



CHATHAM HOUSE

Chatham House, 10 St James's Square, London SW1Y 4LE

T: +44 (0)20 7957 5700 E: [contact@chathamhouse.org](mailto:contact@chathamhouse.org)

F: +44 (0)20 7957 5710 [www.chathamhouse.org](http://www.chathamhouse.org)

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## International Law Meeting Summary

# The Kosovo Human Rights Advisory Panel

Speaker: Professor Christine Chinkin

London School of Economics and Political Science  
Member of the Kosovo Human Rights Advisory Panel

Chair: Louise Arimatsu

Associate Fellow, International Law, Chatham House

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## INTRODUCTION

The Kosovo Human Rights Advisory Panel was established in 2006 to investigate individual complaints of alleged human rights violations committed by or attributable to the United Nations Interim Administration in Kosovo ('UNMIK'). Despite being the first independent individual complaints mechanism (similar to those created by the UN human rights treaties) established to investigate violations of international human rights law committed by or attributable to United Nations field operations, little is known about this institution. Accordingly, this discussion group meeting was organised in order to outline the institution and its activities, and to critically examine both the objectives behind its establishment and the extent to which it could be said to fulfil those objectives. Underlying the discussion was the accountability deficit for violations of international law by international organisations, and the potential precedential value of the Advisory Panel for future accountability mechanisms for the practices of international organisations.

The participants included representatives of NGOs, embassies, academics and practising lawyers.

The meeting was not held under the Chatham House Rule.

## SUMMARY OF MEETING AND DISCUSSION

As the first international mechanism established to receive and consider individual complaints of violations of international human rights committed by an UN administration with respect to its operations in the field, the Kosovo Human Rights Advisory Panel, set up to investigate individual complaints made against the United Nations Interim Administration in Kosovo is essentially an experiment.

The background to the establishment of the Panel is familiar to many people. Security Council Resolution 1244, signifying the end of the NATO bombing campaign in Serbia and Kosovo, authorised member states and relevant international organisations to establish an international security presence, KFOR, in Kosovo, and the Secretary-General to establish an international civil presence as an interim administration in Kosovo.<sup>1</sup> The civil presence, UNMIK, was to promote the establishment, pending final settlement, of substantial autonomy and self governance in Kosovo. In the meantime, it was given very extensive powers to facilitate the rebuilding of key infrastructure, economic reconstruction, maintaining and rebuilding law and order and, relevant for these purposes, protecting and promoting respect for human rights. Accordingly the task before UNMIK was considerable: to quote a leading commentator of the time, it 'had to govern an entire province, re-establish a functioning public sector in the midst of substantial destruction, communal devastation and the exodus of the former regime'.<sup>2</sup>

All legislative and executive authority, including control over the judiciary, was vested in the Special Representative of the Secretary-General ('SRSG').<sup>3</sup> Thus, UNMIK had essentially the same powers as a state would have. However, while becoming a surrogate state, it did so without the same regard for democratic principles such as the separation of powers and those checks and balances and independent supervisory mechanisms that are familiar within constitutional systems. It soon became apparent that in exercising these powers, there was tension between the demands of security within Kosovo and the respect for individual human rights, with UNMIK through the SRSG undertaking such measures as detentions without judicial decision or control, or on the other hand releasing people who had been detained subject to court decision, and interfering with the electoral list. By 2003, commentators had become concerned at the human rights situation within the territory under UNMIK's administration, leading to observations amongst legal institutions such as the UN Human Rights Committee that 'UNMIK had failed. Indeed, the failure is so profound that it put at risk the transition as a whole'.<sup>4</sup>

From the outset, the opportunities to hold UNMIK accountable for such alleged violations of human rights were very limited; essentially the SRSG could not be challenged. Both UNMIK and KFOR personnel enjoyed immunity before the Kosovo courts in line with regular practice in accordance with the 1946 Convention on Privileges and Immunities of the United Nations.<sup>5</sup> In 2000 UNMIK established an independent Ombudsperson, the first such international ombudsperson and as such the first experiment in UN accountability. The Ombudsperson was mandated to 'ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards'.<sup>6</sup> Although Resolution 1244 made no mention of any such institution, the 1998 *Rambouillet Accords* had provided for the creation of an Ombudsman in Kosovo.<sup>7</sup>

To this end, the Ombudsperson was able to investigate complaints by any person or entity in Kosovo with respect to human rights violations. Although by all accounts the Ombudsperson did make himself extremely visible throughout Kosovo, conducting field visits, visiting places of

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<sup>1</sup> UN SC Resolution 1244, 10 June 1999.

