



Evolving International Practices for Protection of Human Rights- the UN Human Rights Advisory Panel and EU Human Rights Review Panel

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Abstract: This article analyses the unique development of the international human rights non judicial protection mechanism in Kosovo. Since 1999 Kosovo has been placed under international supervision carried out by international organizations, namely the United Nations and the European Union. The UN's Mission in Kosovo (UNMK) was unprecedented both in scope and structural complexity. After the Declaration of Independence by Kosovo authorities on 17 February 2008, the European Union Rule of Law Mission in Kosovo EULEX took over to assist and support the Kosovo authorities in the rule of law area, specifically in the areas of the police, the judiciary and customs. The UNMIK's extensive mandate and EULEXs limited executive powers in practice have affected human rights of Kosovars as a consequence of the UNMIK and EULEX actions and inactions in the course of exercise of their mandates. This study will try to reveal the processes that lead to establishment of these two unique international human rights Panels and their impact on human rights protection of individuals under international administration. The main question to be addressed is if these two human rights panels are providing the adequate remedy for addressing human rights violations by international actors in a post conflict Kosovo.

Keywords: accountability; international community; human rights; peace building; right to a remedy

1. Introduction

UNMIK was established in June 1999, after the 78- day NATO military campaign in Yugoslavia. The NATO military campaign concluded with the Military Technical Agreement (Military Agreement, 1999) that led to the adoption of Resolution 1244 (UNSCR 1244, 1999), which is the legal mandate under which UNMIK still operates. The UN Security Council (SC) authorized the Secretary-General of the United Nations (SG), to set up the UNMIK in order to provide an interim administration for Kosovo under which the people of Kosovo could enjoy

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substantial autonomy within the Federal Republic of Yugoslavia (FRY) (UNSCR 1244, 1999, Section 10). UNMIK's tasks necessary to implement its mandate have been overwhelming and have included the development of a civil service, establishment of all social services, the reconstruction and operation of public utilities and roads, airports, and public transportation. UNMIK oversaw the transfer of authority from Kosovo's provisional institutions to the state institutions established under political settlement (Report of the Secretary General, 1999). The UNSCR 1244 also established the legal basis for the deployment of an international NATO led security force and outlined the responsibilities of such a force: maintaining, and if necessary enforcing peace; overseeing the return of refugees and the protection of all groups from ethnic and other types of persecution; ensuring the withdrawal and preventing the return of Federal and Serbian armed personnel into Kosovo; ensuring public safety and order until the international civil presence is in a position to take over this task (UN SC Resolution 1999, Annex 2 Paragraph 4). With this extensive mandate UNMIK operated for almost a decade, and despite the fact that the Constitutional Framework for Provisional Institutions for Self-Government (PISG) in Kosovo provided for transfer of authorities from UNMIK to PISG still the main powers remained with UNMIK SRSG (Constitutional Framework 2001, Chapter 8).

The UNSCR 1244 that established both the international civilian and military presence also provided the legal bases for establishment of the European Union Rule of Law mission known as EULEX. EULEX has been established after the political settlement processes related to the final status have taken place. The negotiations for Kosovo status began after the deterioration of the security situation that resulted with death of civilians, property destruction and economic loss as well, which by many were a result of the Kosovo society frustration on the lack of progress under the UNMIK administration (Human Rights Watch, 2004, Amnesty International 2004). Following the report by UN Special Envoy Kai Eide in 2005 (UN Security Council, Kai Aide Report, 2005), the UN Secretary-General appointed Martti Ahtisaari as the "Special Envoy for the Future Status Process for Kosovo" (UN Security Council, 2005). The UN supported talks lead by Ahtisaari began in February 2006. The status talks went on more than a year between the PISG and Serb authorities and despite some compromises on technical issues no joint agreement on Kosovo's political status was reached. On 2 February, 2007 UN Secretary-General's Special Envoy Martti Ahtisaari presented the "Comprehensive Proposal for the Kosovo Status Settlement" (Ahtisari proposal, 2007) which

