, if there is a responsibility for the internationally wrongful conduct of KFOR and UNMIK, it does not exclude the possibility that the same conduct may also be attributable to the respondent States and may engage their responsibility.[76] This is so, because *n*ational contingents

[72] *Ibid*, par. 151. The Court held that the seizure of the applicant's leased aircraft in this case had been carried out by the respondent State authorities, on its territory and following a decision by one of its Ministers. See *Bosphorus Hava Yollarý Turizm ve Ticaret Anonim Þirketi (Bosphorus Airways) v. Ireland*, App. no. 45036/98, ECHR 2005-VI, par. 137. In this case, the Court reasoned that "*the impugned acts and omissions of KFOR and UNMIK cannot be attributed to the respondent States and, moreover, did not take place on the territory of those States or by virtue of a decision of their authorities*."

[73] *Ibid*.

[74] *Ibid*, par. 121.

[75] Under the jurisprudence of the ECtHR, the initiation of criminal proceedings against a member of a national contingent by his service authorities within the territory of the host State must be considered as an exercise of extra-territorial jurisdiction that has to conform to the relevant provisions of the ECHR, in particular Article 6 concerning the right to a fair trial. See *Issa and Others v Turkey*, App. no. 31821/96, 16 November 2004, para. 71, *Findlay v. United Kingdom* 1997–I 263; (1997) 24 EHRR 221.

[76] It must be taken in mind that the mandate of UN and KFOR is unique and overwhelming in its magnitude. UNMIK came to occupy a unique position in the Kosovo

retain their character as organs of their respective sending State. The international organizations use personnel made available to them by their Member States or third States in order to perform military operations. In the case [of] UN peacekeeping operations, States contributing military forces usually conclude agreements with the UN in which they agree to place their national contingents under the command of the UN, vested in the Secretary-General, and thereby transfer to the Secretary-General full authority over the deployment, organization, conduct and direction of their personnel.[77] But, it does not completely severe the legal and institutional relationship between national contingents and their sending States. Therefore, it is important to mention that OSCE mission in Kosovo stated in its report from 2001 that human rights obligations of Governments participating KFOR apply to the conduct of their troops abroad.[78] It must be taken in mind that the majority of NATO states are members of the Council of Europe and Contracting Parties to the ECHR. Other states are bound by some universal international instruments and subject to review of some UN treaty bodies, which have, more or less, the same practice as the ECtHR.

Maybe it can be doubtful that no jurisdictional link existed between the applicants in *Behrami* and France because UNMIK not only formed part of the institutional structure of the UN, but also exercised powers delegated to it by the Security Council under Chapter VII of the Charter. On the other side, the presence of KFOR in the territory of the FRY rests on a dual legal basis: the consent of the local authorities and Security Council Resolution 1244.[79] It is unclear whether KFOR is merely a multinational instrument of the contributing States, an organ of NATO, or an entity with a separate legal existence. According to the ECtHR, the Security Council retained "*ultimate authority and control over the security mission and it delegated to NATO ... the power to establish, as well as the operational command of, the international presence, KFOR*."[80] But, the exercise of military command and control over national armed forces is a

legal system: it became part of the domestic constitutional order, and at the same time remains superior to it. See Bernhard Knoll, Beyond the *Mission Civilisatrice*: The Properties of a Normative Order within an Internationalized Territory, Leiden Journal of International Law, 19 (2006), p. 283.

[77] Article V(7), Model agreement between the United Nations and Member States contributing personnel and equipment to United Nations peace-keeping operations: Report of the Secretary-General, 23 May 1991, A/46/185.

[78] OSCE, Kosovo Review of the Criminal Justice System, October 2001, 40. See also Inter-American Commission on Human Rights, *Coard et al. v. the United States,* Case 10.675, Report No. 51/96, par. 37.

[79] The MTA also specifically authorized KFOR to take such actions as are required, including the use of necessary force, to ensure its own protection. Both, the MTA and Resolution 1244, confer a right on KFOR to issue detention orders.

