Reviewing Governmental Acts of the United Nations in Kosovo

By Rebecca Everly[*]

A. Introduction

The governmental role played by the United Nations in Kosovo since 1999 raises a host of questions for international lawyers. Chief among these is whether governmental acts of the United Nations Interim Administration Mission in Kosovo (UNMIK) should be subject to review within Kosovo for compliance with applicable legal standards. In principle, such review would be helpful in ensuring UNMIK accountability and in sending the message that the governors—as well as the governed—in Kosovo are subject to the rule of law. However, for many, the prospect of actors in Kosovo second-guessing decisions taken by UNMIK is problematic, partly due to a fear that review could be used to derail the UNMIK-led peacebuilding process in the territory.

The present article examines the manner in which this polemical issue has played itself out in the territory to date, focusing in particular on judicial review within Kosovo of governmental acts taken by the head of UNMIK: the Special Representative of the Secretary-General (SRSG). It discusses both the formal obstacles to such review and the manner in which the Kosovo judiciary has responded to these obstacles. The article also briefly examines certain non-judicial mechanisms established by UNMIK for the purpose of, *inter alia*, reviewing the compliance of the SRSG and UNMIK with international human rights standards. As background, the following section outlines the basis for SRSG governmental authority in Kosovo, as well as the legal constraints on this authority.

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B. Authority of the SRSG

The SRSG exercises governmental authority in Kosovo by virtue of United Nations Security Council Resolution 1244, issued under Chapter VII on 10 June 1999. Pursuant to this Resolution, the Security Council "[a]uthorizes the Secretary-General […] to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia, and which will provide transitional administration" pending a settlement concerning the territory.[1] The Security Council further requests the Secretary-General to appoint a Special Representative to control the implementation of the international civil presence.[2]

The first individual to serve as SRSG in Kosovo, Bernard Kouchner, issued a regulation specifying that "all legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General."[3] In furtherance of this mandate, the SRSG issues generally applicable legal acts in the form of regulations and administrative directions, although in recent years a number of laws have been passed by local institutions and enacted by the SRSG (sometimes with alterations). The SRSG also issues case-based executive decisions for a variety of purposes, *e.g.,* to set aside *ultra vires* decisions of municipal authorities.

While not subject to a complex web of legal standards of the sort used to regulate legislative and executive authorities in more orthodox governmental settings, the SRSG is not entirely unbound by law. He is governed by Resolution 1244, which lays out, in general terms, the rights and duties of the international civil presence in Kosovo. As the head of a subsidiary organ of the United Nations, the SRSG is also obliged to ensure that his conduct is consistent with the UN Charter, as well as customary international law and general principles of law.

Moreover, SRSG-issued legal instruments are sometimes used to set out the rights and duties of the SRSG and other UNMIK officials, although such instruments may be altered or repealed by the SRSG himself. A key example is UNMIK Regulation 1999/24, which provides that: "(i)n exercising their functions, all persons

[1] S.C. Res. 1244, para. 10, U.N. Doc. S/RES/1244 (10 June 1999).

[2] *Id*. at para. 6.

[3] *On the Authority of the Interim Administration in Kosovo*, § 1.1, U.N. Doc. UNMIK/REG/1999/1 (25 July 1999).

undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards."[4] Regulation 1999/24 does not expressly require that the SRSG himself observe internationally recognized human rights standards or that SRSG-issued legal instruments comply with such standards, but lawyers in the UNMIK Office of the Legal Adviser indicate that they interpret the regulation in this manner.[5]

C. Judicial Review

While legal standards regulating the conduct of public authorities are important for establishing and consolidating the rule of law in a given territory, their effectiveness in this regard ultimately depends upon the existence of mechanisms—including judicial mechanisms—for rendering authorities accountable in cases where they violate such standards. In Kosovo, the potential for strong judicial review of the SRSG's decisions is diminished by the broad immunity that the SRSG and UNMIK enjoy in the territory. A regulation issued by the SRSG in 2000 provides that: "UNMIK, its property, funds and assets shall be immune from any legal process"[6] and that the SRSG and certain other high-ranking UNMIK officials "shall be immune from local jurisdiction in respect of any civil or criminal act performed or committed by them in the territory of Kosovo."[7] Other UNMIK personnel enjoy immunity from legal process for acts performed in their official capacity.[8] The broad immunity enjoyed by these actors is similar to that enjoyed by many international organizations and international officials in host territories, and is based on the UN Charter, which provides that the UN shall enjoy the immunity necessary for fulfilment of its purposes in the territory of UN members, and that UN officials shall similarly enjoy the immunity necessary for the independent