provided for internationally supervised independence for Kosovo. The proposal was accepted by Prishtina, it was not however accepted by authorities in Belgrade, and the proposal was not endorsed by the UN Security Council. In the evident deadlock of internationally status negotiations Kosovo authorities supported by the US and most EU states, declared its independence on 17 February 2008 with the Constitution of the Republic of Kosovo entering into force on 15 June 2008. Based on the Comprehensive Proposal for the Kosovo Status Settlement (the “Ahtisaari Plan”), the Kosovo authorities welcomed an international civilian presence (ICO) to supervise the implementation of the Ahtisaari Plan, and the European Union-led rule of law mission EULEX. The NATO Kosovo forces known as KFOR continued to ensure peace and security under this new international setting. EULEX became fully operational on December 2008. Based on the mission statement, EULEX Kosovo “shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices” (Council Joint Action 2008/124/CFSP, Article 2.). The Joint Action is unpacked in the mission mandate and the operational “tasks” horizontally for the three different components of EULEX, that of the justice system, the police and customs components. Related to the justice system EULEX is mandated to “ensure that cases of war crimes, terrorism, organized crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes, as well as property related issues, are properly investigated, prosecuted, adjudicated and enforced according to the applicable law”, “contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organized crime” as well as “contribute to the fight against corruption, fraud and financial crime (Council Joint Action 2008/124/CFSP, Article 3). The EULEX functions, nonexecutive (namely, mentoring and monitoring the Kosovo Police (KP)) and executive in character (to provide back-up to KP in mainstream law enforcement tasks such as crowd and riot control) are much more limited than those initially assigned to UNMIK before 2008. As far as time frame is concerned, initially the EULEX was mandated for two years, and then its mandate was extended first in June 2010, for a period of two years, and later in 2012 still operating within the framework of the UN SC Resolution 1244. In 2014 the mandate was extended again but in a modified legal base based on the Kosovo Constitution but still under UN SC Resolution 1244.

This extension modality was underpinned in an exchange of letters between the then President Atifete Jahjaga and EU High Representative Catherine Ashton on 14 April 2014. Lately on 14 June 2016, the Council extended the mandate of EULEX until 14 June 2018. The newest mandate has been extended based on the exchange of letters between current Kosovo President Hashim Thaci and EU High Representative Federica Mogherini. The mandate of EULEX will be implemented in partnership with Kosovo authorities, and will continue the gradual transfer of its activities to local institutions and other EU actors. It is to be noted here that UNMIK continues to be present in Kosovo though with limited authorities and cooperates with EULEX in several issues most notably in the judiciary through the transfer of cases and files.

From the above it is evident that there is a diversity of UNMIK and EULEX mandate, however both mandates share a common feature, i.e. their potentially wide impact on the local population's human rights. While usually it is expected that the impact of international actors in a post conflict setting to be beneficial – protection and promotion of human rights which has explicitly been envisaged in international mandates– but in practice it might have detrimental effects not only in individual rights, but it might affect the overall human rights culture in the post conflict situation (Ombudsperson Institution in Kosovo, 2002).

2. Human Rights Obligations of UNMIK and EULEX

The determination of the human rights obligations of International Organizations (IOs) and with it their peacekeeping missions are not as straightforward as it is for States (Reinisch, 2001). The applicability of customary law to IOs and their missions is debated (Henckaerts & Doswald-Beck, 2005); IOs and their missions are not parties to human rights treaties (Stahn, Easterday & Iverson, 2014), except the EUs accession to European Convention for Human Rights (Treaty of Lisbon 2009). Currently there is no international venue where they can be held responsible for the alleged human rights violations, while there are several cases where the cases against IOs have been brought in to the national courts (Muller, 1995). However, the issue of the jurisdictional immunity attributed to IOs hampers the successful resolution of cases against IOs in national courts (Reinisch, 2000). Still, the issue of attribution of the conduct as to which entity (the sending State or the organization) should bear responsibility for the conduct of peacekeeping

contingents is in the process of clarification (“DARIO with commentaries” (2011), *Behrami v France & Saramati v Norway*).

