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**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**PRELIMINARY COMMENTS**

**ON**

**THE POSSIBLE ESTABLISHMENT**

**OF A HUMAN RIGHTS SUPERVISORY MECHANISM**

**FOR KOSOVO**

**By**

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### **Preliminary Comments on the Possible Establishment of a Human Rights Supervisory Mechanism for Kosovo**

The possible establishment of a Human Rights Supervisory Mechanism for Kosovo raises a number of questions:

#### **I. What state of 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 of Human Rights without any territorial declaration make it responsible for human rights protection in Kosovo?**

1. A state can only be held responsible for acts over which it is able or to exercise effective control. This rule is part of general international law, as well as human rights law, Therefore, although Serbia and Montenegro is the territorial sovereign with respect to Kosovo, it is, in principle, not responsible for human rights violations which occur on the territory of Kosovo. This is true as long as Kosovo is administered *de jure* and *de facto* by UNMIK and KFOR troops on the basis of UN Security Council Resolution 1244 and as long as such violations are not committed by state organs of Serbia and Montenegro.

2. This leaves the international authorities in Kosovo as responsible for human rights violations in Kosovo. In this respect one important distinction must be borne in mind. 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.

#### **II. 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 part?**

3. The question can only be answered on the basis of a distinction between UNMIK and KFOR as "the international authorities in Kosovo":

4. UNMIK acts in the name of the UN. It can conclude agreements in the name of the UN. There are no obstacles derived from general international law why UNMIK should not have the power to conclude an agreement with another international organisation by which a supervisory human rights mechanism is established, provided that such an arrangement does not contradict UNMIK's mandate. However, there would seem to be limits to this treaty-making-power by UNMIK. It is unlikely, for example, that UNMIK has the power to conclude an agreement by

which it transfers the power to annul its decisions. Any human rights supervisory mechanism would therefore have to remain declaratory.

5. As far as KFOR is concerned, on the other hand, it is highly questionable whether NATO, as the international legal person whose task it is to coordinate KFOR troops, or KFOR itself (which possesses no separate international legal personality, with the possible exception of the KFOR HQ) have the power to transfer powers of supervision to an international body, even if they are only declaratory or advisory. This is because it cannot be presumed that the individual states which have contributed to the KFOR contingents, and which continue to exercise a substantial amount of control over them, have consented to such a transfer of power to NATO. It is in particularly unlikely that the Congress of the United States would regard it as part of NATO's inherent powers to consent to an international human rights supervisory mechanism over the actions of US soldiers abroad, even if this mechanism would only be declaratory or purely advisory.

6. As far as the preconditions from the Council of Europe side of a possible agreement are concerned, it appears that the distinction between UNMIK and KFOR plays a role concerning the need for a possible amendment of the European Convention of Human Rights. According to Article 1 ECHR the contracting states have agreed to ensure and protect human rights for "all persons under their jurisdiction".

- As far as they are subjected to acts by UNMIK, persons in Kosovo are not under the jurisdiction of a member state of the ECHR but under the jurisdiction of an international organisation, the "United Nations". ECHR member states are only indirectly responsible for acts by UNMIK, that is by way of a "transfer responsibility" (See the judgments of the ECHR in *Matthews, Waite and Kennedy*). This means that the ECHR would have to be amended in order to provide for a competence of the European Court of Human Rights to supervise acts by international organisation, and in particular those whose membership goes beyond that of the CoE (a similar problem arises with respect to the EU and its acts).

- As far as acts of KFOR troops are concerned it would seem to be possible that the ECHR member states declare (or agree) that they regard the jurisdiction of the European Court of Human Rights to extend to the acts of their troops in KFOR. Such a declaration or agreement may well turn out to be declaratory as the European Court of Human Rights may find that it already possesses jurisdiction for such cases under the Convention. It is, however, possible, that non-ECHR member states would object even to a supervision of KFOR troops from ECHR member states by the European Court of Human Rights (or any other supervisory human rights mechanism). It may therefore be wise to conclude an agreement between all KFOR troop contributing states which clarifies that such a supervision is acceptable. KFOR troops from non-ECHR member states, however, could not so easily be brought under the jurisdiction of the ECHR.

7. Regardless of whether and how the European Court of Human Rights can technically be brought to play a role in this context it would seem to be unwise if the Court would be conceived as the only supervisory organ. Human Rights protection in Kosovo should be swift and visible, even if this comes at price. In addition, it may well happen that the number of applications will be large. The European Court should only be a Court of last resort and not the first judicial instance in a hotspot.

8. Serbia and Montenegro should be included in any arrangement. It can well be argued that it is precisely the purpose of distinguishing between territorial sovereignty (which remains with Serbia and Montenegro) and effective territorial control (which lies elsewhere) to preserve a sphere of limited influence of Serbia and Montenegro which may go so far as not to impede the exercise of the responsibilities as prescribed by the international community.

**III. 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?**

9. There is an essential difference between the Human Rights Chamber for Bosnia and Herzegovina and any possible Human Rights Chamber for Kosovo: Whereas the HRC for Bosnia was competent to review acts of a national authority, any possible HRC for Kosovo would have to be competent to review acts by an international authority. In Kosovo, even the local provisional authorities derive their legal status from the international authority. This is not a merely a formal point.

10. There is a practice of judicial or quasi-judicial review of acts by international organisations. The Administrative Tribunal of the United Nations is a case in point. The special difficulty in our case is that a body which is constituted by a (regional) international organisation would review the acts of a different international organisation, the UN. While it is true that the UN can bind itself by virtue of its (inherent) treaty making power, it would mark a major precedent if it would subject itself even to a declaratory human rights supervisory mechanism by a different (regional) organisation. And even if the UN would take this step it is possible that difficulties might arise in specific cases. Therefore it seems advisable to call the decisions of any such regional supervisory mechanism not “declaratory” but “advisory”. This change in terminology may not imply a specific legal difference but it makes clear that the competences of the international organisation in charge are not formally curtailed.

11. In substance, the use of an advisory body to review human rights applications which come out of Kosovo is clearly desirable. To achieve this end it is necessary to conclude an agreement between the parties concerned (see above) and the attribution of the task of “advisory review” to a special body. Such a body must not necessarily be newly established. It may even be contemplated to form a Sub-Commission within the Venice Commission to accomplish this task. As with the Council on Democratic Elections, it may even be possible to appoint Kosovars to this body.