[4] *On the Law Applicable in Kosovo*, § 1.3, U.N. Doc. UNMIK/REG/1999/24 (12 Dec. 1999). The applicable human rights standards include: The Universal Declaration of Human Rights, G.A. Res. 217A, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 Dec. 1948); The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (4 Nov. 1950); The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (16 Dec. 1966); The International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (16 Dec. 1976); The Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (7 Mar. 1966); The Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (18 Dec. 1979); The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (10 Dec. 1984); The Convention on the Rights of the Child, 1577 U.N.T.S. 3 (20 Nov. 1989).

[5] Author interviews (Nov. 2004).

[6] *On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo*, § 3.1, U.N. Doc. UNMIK/REG/2000/47 (18 Aug. 2000).

[7] *Id*. at § 3.2.

[8] *Id*. at § 3.3.

exercise of their functions.[9] It is possible to waive immunity, but, to date, the SRSG's immunity has not been waived to allow claims to be brought against him in connection with his governmental acts in Kosovo.

Both scholars and legal practitioners in Kosovo have pointed out that the broad immunity enjoyed by the SRSG and UNMIK raises concerns from a human rights standpoint,[10] particularly in light of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which requires that: "[i]n the determination of his civil rights…everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."[11]

In principle, SRSG/UNMIK immunity in Kosovo need not serve as a bar to judicial review of SRSG-issued legal instruments. Even in countries with a strong tradition of sovereign immunity, courts faced with legal instruments that are inconsistent with higher-level law may often strike down or refuse to apply such instruments. However, no *sui generis* judicial body exists for this specific purpose in Kosovo[12] and local judicial bodies do not formally have jurisdiction to exercise this function. In interviews conducted in November 2004 and May 2006, UNMIK lawyers stressed that judicial bodies in Kosovo may not perform this type of review.

For the most part, courts in Kosovo have not sought to check or control the SRSG's governmental acts. In this regard, an international judge in Kosovo has observed that many judges in the territory, including international judges, fear that they would be accused of "rocking the boat" if they were to engage in the review of

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[9] U.N. Charter art. 105.

[10] *See, e.g., Ombudsperson Institution in Kosovo Special Report No. 1 on the Compatibility with Recognized International Standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo (18 August 2000) and on the Implementation of the Above Regulation* (26 April 2001), http://www.ombudsperson kosovo.org/doc/spec%20reps/pdf/sr1.pdf; Carsten Stahn, *The United Nations Transitional Administrations in Kosovo and East Timor: A First Analysis*, 5 MAX PLANCK YEARBOOK OF U.N. LAW 105, 161 (2001).

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms, *supra* note 4.

[12] In 2001, the SRSG created a short-lived "detention review commission" for reviewing a specific category of SRSG-issued legal instruments: executive decisions detaining individuals outside the regular judicial system in Kosovo. The detention review commission is no longer in operation, and was only used in one case. While in operation, it was criticized for not meeting international human rights standards as regards the right of individuals to challenge the lawfulness of their detention. *See, e.g., Ombudsperson Institution in Kosovo Special Report No. 4: Certain Aspects of UNMIK Regulation No. 2001/18 on the Establishment of a Detention Review Commission for Extra-Judicial Detentions Based on Executive Orders* (12 September 2001), http://www.ombudspersonkosovo.org/doc/spec%20reps/pdf/sr4.pdf.

SRSG-issued instruments.[13] Nevertheless, rare exceptions to this general tendency do exist, where courts in Kosovo have refused to apply SRSG-issued legal instruments or specific provisions of such instruments. Not all such attempts at judicial review have been successful, but they are nevertheless quite useful in illustrating the sometimes fractious relationship between the SRSG/UNMIK and the Kosovo judiciary on the subject of review.

I. The Bota Sot *Case*

One interesting attempt at judicial review occurred in 2004, when the Pristina District Court refused to apply a provision of an UNMIK administrative direction on the alleged basis that it was inconsistent with a law of "higher rank" (*i.e.*, the Law on Regular Courts).[14] The Court took the view that an administrative direction, as a subsidiary legal instrument, could not take precedence over a law applicable in Kosovo.