Notwithstanding, the above dilemmas, UNMIK (and KFOR)’s and EULEXs obligation to apply human rights law in Kosovo arises from their constituting documents but also from the applicable law in the territory of Kosovo (UNMIK Regulation 2000/47 (2000), Constitutional Framework (2001); EULEX, Accountability Information Sheet, Constitution of Kosovo, Chapter II and III (2008)). The Resolution 1244, which provides that one of the main responsibilities of the international civil presence, is protection and promotion of human rights (UNSC Resolution 1244 section. 11(j)). More concretely, international human rights standards for regulating the conduct of public authorities in relation to the citizens were directly applicable in Kosovo’s legal system while under UNMIK administration based on the wording of UNMIK Regulation 1999/24 (as amended by UNMIK Regulation 2000/59). Section 1 of this regulation states that all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards in exercising their functions. The same section makes clear that, among others, human rights standards contained in the European Convention on Human Rights (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) must apply. Also, section 3(5) of UNMIK Regulation 2000/47 obliges UNMIK personnel to respect the laws of Kosovo and to refrain from any action incompatible with that law. KFOR is required to respect applicable law and UNMIK Regulations only “in so far as they do not conflict with the fulfilment of the mandate given under Security Council Resolution 1244” (UNMIK/Reg. 200/47). One of the implications of this limited applicability is the fact that individuals cannot seek to avail of the claims procedures provided for in some of these instruments if the violations occur as the result of the actions/inactions of the UNMIK. This was so due to the fact that that UNMIK but also KFOR have had and continue to have wide immunity and privileges including here the immunity from the court jurisdiction as secured under UNMIK regulation 2000/47 On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (UNMIK Regulation 2000/47).

Similarly, in the fulfilment of its tasks, the EULEX has to ensure that all its activities respect international standards concerning human rights and gender mainstreaming (Joint Action, Article 3(i)). This article is very positive concerning the regulatory framework that provides for human rights protection by the EULEX, while this Article does not provide a concrete reference to the human rights

documents and treaties applicable to EULEX. This broad formulation of “international standards” has been interpreted in the mandate of the Human Rights Review Panel (Panel Accountability Concept EULEX Kosovo, 2009) where the concrete reference to documents and international treaties has been provided. EULEX also has been accorded immunity against local legal and administrative processes. While local legislation cannot be enforced against EULEX or its staff members, EULEX and its staff members still must observe local legislation. EULEX claims to have regulated different forms of accountability, including the operational accountability, financial accountability, accountability to EU member states and to the people of Kosovo, and the external accountability (Panel Accountability Concept EULEX Kosovo, 2009). The so called external human rights accountability: the EU has decided to promote the establishment of a Human Rights Review Panel (HRRP) for EULEX Kosovo for complaints from any person claiming to be the victim of human rights violations by EULEX Kosovo in the conduct of its executive mandate which will be disused below.

3. The UNMIKs Human Rights Advisory Panel

The lack of human rights protection in Kosovo under UN administration has raised much interest among different international bodies in exploring possible alternative solutions. The European Commission for Democracy through Law (Venice Commission), in its opinion in 2004 provided detailed recommendations on establishment of the human rights mechanism necessary to handle alleged human rights violations by international presences (Venice Commission Opinion, 2004). In January 2005, the Parliamentary Assembly of the Council of Europe recommended that the UN/MIK and KFOR/NATO begin work towards establishment of a Human Rights Court in Kosovo (Council of Europe Parliamentary Assembly Resolution 1417, 2005). In the meantime it proposed to establish specific interim review mechanisms that would address the ECHR’s lack of jurisdiction over UNMIK and KFOR. The Human Rights Advisory Panel (HRAP) was created by UNMIK Regulation No. 2006/12 “On the Establishment of the Human Rights Advisory Panel” to examine alleged violations of human rights by the United Nations Interim Administration in Kosovo (UNMIK). Its establishment constitutes an unprecedented development in the context of United Nations missions. The Panel is a pioneer and unique mechanism concerning the responsibility, with regard to human rights, for actions by international

