

The Independence of the Judiciary and Its Role in the Protection of Human Rights under UN Administration Using the Case of Kosovo

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1. Introduction

The independence of the judiciary is an integral part of democracy, intending to shield the judicial process from external influences and to provide full legal protection to all individuals going to court for whatever reason.

Courts are expected to act as protectors of the law, who independently exercise their judicial power without any functional or individual interference. Such interference usually comes from executive and legislative officials, political parties, the military, paramilitary and intelligence forces, criminal groups and the judicial hierarchy itself¹.

This research paper aims to give an overview of the issues surrounding judicial independence in an area that is administered by an international organisation. It discusses structural arrangements which differ in their specific attributes from the governance structures elsewhere. Issues that address prosecutors, lay judges and related UN activities are not discussed as the paper intends to give only a short overview of the situation in Kosovo.

The research focuses on the standards set by the UN Administration for the recreation and establishment of an independent judiciary and examines their compatibility with general international legal standards concerning the independence of the judiciary. The extent of judicial independence is analysed both from the perspective of institutional independence and of functional independence.

In addition to that, it asks certain questions in order to better present the evolution of the judicial system in Kosovo: how, under the old Yugoslav law, were judges appointed? Did these laws guarantee their independence, e.g. were there fixed terms of office, clear legal provisions for the dismissal, etc. How far has the United Nations Interim Administration in Kosovo (UNMIK) come in its attempts to establish an independent judiciary? Is the UNMIK system a democratic system? Does a system that relies more or less on one person and not on the division of powers have the moral authority and integrity to institute an independent judiciary? Are judges who are appointed by the Special Representative of the Secretary-General in Kosovo (SRSG) appointed in a manner that safeguards their independence? What effects does the Kosovo conflict still have on

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¹ Guidance for Promoting Judicial Independence and Impartiality, Office for Democracy and Governance, Bureau for Democracy, Conflict, and Humanitarian Assistance, pg.5, U.S Agency for International Development, Washington, DC 20523-3100, Revised Edition, January 2002.

the work of the judiciary, in particular on its independence? Which post-war forces pose the greatest danger for the independence of judges? What is the political influence on judges and how does it affect their decisions? Does UNMIK have the power to limit any abuse of the law? Can the judiciary existing in the parallel structures established by the Government of Serbia be considered as independent? Who are the new judges who are supposed to be taught to be independent and impartial? To what extent are they judges from the “old school”?

Most of these issues are discussed in this paper, but the answers to some of the above questions still remain open due to the difficulties in obtaining the necessary information.

When looking back at the law that was applied on the territory of the former Yugoslavia, one can safely say that it did not rely sufficiently on accepted principles of international law². The legal system suffered from corruption, a dysfunctional administration of justice, and a lack of transparency.

This problem was prevalent throughout the whole territory of former Yugoslavia. Nevertheless, the degree of unlawfulness proved to be much higher in Kosovo than in other federal units, especially after the abrogation of its autonomy in March 1989³, when the Yugoslav authorities imposed “special measures,” in other words a *de facto* state of emergency, within the territory of Kosovo and promulgated new laws. These laws drastically changed the profile of the judiciary, which became a “factory of evidence”, owned by the unquestionable power of the sole political party, the Social Party of Serbia which was headed by Slobodan Milosevic⁴.

Since the dissolution of the Republic of Yugoslavia, each successor state has undertaken to implement international human rights law into its own domestic law. The aim was to establish a truly democratic legal system and an independent judiciary. In the case of Kosovo, this task was undertaken by the United Nations Interim Administration in Kosovo⁵.

² Ljudska prava u Jugoslaviji 1998, Pravo Praksa i Pravna Svest u Saveznoj Republici Jugoslaviji i Medjunarodni Standardi Ljudskih Prava, pg.214, Beogradski Centar za Ljudska Prava, Beograd,1999.

³ Under the 1974 Yugoslav Constitution, Kosovo had the status of an autonomous province with its own administration, assembly and judiciary. As an autonomous province, Kosovo was one of the equal units making up the Federal Republic of Yugoslavia. In 1989, the Yugoslav authorities abrogated the Kosovo autonomy, which resulted in stripping this province from all self-governmental functions. For more details about the history of Kosovo consult the book of Noel Malcolm, *Kosovo, A Short History*, (1997).