[80] *Ibid*. at para. 135.

prerogative of the State to which those forces belong. Moreover, the Security Council has not requested the Secretary-General to appoint a Special Representative 'to *control* the implementation of the international civil presence', but to instruct his Special Representative merely 'to *coordinate closely* with the international security presence to ensure that both presences operate towards the same goals and in a mutually supportive manner'. Thus, the KFOR is not a subsidiary organ of the UN and its acts are not attributable to the UN. Its acts or omissions can be attributed either to the NATO as international organization, or to the national country.[81]

As a consequence, in the first case, it seems that jurisdiction of the ECtHR could not be established, having in mind that no foreign contingents serving in Kosovo exercises overall effective control over acts exercised in Kosovo, and the conclusion in *Behrami* in terms of 'inadmissibility' seems to be correct. On the contrary, in the second case the jurisdiction could be established because both, France and Norway ratified the ECHR. The *Saramati* case is, thus, pretty different because the applicant was actually in the hands of State agents serving outside the territory of its own country. Every arrested individual has a right under Article 5, par. 3 of the ECHR to be brought promptly before a judge in order to avoid arbitrary conduct, *incommunicado* detention and ill-treatment. Therefore, the respondent State should have been considered as exercising "personal jurisdiction" over the arrested.[82]

This decision is a precedent to several other complaints relating to the conduct of KFOR inadmissible on the ground that it is incompetent *ratione personae* to review the acts of the respondent States carried out on behalf of the UN.[83] It's a pity that the Court rejected the idea that Kosovars should have a possibility to bring a claim before the ECtHR. But it mustn't be forgotten that in Rambouillet, it was agreed that *"applicable rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its protocols shall directly apply in Kosovo*", and that *"these shall have priority over all*

[81] See Resolution 1244, Annex 2, para. 4 and paras. 13–14.

[82] See for the same conclusion Federico Sporetto, The International Security Presence in Kosovo and the Protection of Human Rights, working paper no. 48, 24 May 2008, 11. Text available at *http://www.du.edu/gsis/hrhw/working/2008/48-sperotto–2008.pdf,* last visited on 30 November 2008.

[83] See *Ilaz Kasumaj v. Greece*, Decision of 5 July 2007, Application No. 6974/05; *Slavisa Gajic v. Germany*, Decision of 28 August 2007, Application No. 31446/02; *Duan Beri and Others v. Bosnia and Herzegovina*, Decision of 16 October 2007, Application Nos 36357/04, 36360/04, 38346/04, 41705/04, 45190/04, 45578/04, 45579/04, 45580/04, 91/05, 97/05, 100/05, 101/05, 1121/05, 1123/05, 1125/05, 1129/05, 1132/05, 1133/05, 1169/05, 1172/05, 1175/05, 1177/05, 1180/05, 1185/05, 20793/05 and 25496/05.

other law", that was never enforced in reality.[84] Venice Commission also particularly emphasized the need for an urgent set up of a system of independent review of UNMIK and KFOR acts for conformity with international human rights standards.[85] It concluded that "*it is certainly unwarranted to leave the population of a territory in Europe indefinitely without access to the Strasbourg Court*."[86] Besides, the Ombudsperson stressed out that the inhabitants of Kosovo remain effectively deprived of their access to international human rights mechanisms that have recently been accorded to the inhabitants of Serbia.[87] Unfortunately, although the Constitution of Kosovo came into effect on 15 June 2008 providing in Article 22 that the ECHR is directly applicable in Kosovo and, "*in the case of conflict, have priority over provisions of laws and other acts of public institution*", this provision is just a proclamation without practical value.

6. CONCLUDING REMARKS

It must be concluded that the international community haven't done enough for the respect and improvement of human rights situation in Kosovo. As it was explained above, the ECtHR rejected its jurisdiction for alleged acts or omissions of UNMIK and KFOR although it was not clearly established whether those acts were attributable to them, or to the respective countries. Also, even if those acts were attributable to UNMIK and KFOR it can be argued that they are subject to jurisdiction of the ECtHR because they perform tasks traditionally associated with states and not to the ordinary UN mandates. It is incompatible with the principles of democracy, the rule of law and respect for human rights that UNMIK and KFOR could act as State authorities and be exempted from any independent legal review.