<sup>2</sup> Marshall D and Inglis S (2003) 'The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo', 16 *Harv. J. Int'l L* 95, at p.95.

<sup>3</sup> UN SC, Report of the Secretary General on the United Nations Interim Administration Mission in Kosovo, S/1999/779, 12 July 1999, at para.35.

<sup>4</sup> Marshall D and Inglis S (2003) *The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo*, 16 *Harv. J. Int'l L* 95, at p.96.

<sup>5</sup> UN GA, Convention on the Privileges and Immunities of the United Nations, 13 February 1946.

<sup>6</sup> UNMIK, Regulation on the Establishment of the Ombudsperson Institution in Kosovo, UNMIK/REG/2000/38, 30 June 2000.

<sup>7</sup> Chapter 6, *Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo*, 7 June 1999, S/1999/648

detention and constantly challenging the UNMIK administration, the response from UNMIK was frequently one of non-cooperation and a failure to carry out the recommendations that were made. There was no further follow-up instrument to challenge UNMIK's positions. Accordingly, this added to the concerns raised in 2003 about the human rights situation in Kosovo and the lack of effective mechanisms for accountability.

Further, on 17 March 2004, there was a major outbreak of violence in Kosovo resulting in 19 deaths, nearly 1000 people being injured, and nearly 2000 people displaced. Hundreds of houses primarily belonging to Kosovo Serbs were burned, as were Serbian churches and monasteries. This was followed by another exodus from Kosovo of numbers of Kosovo Serbs. UNMIK had appeared to be completely unprepared for this outbreak of violence; it had failed to contain the violence and had maintained order with considerable difficulty.

It is important to note the temporal backdrop when considering the lack of accountability throughout the territory of Kosovo. 2000 to 2003 was a period when issues of international accountability enjoyed a high place on the international agenda. In particular, the need for such accountability was high in respect to international organisations following on from scandals involving peacekeepers in Bosnia and Herzegovina; more generally, the question of individual criminal responsibility dominated the international agenda, culminating with the entry into force of the Rome Statute of the International Criminal Court in 2002.

Equally important is the spatial context. To have excluded the territory of Kosovo, located as it is in the middle of Europe, from the jurisdiction of any human rights protection, would have been to constitute a troubling lacuna or space within Europe that was not subject to the provisions of the European Convention on Human Rights ('ECHR'), and the jurisdiction of the European Court of Human Rights ('ECtHR'). For example in that particular region by 1999 Croatia, Slovenia and the Former Yugoslav Republic of Macedonia were already parties to the European Convention. Bosnia and Herzegovina became a party in 2002, but had in fact already been subject to the treaty through its direct incorporation through the Dayton Peace Agreements in 1995, and Serbia became a party to the Convention in 2004.

The major criticism of the situation regarding UNMIK's lack of accountability came from the Council of Europe, by way of the Report of the Venice Commission.<sup>8</sup> The Report provided a detailed opinion on the human rights situation in Kosovo, and considered possible mechanisms for accountability that could be implemented. It identified the main human rights concern as being the lack of security, in particular, the lack of security for the non-Albanian Kosovan population (Kosovo Serbs, Roma and other minorities) and, in the north of Kosovo - still a predominantly Kosovan Serb area - security with respect to Kosovan Albanians.

