

Kosovo – UNMIK accountability: Human Rights Advisory Panel Finds Discrimination in Privatization Cases

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Abstract: *The Human Rights Advisory Panel (HRAP) established in 2006 to strengthen the accountability of UNMIK in Kosovo so far has dealt mainly with cases regarding property and missing persons. In two recent cases of members of the Egyptian and the Serbian minority (Fillim Guga and Nevenka Ristić) it also dealt with privatization of socially-owned enterprises and found discrimination on ethnic grounds by the Special Chamber of the Supreme Court, established by UNMIK for such cases, which raises the accountability of UNMIK. In doing so the panel applied Article 14 of the ECHR on prohibition of discrimination in conjunction with Article 6 ECHR on fair trial in the light of relevant jurisprudence of the European Court of Human Rights. It also pointed out that in these cases the Special Chamber did not recognize a prima facie case of indirect discrimination and did not apply the principle of reversal of proof as required by the Anti-Discrimination Law of Kosovo. On behalf of UNMIK, the Special Representative of the Secretary-General defended the findings of the Special Chamber. The conclusions and recommendations in the Opinion of the Panel hold UNMIK accountable for the violations found and require it to take immediate and effective measures including an apology and adequate compensation for non-pecuniary damage as well as urging EULEX and other competent authorities in Kosovo to reopen the case by the Special Chamber. The work of the HRAP raises wider issues of accountability of international missions like UNMIK, to which it makes an important contribution.*

Keywords: Kosovo; Human Rights Advisory Panel; accountability; discrimination; European Convention on Human Rights.

I. Background

There has been strong criticism of the lack of accountability of the United Nations Mission in Kosovo (UNMIK), which operated since its establishment in 1999 under a veil of immunity as the government of Kosovo.¹ It was endowed with practically unlimited powers although the Provisional Institutions of Self-Government (PISG) in Kosovo were successively given a larger role. In 2000 an independent international ombudsman was established by UNMIK, which, however,

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1 See HUMAN RIGHTS WATCH, BETTER LATE THAN NEVER, ENHANCING THE ACCOUNTABILITY OF INTERNATIONAL INSTITUTIONS IN KOSOVO (2007), <https://www.hrw.org/sites/default/files/reports/kosovo0607web.pdf>; see also BLERIM REKA, UNMIK AS AN INTERNATIONAL GOVERNANCE IN POST-WAR KOSOVO: NATO'S INTERVENTION, UN ADMINISTRATION AND KOSOVAR ASPIRATIONS (2003); and generally CARSTEN STAHN, THE LAW AND PRACTICE OF INTERNATIONAL TERRITORIAL ADMINISTRATION. VERSAILLES TO IRAQ AND BEYOND (2008).

largely ignored its recommendations when they concerned activities of UNMIK. This institution was nationalized by UNMIK in 2006.² With the Declaration of Independence of Kosovo in 2008, UNMIK lost its dominant role, but still remained with limited activities. In 2004, the Venice Commission on Democracy through Law of the Council of Europe adopted a report on possible review mechanisms,³ which led to the establishment of the Human Rights Advisory Panel (HRAP) by UNMIK in 2006,⁴ which really became operative only at the end of 2007. Institutionally it is part of UNMIK, but fully independent.⁵ The present members of the Panel appointed by the Special Representative of the Secretary-General (SRSG) on the nomination of the President of the European Court of Human Rights are *Marek Nowicki* as presiding member, and *Christine Chinkin* as well as *Françoise Tulkens* as members. *Marek Nowicki* also served as international ombudsman in Kosovo after the establishment of this institution in 2000 until 2005.