Position that acts or omissions of UNMIK are not under the jurisdiction of the ECHR because they can lead to the respect of all treaties concluded on specific territory and would be contrary to the need to establish UN mandate which is not bound by limitations created by individual states, is not in accordance with the idea that core human rights should be respected by those organs performing governmental functions. However, in Kosovo, UNMIK declared that one of the three different laws that is applicable are the instruments of international law imported

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[84] The Rambouillet Accord, Interim Agreement for Peace and Self-Government in Kosovo, Article VI, February 23, 1999. Text available at *http://www.commondreams.org/kosovo/rambouillet.htm*, last visited on 30 November 2008.

[85] *Ibid*, para. 96.

[86] Venice Comission, par. 17.

[87] Ombudsperson Institution, *Fourth Annual Report (2003–2004)* (2004), p. 30.

into the domestic legal order. But, in practice, it did not respect what was proclaimed. Another position that Resolution 1244 was adopted by Security Council which acted under Chapter VII and Article 103 of the UN Charter which provides that the obligations set up in this instrument "*shall prevail*" over "*obligations under any other international agreement*" is not viable. One of the main purposes of the UN Member States enshrined in Article 1, par. 3 is to promote and encourage respect "*for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion*." The centrality of human rights was even highlighted by the UN Secretary-General who emphasized that "*UNMIK will be guided by internationally recognized standards of human rights as the basis for the exercise of its authority"* when the UN administration was established.[88] However, no real and sincere effort was invested to respect core international human rights instruments, which were so many times proclaimed but remained only dead letters. Thus, it is urgent that the UN system itself develop mechanisms which ensure respect for the limitations on UN action. It is obvious that international community has done almost nothing to improve the human rights situation in Kosovo and to implement "Standards for Kosovo" before the recognition of Kosovo as a state.

The remaining question here is whether a newly established State can be recognized as such? The alleged massive violation of human rights in Kosovo led to the NATO intervention and the adoption of Resolution 1244. After the unilateral recognition of Kosovo, many commentators and politicians explained the uniqueness of Kosovo and justification of its independence because of the massive violation experience.[89] However, so far in modern practice there is no "*suggestion that as regards statehood itself, there exist any criterion requiring for fundamental human rights*."[90] Sadly, but truly, there is no government which does not violate human rights of individuals who are under its jurisdiction, but there is no case where such violations have called statehood in question.[91]

However, if Serbia can lose its title over Kosovo because of the massive human rights violations, is it than legal to recognize a unilateral

[88] See Federal Republic of Yugoslavia (Kosovo), *Setting the Standard and KFOR's Response to the Violence in Mitrovica*, Amnesty International, AI Index: EUR70/013/2000, 13 March 2000.

[89] For example, Daniel Fried, U.S. Assistant Secretary of State for European and Eurasian Affairs, A "European Future" for the Balkans, U.S. Department of State, 6 February 2007.

[90] J. Crawford, *The Creation of States in International Law*, 2nd ed., Oxford University Press, 2006,149.

[91] *Ibid*. The Craford points out that human rights violations can cause humanitarian interventions, but they "*must be carried out for the humanitarian purpose, cannot entail any acquisition of territory and must be brought to an end as soon as possible once the humanitarian situation has been restored*." *Ibid*, 150.

declaration of Kosovo independence, a State that is not willing and capable of respecting and promoting core human rights standards for non-Albanian population? Rule of law, democracy and human rights are preconditions for membership in the Council of Europe and the European Union, and these principles also constituted important criteria for the recognition of the successor states of the Former Yugoslavia and the Former Soviet Union by the EU. Is it than illegal to recognize Kosovo before certain human rights standards are achieved? If the answer is positive, than every single state[92] that has recognized Kosovo as a state in this stage, acts contrary to some basic principles of international law enshrined in the *jus cogens* character of some human rights norms, such as the right to life, freedom from torture, the access to courts, etc. Interestingly enough, none of them used conditional recognition of Kosovo in support of human rights, although all of them were aware that international community and local government failed to protect basic human rights. It brings us to the conclusion that human rights serve only as a veil to some other interests, and that there is no sincere concern about the destiny of people who live in the heart of Europe without adequate human rights protection. In that case, we must be honest and admit that international community has not achieved that level of humanity and that the violation of some basic human rights is not a precondition for the recognition of newly established states. Therefore, the reasoning that Serbia has lost its title over Kosovo because of the massive human rights violations must be urgently reconsidered.

[92] As at 31 October, Kosovo had been recognized as an independent state by 52 countries.