The case arose out of the issuance of a fine by the Temporary Media Commissioner, an SRSG-appointed official tasked with promoting ethical and technical standards for Kosovo's media, against the owners and representatives of the daily newspaper Bota Sot. When the targeted individuals refused to pay the fine, the Commissioner sought enforcement through the Pristina District Court in accordance with UNMIK Administrative Direction 2003/8, which provides the District Court with jurisdiction over the place where the debtor resides with the competence to enforce the fine.[15] Administration Direction 2003/8 further provides that applications for enforcement are to be heard by a single international judge on the Court.[16] The international judge in the instant case ruled the application for enforcement inadmissible, based on the putative unlawfulness of the administrative direction.

Perhaps unsurprisingly, given UNMIK's position on judicial review of SRSG-issued legal instruments, the District Court's decision was not well received by the UNMIK Office of the Legal Adviser. The Legal Adviser sent an interoffice memorandum to the then Director of the UNMIK Department of Justice, responsible for overseeing the construction of an independent and competent

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[13] Author interview (Oct. 2005).

[14] District Court of Pristina, E No. 1/2004 (16 July 2004)

[15] *Administrative Direction No. 2003/8 Implementing UNMIK Regulation No. 2000/36 on the Licensing and Regulation of the Broadcast Media in Kosovo and UNMIK Regulation No. 2000/37 on the Conduct of the Print Media in Kosovo*, §§ 1.3, 1.10, U.N. Doc. UNMIK/DIR/2003/8 (8 April 2003).

[16] *Id*. at § 1.5.

judiciary in Kosovo, which stressed that both UNMIK regulations and administrative directions took precedence over other applicable law in Kosovo and warned that the Court's decision could constitute a serious challenge to SRSG-issued legal instruments.[17] Ultimately, the case was appealed to the Kosovo Supreme Court, where a panel headed by an international judge overruled the District Court's decision and returned the case to the District Court for examination and decision in accordance with Administrative Direction 2003/8.[18] An international judge on the District Court (not the judge responsible for the original inadmissibility decision) subsequently issued an order enforcing the fine.[19]

II. The Termosistem *Case*

Another, more successful, example of judicial review is the decision of the Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters in the 2004 *Termosistem* case.[20] The Special Chamber, which has a mandate to hear claims arising in connection with the ongoing privatization process in Kosovo, refused to apply a provision of an SRSG-issued regulation that it considered to be inconsistent with international human rights standards.

In this case, a panel of the Special Chamber composed of three international and two local judges examined the complaints of a group of Kosovo Serbs against the Kosovo Trust Agency, the body responsible for privatization of socially owned enterprises in Kosovo. The complainants sought a share in the proceeds from the privatization of the company Termosistem in accordance with UNMIK Regulation 2003/13, which confers upon employees an entitlement to a share of the proceeds from the privatization of socially owned enterprises. To be eligible for a share of the proceeds, employees must have been employed with the enterprise at the time of the privatization and on the payroll of the enterprise for not less than three years, although 2003/13 provides an exception to these eligibility requirements in cases where the employee would have been eligible if she or he had not been subjected to discrimination.[21]

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[17] Author interview with UNMIK Department of Justice official (May 2006).

[18] Supreme Court of Kosovo, AC 37/2004 (20 Aug. 2004).

[19] District Court of Pristina, E No. 2/04 (14 Jan. 2005).

[20] Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Matters, SCEL 04-0001 (9 June 2004).

[21] *On the Transformation of the Right of Use to Socially Owned Immovable Property*, § 10, U.N. Doc. UNMIK/REG/2003/13 (9 May 2003).

The complainants argued that they should have been included on a list of Termosistem employees eligible for a share of the proceeds from the company's privatization, and that their names were not listed on the register of the company at the time of privatization because of their Serbian ethnicity. Significantly, although Regulation 2003/13 requires that claims of discrimination be accompanied by documentary evidence of the alleged discrimination,[22] the Chamber refused to apply this provision on the grounds that requiring documentary evidence of discrimination was inconsistent with relevant international human rights standards.

The Chamber, taking into account relevant non-documentary evidence, determined that the complainants had been subjected to discrimination and that, but for the discrimination, they would have been listed as employees of *Termosistem* at the time of its privatization. It thus ordered that their names be added to the list of employees eligible to receive a share of the proceeds from the privatization.