The HRAP's mandate is to examine alleged human rights violations attributable to UNMIK and to make recommendations to the SRSG. For this purpose it issues "Opinions", but has no enforcement capacity.⁶ The applicable law is the European Convention on Human Rights and the major UN human rights conventions. The last deadline for complaints was March 31, 2010, and only incidents occurred within the period from April 23, 2005, until this deadline, including ongoing violations from before, could be covered. The Panel altogether received 527 cases of which, at the end of 2014, 439 were closed while 88 were still pending. Until that date the Panel in 79 sessions delivered 521 decisions on admissibility and 267 opinions on the merits. 252 opinions found violations in 164 cases, while only 15 opinions found no violations.⁷ By June 30, 2015, the statistics are as follows: 474 closed cases, 53 pending cases, 302 opinions issued, 282 violations found, 20 cases in which no violation has been found.⁸

The kinds of cases received by the Panel stretched from property claims and privatization cases to missing persons, killings and disappearances. For example, after reviewing more than 100 complaints alleging the lack of adequate criminal investigations in relation to disappearances, abductions and killings, the Panel found systemic failures of UNMIK in this regard, which could not be justified by the difficulties encountered by UNMIK at the beginning of its mission.⁹

In 2014, for the first time, two opinions were adopted in which the HRAP found a violation of Article 14 of the European Convention on Human Rights (ECHR) due to ethnic discrimination. In the following, these decisions will be presented and discussed leading to some general conclusions on the work of the HRAP.

2 See Christopher Waters, *Nationalizing Kosovo's Ombudsperson*, 12 JOURNAL OF CONFLICT AND SECURITY LAW, 2007, at 139.

3 EUROPEAN COMMISSION ON DEMOCRACY THROUGH LAW, OPINION ON HUMAN RIGHTS IN KOSOVO: POSSIBLE ESTABLISHMENT OF REVIEW MECHANISMS (2004), [http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2004)033-e.asp).

4 See UNMIK Regulation 2006/12 of Mar. 13, 2006, on the establishment of the Human Rights Advisory Panel; and UNMIK Regulation 2007/3 of Jan., 12, 2007, amending UNMIK Regulation No. 2006/12 on the establishment of the Human Rights Advisory Panel.

5 See the pertinent regulations and rules of procedure on the homepage of the Human Rights Advisory Panel, <http://www.unmikonline.org/hrap/Eng/Pages/default.aspx> (last visited Aug. 21, 2015).

6 See the homepage of the Human Rights Advisory Panel for more details; see also CHATHAM HOUSE, INTERNATIONAL LAW MEETING SUMMARY: THE KOSOVO HUMAN RIGHTS ADVISORY PANEL, SPEAKER: PROF. CHRISTINE CHINKIN, Jan. 2012, <http://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/260112summary.pdf>.

7 HRAP, ANNUAL REPORT 2014, at 34 (Mar. 2015), http://www.unmikonline.org/hrap/Eng/Documents/Annual_report_2014.pdf.

8 Information received from the HRAP.

9 HRAP, ANNUAL REPORT 2014, at i.

II. *Fillim Guga against UNMIK*

Fillim Guga introduced his complaint on November 3, 2008. He claimed to have worked for the socially owned enterprise “KNI Dukagjini OTHPB-BP IMN Tjegulltorja” (IMN) for 20 years. Around July 1, 1999, the father of the complainant went missing, which made the complainant flee to Montenegro for fear of his own security. Later his house was burned and his father was found shot dead.

By decision of August 24, 2000, IMN terminated the employment of *Mr. Guga* for his failure to appear at work for a prolonged period without justification. When the complainant returned to Kosovo in 2001, several requests to resume work were rejected. He took court action against this decision, which was rejected on all levels, i.e. the Municipal Court, the District Court and the Supreme Court.

In 2006 IMN was privatized and 20 % of the proceeds were to be distributed among the employees based on the pertinent UNMIK regulation.¹⁰ *Mr. Guga*, however, was not included in the list of IMN employees to receive a share of the proceeds of the privatization. Therefore, he complained to the Kosovo Trust Agency (KTA), basing his claim on Article 10.6 of UNMIK Regulation 2003/13, which contains an exception to the eligibility requirements. Accordingly, employees “who claim that they would have been so registered and employed, had they not been subject to discrimination [...]” shall not be precluded. *Mr. Guga* declared that he felt discriminated because he belonged to the Egyptian Minority in Kosovo and provided the details of his story with all documents. However, KTA dismissed his claim arguing that his employment had been terminated by a decision of IMN for not showing up and that he had not provided evidence of any legal action taken against that decision. A complaint against the final list of share recipients published by KTA also was unsuccessful.