organizations (Final Report 30 June, 2016). Based on UNMIK Regulation No. 2006/12 the Human Rights Advisory Panel is an advisory institution and with competence over the whole territory of Kosovo, but with respect violations occurring in a limited time period. The Panel is composed of three international members, who will flight every month to Prishtina for the panel sessions, each time for three to four days. During this session, the members of the Panel examine the applications. The Panel was mandated to examine complaints from “any person or group of individuals” after “available avenues for review have been pursued”. The Panel’s mandate specifies that its temporal jurisdiction encompasses cases where the alleged violation took place on or after April 23, 2005, thereby excluding jurisdiction over all violations that occurred prior to that date and were not covered by Ombudsperson while it had mandate over UNMIK (UNMIK Regulation No. 2006/12 Chapter 3 Section 2). The Human Rights Advisory Panels mandate was to address breaches of rights set forth in the European Convention and its protocols, violations of rights contained in the ICCPR, and breaches of other human rights instruments (UNMIK Regulation No. 2006/12 Section 1). The complaints are not limited to the complainant itself but are also extended to related parties. A family member, NGO, or trade union may submit a complaint on behalf of the complainant (UNMIK Regulation No. 2006/12, Chapter 3(10.2)). In addition, the Panel can appoint an ex officio representative to submit a complaint and act on behalf of the suspected victim/s if it has reliable information that a violation of human rights has occurred (UNMIK Regulation No. 2006/12 Chapter 3(10.2)). The Human Rights Advisory Panel will issue findings and recommendations as to whether there has been a human rights violation and these will be submitted to the SRSG (UNMIK Regulation No. 2006/12, Chapter 17(17.1)). The Human Rights Advisory Panel’s workload has increased over the years. In 2006, 12 complaints have been submitted, in 2007, 69 in 2008, 352 in 2009 and 89 in 2010. Altogether 527 complaints were introduced (Final Report, 2016). The deadline for the submission of new complaints to the Panel was 31 March 2010. Most of the complaints submitted to the Panel concerned the death and disappearances of elderly relatives as a consequence of inaction of UNMIK (Final Report 30 June 2016). During its life tie the Panel has faced many difficulties including the financial and human resources, lack of previous similar experiences, lack of responsiveness by the UNMIK (Final Report 30 June 2016). Notwithstanding the challenges and obstacles it faced, the Panel was able to achieve a lot in terms of its legal legacy. Specifically, the Panel contributed to international thinking concerning numerous important questions in terms of human rights protection

standards, especially those related to the human rights accountability of international organizations, in this case the UN. More than eight years after its first session in November 2007, the work of the Human Rights Advisory Panel at the UN Mission in Kosovo has come to an end. From 1 July 2016 the Human Rights Advisory Panel, as well as its Secretariat in UNMIK, ceased its operations. Throughout its life time the Panel had no jurisdiction over KFOR.