⁴ The special measures imposed by the Yugoslav government consisted of the forced removal of Albanians from their working places, including all spheres of society. Until 1999, almost no Albanians were working in public institutions and only a small number of Albanian judicial officers continued to work in the judiciary. The rest began working as defence lawyers, mainly in the field of criminal law. The Serbian Government claimed that the dismissal of Albanian judges took place as part of the reorganisation of the judiciary, which was carried out pursuant to the *Ordinary Courts Act of the Republic of Serbia* (Articles 63 and 78) and the *Public Prosecutor Act*. See *Report of the Independence of Judiciary and the protection of practising lawyers*, prepared by Mr. Louis Joinet pursuant to Sub Commission Resolution 1992/38 available at www.hchr.ch/huridocda/huridoca.nsf.

⁵ UN Resolution 1244 established the UNMIK Administration on the territory of Kosovo under which the people of Kosovo can enjoy substantial autonomy within the Federal Republic of Yugoslavia. More details about the UN mission in Kosovo can be found on the UNMIK website: www.unmik.org.

2. United Nations Interim Administration in Kosovo (UNMIK), Its Structure and Activities

The United Nations Interim Administration in Kosovo (UNMIK) was established on 10 June 1999 pursuant to Security Council Resolution 1244, taken under UN Charter Chapter VII. The territory of Kosovo was placed under the civil administration of UNMIK, which was established as a surrogate state empowered to exercise all legislative and executive authority and to take responsibility for the administration of justice.⁶ Its structure comprised four pillars, each assigned to different tasks⁷: Pillar I is in charge of Police and Justice and Pillar II for Civil Administration. Both are under the direct leadership of the Special Representative of the UN Secretary-General (SRSG), who represents the United Nations in Kosovo. Pillar III is responsible for Democratization and Institution Building and led by the Organization for Security and Co-operation in Europe (OSCE), while Pillar IV, led by the European Union (EU), is in charge of Reconstruction and Economic Development⁸.

⁶ See *UNMIK Regulation 1999/1* para 1.1 “all legislative and executive authority with respect to Kosovo is vested in UNMIK and is exercised by the Special Representative of the Secretary – General”. All UNMIK Regulations can be found on www.unmikonline.org.

⁷The major tasks of UNMIK include;

- Performing basic civilian administrative functions where and as long as required;
- Organising and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections;
- Transferring, as these institutions are established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo provisional institutions and other peace-building activities;
- Supporting the reconstruction of key infrastructure and other economic reconstruction;
- Maintaining civil law order, including establishing local police forces and meanwhile through the deployment of international police personnel to serve in Kosovo
- Protecting and promoting human rights;

⁸ Pursuant to the *UNMIK Regulation 2001/9 of 15 May 2001* on the Constitutional Framework for Provisional Self-Government in Kosovo, a number of competencies were transferred to local government institutions. In particular, most of the competencies under Pillar II have been or are in the process of being, transferred to local structures. However, some major responsibilities remain in the hands of the SRSG. Those “reserved powers and responsibilities” include:

“Exercising powers and responsibilities of an international nature in the legal field;
Exercising authority over law enforcement institutions and the correctional service,
Concluding agreements with states and international organizations in all matters within the scope of UNSCR 1244 (1999); and
External relations, including with states and international organizations, as may be necessary for the implementation of [the SRSG’s] mandate.”

Hence, the responsibilities and powers held and exercised by Pillar I are among those remaining in the hands of UNMIK until the final status of Kosovo is determined.

The powers enshrined in both Resolution 1244 and the Constitutional Framework for Provisional Self-Government⁹ guarantee the full presence of UNMIK in each sphere of society. In exercising these powers, UNMIK becomes responsible for any consequences that arise from it assuming such a state-like function. A number of scholars oppose this by stressing that the SRSG and UNMIK could only be characterized as subsidiary organs of the Security Council or of the UN organization as whole¹⁰ with no individual power at all. This assumption is based on Articles 7 para. 2 and 29 of the UN Charter¹¹.

3. International Principles that Secure the Independence of the Judiciary

There is a common opinion that an independent judiciary is the strongest guarantee to upholding the rule of law and the protection of human rights¹². The necessity of strengthening justice was considered a priority when drawing up the United Nations Charter in 1945, which at that time determined: “to establish conditions under which justice and respect for obligations arising from treaties and sources of international law can be maintained”¹³. International human rights instruments corroborated this by requiring that everyone should be given a fair trial by an independent and impartial tribunal¹⁴, thus obliging the respective signatory states to implement this and other standards inherent in those conventions into their domestic legislation¹⁵. Full implementation of such human rights law into domestic legislation guarantees that judiciary organs are independent in performing their functions. The United Nations has addressed this issue more specifically by adopting its *Basic Principles on the Independence of the Judiciary*¹⁶.