On April 11, 2008, the complainant filed a petition with the Special Chamber of the Supreme Court of Kosovo, giving the same reasons but claiming in addition that ethnic Serbs who failed to appear at work after June 10, 1999, for security reasons were included in the list of eligible employees. The KTA, however, argued that there were no ethnic tensions after June 1999 as some non-Albanians returned to work and therefore it saw no reasonable grounds to presume discrimination.

The Special Chamber rejected the claim as ungrounded. It also referred to Section 8 of the Anti-Discrimination Law of Kosovo.¹¹ According to this Section complaints of discrimination have to present a *prima facie* case of direct or indirect discrimination, in which case the respondent is to prove the absence of discrimination. But the Chamber found that the facts submitted did not show direct or indirect discrimination. Also, an appeal against this judgment to a different panel of the Special Chamber, made possible by an amendment of UNMIK to its pertinent regulation,¹² was rejected.

The complaint submitted to the HRAP in November 2008, in substance, is about discrimination due to the Egyptian ethnicity of the complainant whose *prima facie* case had not been properly

10 See UNMIK Regulation No. 2003/13 of May 9, 2003, on the Transformation of the Right to Use to Socially-Owned Immovable Property.

11 See Law on Anti-Discrimination, (Law No. 2004/3) promulgated by UNMIK Regulation No. 2004/32 of Aug. 20, 2004, on the promulgation of the Anti-Discrimination Law adopted by the Assembly of Kosovo.

12 UNMIK Regulation No. 2008/4 of Feb. 5, 2008, amending UNMIK Regulation No. 2002/13 on the Establishment of a Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters.

addressed by the Special Chamber, which amounts to an invocation of a violation of Article 14 ECHR on prohibition of discrimination in conjunction with Article 6 on the right to a fair trial. Furthermore, Article 1 of Protocol No. 1 and Article 1 of Protocol No. 12 to the ECHR were to be considered. On June 9, 2011 the HRAP, after asking the SRSg for his cooperation on KTA files and his comments, declared the complaint partly admissible.

Entering into the merits of the case, the HRAP asked the SRSg for the observations of UNMIK. Of particular interest is the SRSg's view that Article 14 would not apply to this case because of its accessory nature and because it could not be invoked in employment-related matters, while Article 6 was considered not to have been violated. The panel went to some length to review that argument drawing heavily on the jurisprudence of the European Court of Human Rights (ECtHR), starting from the "Belgian linguistics" case of 1968, which only requires that the violation falls within the provisions of the ECHR, in this case Article 6.¹³

The main issue in the discussion on the merits of the case was whether the proceedings of the Special Chamber met the requirements of Article 14 ECHR in conjunction with Article 6. Again the HRAP referred to the jurisprudence of the ECtHR to clarify the meaning of the concept of "indirect discrimination", which accordingly may result from a *de facto* situation,¹⁴ in cases of ethnic discrimination, because of its invidious nature, requires "special vigilance and a vigorous reaction" by the authorities,¹⁵ and which applies the principle of reversal of proof in cases of alleged ethnic discrimination,¹⁶ which was also to be found in the Kosovo Anti-Discrimination Law. The Panel noted that the Special Chamber did not specify why it found the facts indicated by the complainant as insufficient for a *prima facie* case of discrimination. However, in the concrete circumstances, a more detailed demonstration of the discrimination would have placed an unjustified burden on a great number of members of minority communities.¹⁷ It observed the different attitude of the Special Chamber in the case of the privatization of the company "Termostan" in 2004, where it had accepted the argument of former Serb employees that the security situation from early 2000 onwards prevented them from coming to work as a "matter of common knowledge" not requiring further proof, and had found that their dismissal had been discriminatory,¹⁸ an approach, which was also taken in another case of 2006. Accordingly, the HRAP found divergences in the case law of the Special Chamber, which, in the absence of satisfactory explanation, compromised the principle of legal certainty.¹⁹

Furthermore, the Panel considered that the Special Chamber did not adequately take the particular situation of the complainant as a member of an ethnic community, whose persecution in the aftermaths of the conflict was a matter of common knowledge, into account.²⁰ The Special Chamber had acted in a discriminatory way also by its failure to reverse the burden of proof as required by Article 8 of the Anti-Discrimination Law. The SRSg had not rebutted the *prima facie* case of discrimination. In conclusion, the Panel found a violation of Article 14 in conjunction with

13 *Fillim Guga v. UNMIK*, Case No. 47/08, 24. January 2014, HRAP (Opinion), paras. 56–60, http://www.unmikonline.org/hrap/Eng/Cases%20Eng/OP_47-08_ENG.pdf (last visited Aug. 21, 2015).