Following the Chamber's decision, the SRSG promulgated an Anti-Discrimination Law adopted by the Kosovo Assembly, which allows complainants to establish or defend cases of discrimination by any means, rather than solely through documentary evidence.[23] While this law appears to address the concerns expressed by the Chamber, a lawyer in the UNMIK Office of the Legal Adviser has noted that the provisions in the law concerning evidence of discrimination were not specifically promulgated in response to the *Termosistem* case and should not be understood as signifying UNMIK acquiescence to judicial review of SRSG-issued instruments by bodies in Kosovo—whether for compliance with international human rights standards or any other legal standards governing the SRSG.[24]

III. The Mobikos *Case*

In 2005, the Pristina Municipal Court ordered the execution of a contract in contravention to a relevant SRSG executive decision.[25] The contract, which was

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[22] *Id*.

[23] *On the Promulgation of the Anti-Discrimination Law Adopted by the Assembly of Kosovo*, U.N. Doc. UNMIK/REG/2004/32 (20 Aug. 2004). After the promulgation of the law, the presiding judge in the *Termosistem* case requested clarification from the SRSG as to whether Regulation 2004/32 promulgating the anti-discrimination law supersedes inconsistent provisions of Regulation 2003/13. The SRSG confirmed that this is the case. Memorandum from the Special Representative of the Secretary-General (11 Jan. 2006) (on file with author).

[24] Author interview (May 2006).

[25] Municipal Court of Pristina, P. br. 3044/04 (16 Mar. 2005).

concluded by the Telecommunications Regulatory Authority in Kosovo (TRA) and the company Mobikos, envisaged that Mobikos would provide mobile telephone services in Kosovo. It was signed against the wishes of the SRSG, who had issued an executive decision cancelling the tender process for the mobile phone operator after determining that the process was flawed.

In its very brief decision in this case, the court did not clarify why it refused to apply the relevant SRSG executive decision. This refusal prompted a strong reaction from UNMIK. At a press briefing on 23 March 2005, the spokesperson for UNMIK announced that the agreement between the TRA and Mobikos was null and void by virtue of the SRSG's executive decision and that the decision of the court was therefore without legal basis and unenforceable.[26] The contract was not executed as a result of UNMIK's intervention.[27]

IV. The Berisha *and* Goci *Transfer Cases*

While the main focus of this section is judicial review of SRSG-issued legal instruments in Kosovo (i.e., regulations, administrative directions and executive decisions), it is useful to highlight two recent cases in which the Kosovo Supreme Court refused to apply agreements concluded by UNMIK with officials of foreign states. In these cases, decided in January of 2006, an appellate panel of the Court reviewed agreements concluded by UNMIK with the government of the United Kingdom (UK) and the Swiss liaison office in Pristina, which provided for the transfer of Kosovo residents Luan Goci and Bashkim Berisha to the UK and Switzerland, respectively, for the purpose of facing criminal proceedings.[28]

In accordance with the Provisional Criminal Procedure Code of Kosovo, issued by the SRSG, a resident of Kosovo may be transferred to a foreign jurisdiction if "(h)is or her transfer is permitted by an international agreement"[29] and certain other prerequisites are met. In the *Berisha* and *Goci* cases, the transfer agreements took the form of a memorandum of understanding with an individual declaring to represent the UK government and an exchange of letters with the Swiss liaison office. The appellate panel, with an international judge presiding, decided that these instruments did not constitute "international agreements" for the purpose of the

[26] UNMIK press briefing (23 Mar. 2005).

[27] Author interview with UNMIK official (May 2006).

[28] Supreme Court of Kosovo, Pn-Kr 333/05 (30 January 2006); Supreme Court of Kosovo, Pn-Kr 335/2005 (30 Jan. 2006).

[29] *On the Provisional Criminal Procedure Code of Kosovo*, U.N. Doc. UNMIK/REG/2003/26 (6 July 2003).

Criminal Procedure Code and thus refused the petition for transfer of the individuals concerned. In the view of the Court, the UK and Swiss officials involved could not be viewed as representing their states for the purpose of concluding valid international agreements. The Court also expressed some concern as to whether UNMIK possessed the legal personality necessary to conclude international agreements.