⁹ The Constitutional Framework for Provisional Self-Government, established by *UNMIK Reg. 2001/9 (15 May 2001)* confirms the role of UNMIK and stipulates that the areas under the reserved powers of the SRSG should remain in the hands of UNMIK even after the establishment of institutions for self government.

¹⁰ Mattias Ruffert, *The Administration of Kosovo and East Timor by the International Community*, International and Comparative Law Quarterly vol. 50, Part 3, British Institute of International and Comparative Law, Oxford University Press, 2001.

¹¹ Article 7 para. 2 of the UN Charter stipulates: “Such subsidiary organs as may be found necessary may be established in accordance with the present Charter”. Article 29 adds that “The Security Council may establish such subsidiary organs as it deems necessary for the performance of its functions”.

¹² See paper prepared by Daniel C. Prefontaine, Q.C. & Joanne Lee for the *World Conference on the Universal Declaration on Human Rights*, Montreal, December 7, 8, 9, 1998.

¹³ See the Preamble of the UN Charter.

¹⁴ International Covenant on Civil and Political Rights (ICCPR) (Article 14 (1)), European Convention on Human Rights (ECHR) (Article 6 (1)), American Convention on Human Rights (ACHR) (Article 8 (1)), African Charter on Human Rights (ACHR) (Article 7 (d)).

¹⁵ Any State who has signed these human rights conventions is obliged to keep to their rules. However, next to them, the basic rights enshrined in the Universal Declaration of Human Rights (1948) have become accepted norms of customary international law and as such have an imperative character.

¹⁶ *The Basic Principles on the Independence of the Judiciary* adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held in Milan from 26 August to 6 September 1985 and endorsed by General Assembly Resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

The principles in question impose an obligation on the States concerned to secure and promote the independence of the judiciary within their jurisdiction by incorporating the necessary safeguards into domestic legislation and bringing this to the attention of the judicial organs, and to members of both legislative and executive organs. In addition, no inappropriate interference, no improper influence, pressure or threat to the judiciary should be allowed¹⁷.

Following the United Nation policy of promoting the independence of the judiciary, the Council of Europe issued a set of documents which involve the relationship between justice and society. It determines the role of judges in a society by emphasising judicial ethics necessary for strengthening the rule of law and protecting individuals from extra-judicial activities. The Council of Europe Recommendation on the Independence of Judges¹⁸ contains principles, which, contrary to basic human rights instruments, address the issue of the independence of judiciary more specifically. It recommends that the executive and legislative powers of the respective governments of member states adopt and undertake all measures to ensure that judges are independent and act without restriction, improper influence, inducements etc.¹⁹ In addition, the provisions enshrined in the European Charter on the Statute for Judges²⁰ provide rules which best guarantee the independence and impartiality of judges. The International Bar Association Minimum Standards of Judicial Independence²¹ laid down a guideline for establishing an independent and impartial judicial system. These guidelines intend to provide an independent basis for judicial discipline.

By agreeing to adhere to the human rights law set forth in universal and regional declarations and treaties such as the Universal Declaration of Human Rights, the Human Rights Covenant and the European Convention on Human Rights, UNMIK is automatically obliged to abide by these documents and thus is held to integrate all universally accepted principles of human rights law into the imposed legal system.²²

¹⁷ *Supra* note 17, para.1, 2,3,4.

¹⁸ Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges, 13 October 1994.

¹⁹ Para 2 (d) of Recommendation No. R (94).

²⁰ The European Charter on the Statute for Judges was adopted by the participants of a second multilateral meeting organized by the Council of Europe, held in Strasbourg on 8-9 July 1998.

²¹ Adopted in 1982 and available on the website of the International Bar Association: www.ibanet.org/aboutiba/IBA_Resolutions.cfm.

²² In particular, UNMIK Regulation 2000/59 states the following:

In exercising their functions, all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognized human rights standards, as reflected in particular in:

1)The Universal Declaration on Human Rights, 2)The European Convention for the Protection of Human Rights and Fundamental Freedom and the Protocols thereto, 3) The International Covenant on Civil and Political Rights, 4)The International Covenant on Economic, Social and Cultural Rights 5) The Convention on the Elimination of All Forms of Racial Discrimination 6) The Convention on the Elimination of All Forms of Discrimination Against Women , 7) The Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment and 8)The International Convention on the Rights of the Child.