14 *D.H. and others v. Czech Republic* [GC], no. 57325/00, 13. November 2007, ECtHR, para. 175.

15 *Horváth and Kiss v. Hungary*, no. 11146/11, 29. January 2013, ECtHR, para. 101.

16 *D.H. and others v. Czech Republic*, ECtHR, paras. 176–177.

17 See *Fillim Guga v. UNMIK*, HRAP, para. 76.

18 *Fillim Guga v. UNMIK*, HRAP, para. 70.

19 *Fillim Guga v. UNMIK*, HRAP, para. 74.

20 *Fillim Guga v. UNMIK*, HRAP, para. 81.

Article 6 ECHR,²¹ while it considered the alleged violations of Article 1 of Protocol No. 1 and of Article 1 of Protocol No. 12 to the ECHR not necessary to examine as additional issues.²²

The Panel did not enter into the contradiction that the complainant had sought reinstatement into his job with IMN with the courts, while the KTA had claimed that he had not provided any evidence of legal action against the decision of the company terminating his employment,²³ which could also have been considered a violation of Article 6 ECHR.

In its concluding comments the HRAP recalls that ethnic discrimination requires a “vigorous reaction” from authorities. While it would have been for UNMIK to redress the effects of the violation found, the fact that UNMIK after the entry into force of the Kosovo constitution on June 15, 2008, had ceased to perform executive functions in Kosovo, limited its ability to provide full and effective reparation and its responsibility regarding the judiciary ended on December 9, 2008, when the EU Rule of Law Mission (EULEX) assumed operational control in that area.²⁴ Nonetheless, the Panel held that this did “not relieve UNMIK from its obligation to redress as far as possible the effects of the violation for which it is responsible”.²⁵

Consequently, the Panel made a number of recommendations, in particular that UNMIK urges EULEX and other competent authorities in Kosovo towards a review of the claim by the Special Chamber, to make a public apology to the complainant for the failure of the Special Chamber, to take appropriate steps towards payment of adequate compensation to the complainant for the non-pecuniary damage suffered, to liaise with competent authorities in Kosovo to ensure full implementation of the Kosovo anti-discrimination law and to take immediate and effective measures to implement the recommendations of the Panel.

III. *Nevenka Ristić against UNMIK*

In the case *Nevenka Ristić* against UNMIK, decided by the HRAP on May 13, 2014, the Panel reached a similar result.²⁶ In this case, a Serbian complainant employed by the socially-owned enterprise “*Eximkos*” for 22 years left Kosovo for Montenegro due to security reasons and was “pensioned off” in 2000. In this case, the complainant’s name was included by KTA on the list of employees eligible for sharing the proceeds from the privatization, but the Special Chamber of the Supreme Court excluded her in response to a claim filed by a group of former employees of the company, arguing that she and a number of other persons did not meet the criteria for being included.

Ms. Ristić provided documents to the Special Chamber to prove that these allegations were substantially wrong and claimed that she was discriminated as a non-Albanian employee. The Special Chamber found that she did not prove that she was still an employee at the time of the privatization and also “did not prove that she was discriminated”.²⁷

²¹ *Fillim Guga v. UNMIK*, HRAP, paras. 85–87.

²² *Fillim Guga v. UNMIK*, HRAP, paras. 88–91.

²³ *Fillim Guga v. UNMIK*, HRAP, paras. 20, 25, 29 and 34.

²⁴ *Fillim Guga v. UNMIK*, HRAP, para. 94.

²⁵ *Fillim Guga v. UNMIK*, HRAP, para. 95.

²⁶ *Nevenka Ristić v. UNMIK*, Case No. 319/09, May 13, 2014, HRAP (Opinion), http://www.unmikonline.org/hrap/Eng/Cases%20Eng/319_09%20Ristic%20Final%20opinion%2030May14.docx (last visited Aug. 21, 2015).

²⁷ *Nevenka Ristić v. UNMIK*, HRAP, para. 17.