An official in the UNMIK Department of Justice, interviewed in May 2006, confirmed that the individuals concerned had not been transferred and that, instead, the agreements on their transfer are in the process of being redrafted. However, following issuance of the Supreme Court's decisions, and in a reprise of its reaction to the 2004 *Bota Sot* case described above, the UNMIK Legal Adviser sent an interoffice memorandum to the Director of the Department of Justice expressing his strong disagreement with the decisions. The Legal Adviser argued that the agreements on transfer involved in the *Berisha* and *Goci* cases were valid international agreements for the purpose of the Provisional Criminal Procedure Code and that, accordingly, the Supreme Court's refusal of the petition for transfer in these cases was not justified. The Legal Adviser also asked that his position be presented to the Supreme Court of Kosovo for reference in future cases.[30]

V. Concerns within UNMIK Regarding Judicial Review

It is apparent from the discussion above that high-level UNMIK decision-makers do not tend to look favourably upon attempts by courts in Kosovo to exercise judicial review over SRSG or UNMIK governmental acts, although the response to such attempts has been *ad hoc*. UNMIK's resistance to judicial review is perhaps best evidenced by its position that the 2005 *Mobikos* decision of the Pristina Municipal Court is "without legal basis" and "unenforceable." In other cases where courts have refused to apply provisions of SRSG-issued instruments (or, in the *Berisha* and *Goci* cases, an UNMIK agreement), UNMIK lawyers have tended to voice disapproval without going so far as to declare the courts' decisions unenforceable.

In this context, one should bear in mind that not all of the attempts at judicial review of SRSG/UNMIK governmental acts in Kosovo are strongly grounded in law. For instance, the international judge in the *Bota Sot* case, in refusing to apply an SRSG-issued administrative direction, appears to have simply disregarded an SRSG-issued regulation specifying that regulations and subsidiary instruments

[30] Author interview with UNMIK Department of Justice official (May 2006).

(including administrative directions) take precedence over other domestic law.[31] In contrast, the refusal of the Special Chamber of the Kosovo Supreme Court on Kosovo Trust Agency Related Matters to apply a provision of an SRSG-issued Regulation is based on UNMIK Regulation 1999/24, which obliges public officials to observe internationally recognized human rights standards. Yet, as noted above, the position of UNMIK is that judicial bodies in Kosovo are not competent to engage in review of SRSG-issued decisions *on any grounds*. This seems paradoxical in light of UNMIK's involvement in establishing and consolidating the rule of law in Kosovo, and concern is frequently expressed that it sets a bad example for local authorities in the territory.

These problems are compounded by the dearth of opportunities for review of SRSG conduct by international judicial bodies. Such bodies typically do not have jurisdiction to hear complaints against international organizations and international officials. Moreover, attribution of the SRSG's governmental conduct to Kosovo does not remedy the problem. Kosovo is not an independent state, and is not a party to international agreements, such as the European Convention for the Protection of Human Rights and Fundamental Freedoms, that would allow claims to be brought against it before international bodies. Finally, UNMIK has expressed the view that "Serbia and Montenegro cannot be held responsible for an alleged violation of human rights arising from an act or omission attributable to UNMIK."[32]

UNMIK's position on judicial review of SRSG and UNMIK governmental acts by bodies in Kosovo appears to be influenced by the fact that international organizations, including the UN, often operate outside the control of judicial bodies in their host territories (whether as a consequence of immunity or other obstacles to domestic jurisdiction). A high-level UNMIK official suggests that UNMIK's resistance to judicial review also stems from a concern that allowing judicial bodies in Kosovo to check the SRSG's power could hinder the process of post-conflict

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[31] The regulation specifies:

> The law applicable in Kosovo shall be:
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> (a) The regulations promulgated by the Special Representative of the Secretary-General and subsidiary instruments issued thereunder; and
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> (b) The law in force in Kosovo on 22 March 1989.
>
> *In case of a conflict, the regulations and subsidiary instruments issued thereunder shall take precedence.*

UNMIK/REG/1999/24, *supra* note 4, at § 1.1 (emphasis added).

[32] *Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999*, at 29, U.N. Doc. CCPR/C/UNK/1 (13 Mar. 2006).

peacebuilding in the territory. Contributing to this concern are specific, ongoing problems within the Kosovo judiciary, including poor management of cases, executive interference, judicial bias and intimidation of judges.[33] UNMIK has integrated international judges into the Kosovo judicial system partly to address these problems, but such judges are few in number and resolving the problems of Kosovo's judiciary is a long-term project.