4. UNMIK's Strategy of Implementation of International Standards for the Independence of the Judiciary on the Territory it Administers

The UN Security Council empowered UNMIK to exercise all legislative and executive authority and to take responsibility for the administration of justice.²³ UNMIK thus has an enormous task, which *inter alia*, involves the re-creation of the judiciary. As the SRSG also became responsible for promulgating laws, UNMIK automatically turned into the exclusive legislator of the administered country.

Thus empowered, UNMIK immediately focused on improving the effectiveness of the judiciary by establishing a legal framework, re-activating the judicial staff and establishing a police force. The reform in question is still being conducted today with the active participation of regional organizations, non-governmental organizations and the legal technical assistance of the international community, which involves reforms of substantive and procedural laws, as well as education and training of judges and public prosecutors in order to reform the court administration in general²⁴.

5. Compliance with International Standards

The following section aims to present the approach of the UN system to the implications arising from the internationally recognized standards for establishing an independent judiciary in Kosovo. By highlighting the basic requirements necessary for establishing an independent judicial system it intends to show whether it is possible to establish an independent judiciary under the UN administrative system²⁵.

A. Division of Powers - A Basic Rule for the Independence of the Judiciary

The principle of the separation of powers is the best guarantee to prevent judges from acting as an extension of legislative or executive branches. Therefore, each legal system should be based on the separation of powers to ensure both institutional and functional independence of these powers. Looking at the legal system in Kosovo as a whole, one notices that there is no division of powers, since all three powers are concentrated in the hands of one person, the SRSG²⁶. This situation poses a serious threat to the independence of the judiciary as it raises doubts as to the equal balance of the judiciary, executive and legislative.

²³ See UNMIK Regulation 1991/1 para 1.1 "all legislative and executive authority with respect to Kosovo is vested in UNMIK and is exercised by the Special Representative of the Secretary – General".

²⁴ The Organization for Security and Cooperation in Europe (OSCE) is directly involved in helping to re-establish the judicial system in Kosovo. For more details about OSCE activities in Kosovo see OSCE website: <http://www.osce.org/kosovo/mandate>.

²⁵ Although now abandoned as a practice, executive orders issued by the SRSG in order to detain criminal suspects left a deep mark within the judicial system in Kosovo. (For more details about executive orders see the Ombudsperson Institution's website: www.ombudspersonkosovo.org.)

²⁶ He is the Head of UNMIK and he presides over the work of pillar.

B. UN Legal Formula and Its Institutional Independence

Immediately upon its establishment, UNMIK promulgated a package of laws issued in the form of UNMIK Regulations. In addition to these Regulations, the applicable criminal law in Kosovo consists of certain non-discriminatory provisions taken from the Yugoslav criminal law that are not in contradiction to accepted standards of international human rights²⁷. On 6 April 2004, a new criminal code and criminal procedure code drawn up by UNMIK and a team of experts were promulgated.

The laws enacted under the auspices of the UN Administration grants more protection to all citizens living in Kosovo, but at the same time grants almost absolute immunity to UNMIK, so that it is in no way obliged to follow the legal provisions of the administered area²⁸. There is no supervisory body to supervise the acts of UNMIK as regards the compatibility of its actions with human rights standards. It is common knowledge that the SRSG often interferes in the passing of laws, often by refusing to promulgate laws adopted by Assembly, which he considers to be in opposition to Resolution 1244 or the Constitutional Framework. Corrections and amendments are often conducted by the SRSG without further consultation with the Assembly.

The above legal formula laid out by UNMIK with regard to the law applicable in Kosovo has however turned out to be rather difficult to apply. It totally confused both those who had set up the formula, as well as those who had to apply the laws in practice. Among the applicable law established by this quick “UN formula”, some legal provisions dated from before 1989, but only if they were not discriminatory and in consistence with internationally recognised standards. It should be stressed that there is no clear line as to which laws or parts of laws are inconsistent with internationally recognised standards, which is the main reason for the confusion as to which laws are applicable in Kosovo. This is enhanced by the fact that the judiciary was composed of a mixture of international and local judges. As international judges come from different countries, it is often not easy for them to identify legal gaps in an “improvised law”, particularly as regards discriminatory provisions that are considered to pose a serious obstacle to the rule of law²⁹. On the other hand, local judges coming from the old communist school are totally unfamiliar with international human rights law and have thus been facing many difficulties in applying the applicable laws which have incorporated human rights standards³⁰. In addition, by failing to

²⁷ The laws enacted prior to the NATO strike (23 March 1999) remained in force insofar as they did not conflict with international recognized conflict.