The HRAP again requested the views of the SRSG on the matter, which were supportive of the decision of the Special Chamber and, in particular, held that it was “not within HRAP’s purview to assess the legality and accuracy of decisions made by competent judicial institutions, unless there is evidence that such decisions have been rendered in an obviously unfair and inaccurate way”.²⁸ The Panel accepted this approach in line with the pertinent jurisprudence of the European Court of Human Rights²⁹ and, following a similar line of reasoning as in “*Guga*”, found that the complainant had indeed shown circumstances that indicate discrimination and that the Special Chamber had ignored relevant facts although confirmed by KTA. It found this attitude “disturbing” and “surprising”, in particular as the Special Chamber had followed the claims of the group challenging the inclusion of the complainant in spite of facts confirming the contrary and its own findings in other cases of discrimination.³⁰ The Panel, therefore, reached the same conclusion as in “*Guga*”, in particular that the Special Chamber had failed to recognize the existence of a *prima facie* case of indirect discrimination and to give effect to the reversal of burden of proof in the Kosovo anti-discrimination law. It thus found a “violation of Article 14, taken in conjunction with Article 6 of the ECHR”,³¹ which resulted in the same set of concluding comments and recommendations as in “*Guga*”.³²

IV. Comments on the Cases

The two cases show the important role that the HRAP managed to play in applying the standards of the ECHR to the specific area of minority protection in privatization cases in Kosovo. While the Republic of Kosovo itself and its citizens are prevented from participating in the enforcement system of the ECHR for lack of membership in the Council of Europe, the HRAP in its area of competence demonstrates, what such membership could entail for the state and its minorities.

There were serious limitations of the mandate of the HRAP in terms of substance, i.e. potential human rights violations by UNMIK, and time, as it could only accept complaints for events since 2005 till the year 2008, when UNMIK ceased to exercise its executive powers (in some areas this happened with the entry into force of the Kosovo constitution, in others – like the police and justice components – this meant the end of 2008 as a result of the establishment of the EULEX mission). Its competence, however, included ongoing violations from before 2005. In any case, the competence of the Panel to review the accountability of the United Nations Mission in Kosovo on the basis of the applicable law, i.e. the ECHR and other international human rights treaties, which did not play a role in these cases, is by itself very remarkable. UNMIK was the highest authority during this time and, like a government, also responsible for the actions of the Courts. The review of these actions by the HRAP can be compared to the reviews by the European Court of Human Rights of decisions by national courts, however, only within its limited mandate.

Certainly, it is disturbing that it is in the hands of the United Nations how to comply with the recommendations of the Panel and this compliance has not been satisfactory. However, the work of the HRAP can be considered as best practice, setting standards not only for international

28 *Nevenka Ristić v. UNMIK*, HRAP, para. 29.

29 *Nevenka Ristić v. UNMIK*, HRAP, para. 53, referring to *I.J.L. and Others/United Kingdom*, no. 29522/95, 30056/96, 30574/96, Dec. 19, 2000, ECtHR and other judgments.

30 *Nevenka Ristić v. UNMIK*, HRAP, paras. 57 and 58.

31 *Nevenka Ristić v. UNMIK*, HRAP, para. 78.

32 *Nevenka Ristić v. UNMIK*, HRAP, paras. 79–82.

accountability but also for the judicial institutions active in Kosovo, as well as for EULEX, on how to bring the ECHR to life in a country which incorporated the direct applicability of the convention in its constitution without being – as yet – a member state of the Council of Europe. It needs to be noted, however, that in the past the ECHR had already been used as the main reference instrument for the Kosovo Ombudsperson in cases related to UNMIK.

Both of the described cases show that in spite of an elaborate system developed by UNMIK to assure a fair distribution of privatization gains to the employees by taking the possibility of discrimination into account, there have been deficiencies in the practice of the Special Chamber, in particular with regard to the application of the anti-discrimination law, which made the panel draw some general comments on the need to adopt positive protective measures by the authorities in cases of displaced minorities in a situation of vulnerability.³³ All in all, the jurisprudence of the HRAP on discrimination cases in the context of privatization is an important contribution to the application of the ECHR in Kosovo.