D. Non-Judicial Review

Notwithstanding the dearth of formal judicial mechanisms in Kosovo for reviewing SRSG and UNMIK governmental acts, the SRSG has established certain non-judicial mechanisms in the territory for the purpose of, *inter alia*, reviewing SRSG and UNMIK conduct for compatibility with international human rights standards. From 2000 to the end of 2005, the primary mechanism of this type was the Ombudsperson Institution in Kosovo established by UNMIK Regulation 2000/38.[34] During this period, the Institution was headed by Polish human rights lawyer Marek Antoni Nowicki, who was appointed by the SRSG but, according to Regulation 2000/38, was intended to operate independently.[35]

Pursuant to 2000/38, the international Ombudsperson had jurisdiction "to receive and investigate complaints from any person or entity in Kosovo concerning human rights violations and actions constituting an abuse of authority *by the interim civil administration* or any emerging central or local institution…"[36] (emphasis added). Toward this end, he could "receive complaints, monitor, investigate, offer good offices, take preventive steps, make recommendations and advise on matters relating to his…functions."[37] While the Ombudsperson did not have the power to issue binding decisions, he prepared special reports on general situations and individual case reports, either following a complaint or *ex officio*.

During his tenure, the international Ombudsperson was highly critical of the

[33] For an overview of the state of Kosovo's judiciary, see the reports of the Legal Systems Monitoring Section of the Organization for Security and Co-operation in Europe (OSCE) mission in Kosovo, available on the mission's website at http://www.osce.org/kosovo. The OSCE mission forms a distinct component of UNMIK.

[34] *On the Establishment of the Ombudsperson Institution in Kosovo*, U.N. Doc. UNMIK/REG/2000/38 (30 June 2000).

[35] *Id*. at § 2.1.

[36] *Id*. at § 3.1.

[37] *Id*. at § 4.1.

SRSG's and UNMIK's compliance with international human rights standards, both in formal reports and in the media. He issued a report at the beginning of his mandate which criticized the broad immunity enjoyed by the SRSG and UNMIK officials in Kosovo, finding such immunity to be inconsistent with, *inter alia*, the right of access to court.[38] In this connection, the Ombudsperson noted that the purpose of granting immunity to international organizations is to protect them from governmental interference in the territories where they are based, and that a wide grant of immunity is illogical in cases such as Kosovo where an international organization serves as a governmental actor. He thus recommended that immunity be limited.

The international Ombudsperson issued a number of other reports critiquing SRSG-issued decisions, including SRSG extra-judicial detentions[39] and an SRSG regulation that allows UNMIK to refuse to permit the registration of contracts for the sale of residential property in areas of Kosovo with a predominantly ethnic minority population.[40] These reports certainly had an important sunshine effect. However, the Ombudsperson had no power to compel the SRSG to follow his recommendations. In some cases, the SRSG and UNMIK took action in response to such recommendations but, in other cases, they openly disagreed with him or simply did not respond to his concerns.[41] The Human Rights Committee, in particular, has criticized UNMIK for not always extending "due cooperation" to the Institution.[42]

In an address to the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe in March 2004, the Ombudsperson outlined a particular constraint on his ability to provide a rigorous check on SRSG governmental authority:

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[38] *Special Report No. 1, supra* note 10.

[39] *Ombudsperson Institution in Kosovo Special Report No. 3 on the Conformity of Deprivations of Liberty under 'Executive Orders' with Recognised International Standards* (29 June 2001), http://www.ombudspersonkosovo.org/doc/spec%20reps/ pdf/sr3.pdf.

[40] *Ombudsperson Institution in Kosovo Special Report No. 5 On Certain Aspects of UNMIK Regulation No. 2001/17 on the Registration of Contracts for the Sale of Real Property in Specific Geographical Areas of Kosovo* (29 Oct. 2001), http://www.ombuds personkosovo.org/doc/spec%20reps/pdf/sr5.pdf.

[41] Author interview with Marek Antoni Nowicki (Nov. 2004).

[42] HUMAN RIGHTS COMMITTEE, CONCLUDING OBSERVATIONS OF THE HUMAN RIGHTS COMMITTEE KOSOVO (REPUBLIC OF SERBIA), at 3, U.N. Doc. CCPR/C/UNK/CO/1, (14 August 2006), *available at* http://www.unhchr.ch/TBS/doc.nsf/7cec89369c43a6dfc1256a2a0027ba2a/58c3c45e32382c0fc1257220003e967b/$FILE/G0643691.doc.