²⁸ Section 2 and 3 of the UNMIK Reg. No. 2000/47 of 18 August 2000 stipulate that UNMIK and KFOR personnel “shall be immune from any legal process”. It is based on the general provisions enshrined in article 105 of UN Charter which provides that the Organization shall enjoy in the territory of each of its Members such privileges and immunities as are necessary for the fulfillment of its purposes and that representatives of the Members of the United Nations and officials of the Organization shall similarly enjoy such privileges and immunities as are necessary for the independent exercise of their functions in connections with the Organization.

²⁹ See David Marchal and Shelly Inglis, *The Disempowerment of Human Rights- Based Justice in the United Nations Mission in Kosovo*, pp. 97, Harvard Human Rights Journal. Vol.16, Spring 2003.

³⁰ The President of the Supreme Court in Kosovo, Justice Rexhep Haxhimusa does not agree with this argument as he considers that it was not difficult to distinguish which provisions of the Serbian Law contain discriminatory elements. The judges could recognized these provisions easily, because most of them have been working as defense lawyers so they very often had to

establish a legal framework under which actions of UNMIK and Kosovo Force (KFOR) staff can be challenged, one gets the impression that the UN mission in Kosovo is run by an unchallenged and absolute administration.

C. The Appointment of Judges

In many countries, problems surrounding the independence of the judiciary begin when a judge is selected³¹.

In the previous system of the Federal Republic of Yugoslavia, judges were appointed for a life-term by a parliamentary panel based on a list drawn up by the Ministry of Justice. One of the main criteria for their nomination was loyalty to the government. Judges were politically influenced and under constant pressure³². Because of the lack of separation of powers, there was little need for judges to be independent; loyalty to the government was valued far higher than independence³³.

Nowadays in Kosovo, the procedure for the appointment of local judges is conducted by the Kosovo Judicial and Prosecutorial Council (hereinafter KJPC), a so-called independent body established pursuant to Regulation 2001/8 (6 April 2001)³⁴ that plays the role of a consulting body that gives advice and makes recommendations to the SRSG concerning the appointment of professional judges, lay judges, and prosecutors. The SRSG then makes a final selection from a list of candidates proposed by the KJPC and endorsed by the Assembly, but reserves the right to remove local judges and prosecutors without any prior consultation with the KJPC³⁵.

The period for which judges are appointed is a matter of concern. At the beginning of the mission, local judges were appointed for six month terms but now this has been changed and their terms will last until the end of the UN mission³⁶. International judges are appointed through a UN procedure in New York and are subject to six month renewable terms of office³⁷. The

deal with those provisions. Interview with Justice Haxhimusa, 28 October 2004, Office of the Supreme Court, Prishtine.

³¹ See *supra* note 1, pg.13.

³² Mr. Nike Lumezi, an attorney at law with 40 years of legal experience in different fields (former Deputy Ombudsperson in Kosovo, former President of the Supreme Court, former Head of the Legislation Secretariat) says: “Interference was always present during politically motivated trials. During such trials, a judge was not only obliged to follow the law (which was very tough on offences affecting the values of the communist system) but to defend the communist ideology as well. The interview with Mr. Lumezi was conducted on 26 October 2004 in Pristina.

³³ On 28 May 1998, the Yugoslav Minister of Justice Mr. Dragoljub Jankovic, in a speech during a nomination ceremony, addressed the newly appointed judges by saying: “Your duty is not only to protect the constitutionality and legislation of this country, but also to love this country, therefore do not forget your roots...We will be fighting terrorism” *supra* note 2, pg, 215.

³⁴ Judicial Councils are a mechanism for selecting judges and prosecutors that can be found in many European countries. For more details see *supra* note 1, pg 14.

³⁵ See note *supra* 29, pg 121.

³⁶ See American Bar Association, Legal Information for Kosovo , available on the following website: www.abanet.org/ceeli/countries/Kosovo/legalinfo/html.