V. General Conclusions

The Human Rights Advisory Panel of UNMIK in Kosovo is of particular interest for the development of the accountability of international organizations. The large number of opinions by the HRAP finding a violation of the ECHR shows that UNMIK indeed had a major accountability problem, which has been ignored by the United Nations for too long, maybe because this was not a unique but rather a general structural problem of the United Nations and other international institutions.³⁴

The findings of discrimination on ethnic grounds in the two reported cases are of particular importance in Kosovo, where UNMIK from its first regulation on put a major emphasis on fighting discrimination,³⁵ which can also be seen from the Kosovo anti-discrimination law.

The procedures and practice of the HRAP prove that accountability mechanisms are possible although there is room for improvement, in particular with regard to the implementation of the opinions. If the accountability of UNMIK is to be taken seriously, it should make best efforts to comply with the detailed recommendations made by the HRAP. However, in practice it seems that there was little follow up. Victims of violations could therefore take the opinions mainly as “just” or “moral satisfaction”, but not expect a proper reinstatement in their rights. Therefore, and in view of the fact that UNMIK no longer has powers of enforcement, the opinions also address themselves through UNMIK to the Kosovar government and EULEX, which has a monitoring and advisory function and, in some respects, also an executive role to strengthen the rule of law, to take all possible steps to address the violations found. However, the attitude of EULEX has been rather disappointing as shown by the last Annual Report of the HRAP,³⁶ which may also partly explain why EULEX does have an accountability problem itself.

33 See *Fillim Guga v. UNMIK*, HRAP, para. 18; *Nevenka Ristić v. UNMIK*, HRAP, para. 17.

34 See GUGLIELMO VERDIRAME, *THE UN AND HUMAN RIGHTS: WHO GUARDS THE GUARDIANS?* (2011).

35 See UNMIK Regulation 1999/1 of July 25, 1999, on the authority of the Interim Administration in Kosovo.

36 See HRAP, *ANNUAL REPORT 2014*, at i.

One particular limitation of the procedure is the lack of any compensation scheme provided by UNMIK for victims of human rights violations found by the HRAP.³⁷ While this is a general problem of UN missions, which only provide compensation *ex gratia*,³⁸ in the case of UNMIK the establishment of an accountability mechanism in the form of the HRAP has raised legitimate expectation from the side of victims of violations to see these violations addressed. However, as noted by the HRAP in its 2014 report, “the Panel does not see any meaningful activity undertaken by UNMIK in response to its recommendations [...] due to UNMIK’s inertia, there has been no redress for the complainants. As such they have been victimized twice by UNMIK [...]”.³⁹ This is a bitter conclusion before the forthcoming termination of its activities.

What is remarkable is that the main standard of accountability is the European Convention on Human Rights, as interpreted by the European Court of Human Rights, which is part of the constitutional law of Kosovo although Kosovo is not (yet) a member of the Council of Europe. Accordingly, UNMIK as a United Nations mission is held accountable for not respecting regional human rights law. However, it was UNMIK itself, which by regulation decreed in 1999 made the ECHR (next to other international human rights conventions) applicable in Kosovo.⁴⁰ But until today, Kosovars have no way to file complaints at the European Court of Human Rights, thus lacking a remedy every European citizen is granted.⁴¹ The “jurisprudence” of the HRAP, which orientates itself closely towards the European Court of Human Rights, can be considered as an important contribution to closing that gap. However, its obvious temporary and substantive limitations also limit the potential of this contribution. Furthermore, the HRAP is in the process of winding up its activities. No doubt it leaves an important legacy of case law on human rights in Kosovo, from which the Kosovar judiciary could be inspired with regard to applying the European Convention on Human Rights.

37 HRAP, ANNUAL REPORT 2014, at para. 77.

38 Compare GERHARD NIEDRIST, THE NECESSITY OF A HUMAN RIGHTS ACCOUNTABILITY FOR THE UNITED NATIONS (2014), http://works.bepress.com/gerhard_niedrist/1.

39 HRAP, ANNUAL REPORT 2014, at para. 79.

40 See UNMIK Regulation 1999/24 of Dec. 12, 1999, on the applicable law in Kosovo.

41 See Bernhard Knoll, *Rights Without Remedies: The European Court’s Failure to Close the Human Rights Gap in Kosovo*, 68 HJIL, 2008, at 431.