4. EULEX Human Rights Review Panel

The European Union established the Human Rights Review Panel on 29 October, 2009 with a mandate to review alleged human rights violations by EULEX in the conduct of its executive mandate. The panel is composed of three international members appointed by the Head of the EULEX mission for a three year renewable term. The panel is supported by a permanent secretariat located in the capital city of Kosovo. In accordance with the provisions of the Accountability Concept, the Panel may consider complaints pertaining to alleged breaches of, among others, the following human rights instruments: The Universal Declaration on Human Rights (1948); The European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention, 1950); The Convention on the Elimination of All Forms of Racial Discrimination (CERD, 1965); The International Covenant on Civil and Political Rights (CCPR, 1966); The International Covenant on Economic, Social and Cultural Rights (CESCR, 1966); The Convention on Elimination of All Forms of Discrimination Against Women (CEDAW, 1979); The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT, 1984); The International Convention on the Rights of the Child (CRC, 1989). In practice, the complaints filed to date have been primarily based upon the European Convention on Human Rights and its Protocols (Human Rights Review Panel, Annual Report, 2015). A number of cases also relied on the provisions of the Declaration on Human Rights, the International Covenants and other human rights instruments (Human Rights Review Panel, Annual Report, 2015).

The HRRP examines complaints relating to alleged violations that occurred since 9 December 2008 in Kosovo. Complaints must be submitted to the HRRP within three months from 9 June, 2010, when the HRRP became operational or within six months from the date of the alleged violation, whichever is the more favorable to the Complainant. Neither a judicial nor a disciplinary body, the Panel is however

only mandated to look into whether or not a violation of human rights has occurred and to formulate recommendations for remedial action not linked to compensation. The Panel decides if a complaint is admissible and when admissible, it reviews the complaint and renders a finding as to whether or not EULEX has violated human rights law applicable in Kosovo.

When the Panel determines that a violation has occurred, its findings may include non-binding recommendations for remedial action by the Head of Mission. The recommendations of the Panel and the subsequent actions by the Head of Mission with regard to the implementation of its recommendation are published in the English, Albanian and Serbian languages on the Panel's website. In 2015, 16 new cases have been registered with the Panel. By the end of 2015, a total of 152 cases have been submitted to the Panel since its inception in 2010, out of which 118 have been closed by a final decision (Human Rights Review Panel, Annual Report, 2015). Most of the cases concern violations related to lack of proper investigations, fair trial hearings, and property issues as well (Human Rights Review Panel, Annual Report, 2015). The activities of the Human Rights review panel continue still. It remains to be seen if the mandate of the Review panel will be linked with the overall mandate of the EULEX in Kosovo.

5. Conclusion

Indeed the establishment of the UNMIK Human Rights Advisory Panel (HRAP) and the EU Human Rights Review Panel (HRRP), entrusted with the mandate to review alleged human rights violations committed by UNMIK and EULEX in the performance of their authorities are the first of this kind in the history of the international administration. Currently, these two non-judicial mechanisms serve as the only two international panels of this kind that hold international missions accountable for human rights violations. As such this extension of accountability for human rights violations from states to international missions and with it international organizations represents a major advance in the development of international human rights protection. The most positive aspect of the both panels is that they have been mandated to express their view as to whether or not there had been a breach of the applicant's fundamental rights and freedoms in respective cases. While the UNMIK Human Rights Advisory Panel would have to commit itself to providing appropriate redress including possible compensation, the EULEX Human Rights review panel is not mandated to recommend compensation.

UNMIK Human Rights Advisory Panel recommend in all the cases where it found that there had been a violation of Convention rights, the award “adequate compensation for non-pecuniary damage” (Venice Opinion, 2009). However, in practice no compensation has been granted so far by UNMIK since the UNSC Resolution 1244 does not provide for compensation provision (Venice Opinion 2009).

The functioning both panels are part time and both has only advisory functions; their findings and recommendations are non-binding. The Head of Missions may decide not to implement the recommendations. Additionally, it is not clear what the role of the Panels in cases is when the recommendation are not being considered or delayed by the Head of Missions. Although this modality for the human rights accountability by international presences does not in its entirety satisfy the concept of a human rights remedy, still it presents a positive response for redress to the societies under international supervision. The fact that both panels had the mandate to declare that a breach of a human rights has taken place(or not) provides for the initial moral satisfaction which in most cases where a human rights violation has taken place is the most desired outcome.

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