> The Ombudsperson may, if he considers that a human rights violation has taken place, report this directly to the SRSG, thereby submitting his findings directly to the final supervisor of that same international or local organ which was responsible for the violation in the first place. It is very questionable whether such a system can lead to an effective human rights protection, in particular in cases of violations in areas under the direct responsibility of the SRSG.[43]

He therefore concludes that:

> It would be much better if the reports of the Ombudsperson were delivered directly to the Secretary-General of the United Nations. In future cases involving the establishment of an Ombudsperson Institution by the international community in other regions of the world, I would strongly advise the competent decision-makers to reconsider and change the current system in favor of a more effective one.[44]

The Ombudsperson Institution still exists in Kosovo, but it has been converted into a wholly domestic body. It is to be headed by a local Ombudsperson following the latter's appointment by the Kosovo Assembly. Presently, a local acting Ombudsperson fills this role. UNMIK Regulation 2006/6, issued by the SRSG in February 2006, sets out the new mandate of the Institution, which does not include the power to investigate possible human rights violations by the SRSG or UNMIK.[45] The Regulation provides that "[t]he Ombudsperson Institution may enter into a bilateral agreement with the Special Representative of the Secretary-General on procedures for dealing with cases involving UNMIK."[46] However, this wording is quite similar to language in Regulation 2000/38 concerning the relationship

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[43] Marek Antoni Nowicki, The Human Rights Situation in Kosovo, Address at the Meeting of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe (16 Mar. 2004).

[44] *Id*.

[45] On *the Ombudsperson Institution in Kosovo*, U.N. Doc. UNMIK/REG/2006/6 (16 Feb. 2006).

[46] *Id*. at § 3.4.

between the Ombudsperson Institution and the NATO-led force in Kosovo, over which the Institution never formally had jurisdiction.

Recently, another non-judicial mechanism was created for the purpose of hearing complaints regarding the non-compliance of UNMIK with international human rights standards. This mechanism, the "Human Rights Advisory Panel," was established by UNMIK Regulation 2006/12 on 23 March 2006.[47] It is to be composed of three international jurists appointed by the SRSG upon the proposal of the President of the European Court of Human Rights. According to a Council of Europe official in Kosovo, the members of the Panel have not yet been appointed, although the Panel's secretariat is currently taking complaints.[48]

The Panel has competence to examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights contained in specific international agreements, including the Universal Declaration of Human Rights; the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights.[49] The Panel's jurisdiction is limited to complaints arising from facts occurring no earlier than 23 April 2005, unless such facts give rise to a continuing violation of human rights.[50] Until the Panel is formed, complaints against UNMIK lodged with the Ombudsperson Institution remain pending, but the latter no longer has authority to investigate them.

In examining complaints, the Panel is obliged to hold oral hearings where it is in the interests of justice, issue findings as to whether there has been a breach of

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[47] *On the Establishment of the Human Rights Advisory Panel*, U.N. Doc. UNMIK/REG/2006/12 (23 Mar. 2006).

[48] Author interview (July 2006). As this article is being prepared, three jurists proposed by the President of the European Court of Human Rights for membership on the Panel are awaiting appointment. One of the individuals proposed is Marek Nowicki, the former international Ombudsperson in Kosovo.

[49] UNMIK/REG/2006/12, *supra* note 47, at § 1.2. The full list of international instruments is: The Universal Declaration of Human Rights, G.A. Res. 217A, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (12 Dec. 1948); The European Convention for the Protection of Human Rights and Fundamental Freedoms, 213 U.N.T.S. 221 (4 Nov. 1950); The International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (16 Dec. 1966); The International Covenant on Economic, Social and Cultural Rights, 993 U.N.T.S. 3 (16 Dec. 1976); The Convention on the Elimination of All Forms of Racial Discrimination, 660 U.N.T.S. 195 (7 Mar. 1966); The Convention on the Elimination of All Forms of Discrimination Against Women, 1249 U.N.T.S. 13 (18 Dec. 1979); The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 U.N.T.S. 85 (10 Dec. 1984); The Convention on the Rights of the Child, 1577 U.N.T.S. 3 (20 Nov. 1989).

[50] UNMIK/REG/2006/12, *supra* note 47, at § 2.

human rights and, where necessary, make recommendations to the SRSG.[51] As with the international Ombudsperson who operated in the territory through 2005, the ability of the Panel to serve as a powerful check on SRSG/UNMIK authority in Kosovo is circumscribed. It has no power to enforce its recommendations, and the SRSG has exclusive authority and discretion to decide whether to act on its findings.[52] It has also been suggested that the Panel is more of an in-house mechanism than an independent check on the power of the SRSG and UNMIK.[53] The Human Rights Committee, for its part, has expressed concern that the Advisory Panel "lacks…necessary independence and authority."[54]

E. Conclusion

Despite the fact that UNMIK exercises extensive governmental authority in Kosovo through the SRSG, the latter's acts are generally not subject to judicial scrutiny. The SRSG enjoys broad immunity, and no judicial body in Kosovo formally has a mandate to review the legality of SRSG-issued instruments. In rare cases, judicial bodies in the territory have refused to apply such instruments or provisions thereof, but UNMIK officials have expressed disapproval with these attempts at judicial control.