³⁷ See *Review of the Criminal Justice System* , issued by the Department of Human Rights and Rule of Law, OSCE, (September 2001- February-2002), pg 32, available on www.osce.org/kosovo/documents/reports/justice/criminal_justice_eng.pdf.

procedure for the appointment of international judges lacks clarity as there is no clear criteria on which to base their appointment³⁸. This situation shows that the procedure for the appointment of judges in Kosovo involves different political and executive factors, as well as the KJPC, which is an advisory body with no real power. The short term of office of international judges constitutes a serious threat to judicial independence³⁹ and to the quality of the administration of justice. Even if the term of office of the local judges is now longer than six months, it is still not a fixed term – nobody knows how long the UN Administration will be in place for. Due to the lack of security of tenure, both international and local judges automatically become vulnerable to the influence of those who may affect their employment prospects⁴⁰. Furthermore, the failure to establish a legal mechanism to address the complaints involving international judges raises serious concerns with regard to the transparency of the system as a whole⁴¹.

D. Budget, Salaries and Court Management

For a court to act impartially, the system needs to establish a proper managerial capacity at every level: budget, personnel, court operations, relations with the executive branch, public relations and strategic planning⁴². There is no internal capacity within the judicial system in Kosovo. The budget of the entire Kosovan judiciary and judicial operations fall under the competence of the Department of Justice which itself is financed by the Ministry of Public Services⁴³. The low salaries of judges, prosecutors, and judicial staff working for the court directly affect the effectiveness of the judiciary. This poses a serious threat to the judiciary as it can always open a door to corruption and other alternatives for providing income.

6. The Effects of Parallel Court Structures

Even five years after its establishment, UNMIK has still not managed to establish full control over the judicial system in Kosovo. A number of courts in Kosovo are still working under the auspices of the Serbian authorities. They mainly deal with property issues. At the same time, there is a parallel structure of courts in Serbia proper that deal with cases involving inhabitants of

³⁸ See *supra* note 29, pg. 124.

³⁹ “This is a serious matter of concern” says Mr. Marek Antoni Nowicki, Ombudsperson in Kosovo. Who further stresses that; “the short terms appointments may affect their ability to act impartially “. Interview with Mr. Marek Antoni Nowicki was conducted on 3 October 2004 in Prishtina.

⁴⁰ Security of tenure involves a long-term appointment; it guarantees that a judge can be removed from his/her position only for a good cause, breach of ethical rules. For a detailed explanation see *supra* note 1 pg 19.

⁴¹ During the interview with Mr. Thomas Monaghan the issue of the disciplinary mechanism by which the complaints can be brought against international judges was raised. Because of a limited aspect of this issue no answer was provided. The interview with Mr. Monaghan was conducted on 28 October 2004.

⁴² See *supra* note 1, pg 38.

⁴³ Justice Haxhimusa, “An independent legal system are equally based on; the degree of control over the budget of the court, decent salaries and efficient management. In most countries, the Supreme Court proposes and administers the budget itself. But the Supreme Court in Kosovo is not even consulted for the employment of the court’s administrative staff”.

Kosovo. UNMIK has not yet come up with a decision with regard to the legal validity of decisions issued by parallel courts, especially between 1999 and 2002, when they were most active⁴⁴.

7. Conclusion

Despite my criticism of the UN Administration, one needs to recognize that it is not faced with an easy task.

As a surrogate state with a broad mandate, the UN Administration is required to establish an independent, impartial and multi-ethnic judiciary in a society that has been totally dysfunctional for many years. In the light of this responsibility, the legal status of an international organization such as UNMIK needs to be determined in a proper manner. The current provisions which form the legal spine on which the functioning of the UN administration is based require clarification and necessary amendments. It is essential to establish laws outlining the rights of the people and duties of the administrative authority. The rights of the people administered by the United Nations would be without value if there was no legal system to actively protect their rights. It is unacceptable for any governing administration to operate in such a legal vacuum. The establishment of a set of concrete rules determining the legal status of the UN Administration would facilitate the accomplishment of the UN's goals in the administered territory.

The main impediment to the effectiveness of the UN Administration in Kosovo is the fact that according to Article 7 of the UN Charter, it is not permitted to be more than a "subsidiary organ". This limitation of competences clashes with the responsibilities and functions that UNMIK holds as a surrogate state. This dilemma should serve as signal to the United Nations to start a procedure to amend the UN Charter. Furthermore, the situation in other parts of the world, notably Afghanistan and Iraq, shows that the issue of reform of the existing rules of international law is a matter of urgency.

⁴⁴ See *Parallel Structures in Kosovo*, Report issued by the Department of Human Rights and Rule of Law, OSCE, October 2003, pg 26, available on http://www.osce.org/documents/mik/2003/10698_en.pdf.