The dearth of mechanisms available for judicial review of the SRSG in Kosovo is, in some ways, unsurprising. International organizations and officials are often exempt from the scrutiny of judicial bodies in the territories where they operate. In addition, the dearth of judicial review mechanisms appears to be related to a desire on the part of high-level UNMIK decision-makers to maintain control over the peacebuilding process and an attendant reluctance to allow their power to be checked by Kosovo's weak judiciary.

Two key non-judicial mechanisms have been established during UNMIK's tenure in Kosovo with responsibility for, *inter alia*, monitoring SRSG and UNMIK conduct for compliance with international human rights standards: an international Ombudsperson and a Human Rights Advisory Panel. The former operated in Kosovo

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[51] *Id*. at §§ 14, 17.1.

[52] *Id*. at § 17.3.

[53] Author Correspondence with International Official in Kosovo (July 2006).

[54] Human Rights Committee, *supra* note 42, at 3. While this section is focused on non-judicial mechanisms *within Kosovo* for reviewing SRSG/UNMIK conduct, one should be aware that UNMIK recently submitted a report on the overall human rights situation in Kosovo to the Human Rights Committee and the Committee on Economic, Social and Cultural Rights, as well as a report on implementation of the principles contained in the Framework Convention for the Protection of National Minorities to the Committee of Ministers of the Council of Europe. The submission of these reports allows for some broad non-judicial oversight of UNMIK conduct by international bodies.

until the end of 2005, and was quite active in drawing attention to areas where SRSG-issued instruments failed to conform to international human rights standards and making recommendations for change. Nevertheless, in many cases, the Ombudsperson's recommendations met with no response, and the Ombudsperson had no means at his disposal for enforcing them. The latter mechanism, the Human Rights Advisory Panel, is not yet operational, and it remains to be seen how effective it will be in checking UNMIK conduct. One should bear in mind in this context that the Advisory Panel is being constituted on the eve of UNMIK's departure from Kosovo and it has no power to enforce compliance with its findings and recommendations.

When contemplating future experiments with governance by international organizations, or "international territorial administration," it is important to consider the experience of the SRSG and UNMIK on the issue of review. One lesson to be taken from this experience is that an international administrator's determination to remain outside of the judicial system in the administered territory is likely to be met with resistance from at least some local courts. To help minimize conflicts, international actors performing governmental functions should, at the outset of their mandate, clarify the jurisdiction of local courts with regard to their governmental acts.

Clarity regarding local jurisdiction is not, however, sufficient. From a rule of law perspective, it is important to ensure that some avenues are available for holding such actors judicially accountable for their governmental conduct. International actors performing governmental functions take actions with wide-ranging effects on individuals in the territories where they are deployed, and judicial accountability is important for protecting the rights of these individuals. Particularly in cases where international actors are deployed in post-conflict situations with non-existent or weak judiciaries, it may be advisable to establish a *sui generis* judicial body, of either international or mixed international/local composition, for the purpose of hearing complaints concerning the governmental conduct of these actors and reviewing the legal instruments issued by these actors for compliance with applicable law (*e.g.*, constituent instruments and relevant human rights standards).

Non-judicial mechanisms can provide a useful supplemental means of review, but the experience of the SRSG and UNMIK in Kosovo suggests that, for such mechanisms to be effective, they must be met with support and cooperation. Even if an international actor does not agree with the recommendations of non-judicial review bodies, it should be obliged to respond to such recommendations—ideally listing the reasons for any points of disagreement. In order to increase the likelihood that international actors will cooperate with non-judicial review bodies, it may be advisable for the latter to report their findings and recommendations to those charged with overseeing the actors' work (*e.g.*, the Secretary-General in cases of UN interna-

tional territorial administration). Finally, non-judicial mechanisms should maintain a level of independence that allows them to effectively provide a check on international actors' governmental conduct. Taken together, these steps would help to ensure that the often extensive power exercised by international administrators is subject to the type of checks and constraints that have come to be associated with responsible governance.