In the aftermath of the March 2004 violence, the Venice Commission was concerned by the lack of an independent international mechanism for review with respect to any of the acts of UNMIK, and considered that in the absence of any such *international* mechanism, it was the responsibility of UNMIK itself to develop its own appropriate mechanism.<sup>9</sup> In the short term, it recommended the creation of an independent advisory panel to operate alongside the Ombudsperson to 'provide the public with a visible sign that UNMIK does not shield its acts from a body of independent members of a human rights panel'.<sup>10</sup>

## Creation of the Kosovo Human Rights Advisory Panel

In 2006, in accordance with the recommendations by the Venice Commission, UNMIK established the Kosovo Human Rights Advisory Panel. The Panel has three members, and takes a similar form

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<sup>8</sup> European Commission For Democracy Through Law, Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, Opinion No. 280/2004 (CDL-AD (2004)033), 11 October 2004, available at: [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp).

<sup>9</sup> In its report, the Venice Commission noted that in the 46 European states which are members of the Council of Europe, an international mechanism is principally provided by the ECHR. However, by virtue of Resolution 1244, Serbia and Montenegro does not exercise 'jurisdiction' within the meaning of Article 1 of the ECHR over Kosovo and therefore cannot be held accountable for human rights violations stemming from acts or omissions which are outside its control. Ibid, para 77.

<sup>10</sup> Ibid. para. 124.

as that of the United Nations Human Rights Treaty Bodies, namely a model of individual complaint from victims of alleged violations of human rights attributable to UNMIK. The applicable law as set out in the Regulations is remarkable; the Panel is entitled to draw upon and directly apply a comprehensive body of international and human rights instruments, most notably including the Universal Declaration of Human Rights ('UDHR'), making it one, if not the only, body authorised to directly apply the Universal Declaration. However, in practice, the primarily applicable and applied regime is that of the ECHR. The Panel can consider complaints relating to alleged human rights abuses by UNMIK, since 23 April 2005, after all other remedies have been exhausted by the complainants. It has no jurisdiction over alleged human rights violations by KFOR.

A complaint to the Panel passes through two stages of consideration: first on admissibility, and then, if it meets the admissibility requirements, on its merits. Like the UN Treaty Bodies on which it is modelled, the Panel is not a Court; it is at best quasi-judicial, and can only recommend compensation or other measures. Its recommendations to UNMIK are advisory in nature. Throughout the process, the Panel communicates regularly with the SRSG for UNMIK's comments with regard to the admissibility and merits of individual complaints, as well as maintaining contact with the complainants in order to seek further information or clarification when necessary.

## Reception of the Panel

From the outset, the Panel was the subject of criticism both externally from human rights NGOs, and internally, from UNMIK itself.

Externally, the main concern was its limited temporal jurisdiction, flowing from both the date specified in the Regulation as the date of commencement of the Panel's jurisdiction, 23 April 2005, and also that it was established so late in UNMIK's administration of the territory. By 2006 UNMIK had been in control for seven years and momentum for the resolution of the political settlement for Kosovo's future was well underway. What was more, the April 2005 date of commencement automatically excluded the violence of March 2004 from the Panel's jurisdiction. In addition, it was considered that the Panel was institutionally too close to UNMIK, thus raising questions as to whether it enjoyed sufficient independence.

Whereas the Venice Commission had recommended that the Ombudsperson and the Panel operate in tandem, so as to develop a more coherent approach to human rights accountability in Kosovo, in reality this never happened. In 2006, UNMIK replaced the international Ombudsperson with a national ombudsperson appointed by the Kosovo Assembly, who had jurisdiction only over the institutions of Kosovo, and not over UNMIK. Accordingly, the idea that the Panel and the Ombudsperson would work together never came to fruition.

Internally, it seems that UNMIK had failed to appreciate the implications of what the establishment and functioning of an independent complaints mechanism would entail; namely that there would in fact be investigations and questions asked of UNMIK with respect to alleged human rights violations raised by complainants. This resulted in a tension between the Panel and UNMIK, leading to the 2009 Administrative Directive that reduced further the jurisdiction of the Panel.<sup>11</sup> The Directive emphasised the strong non-adversarial and advisory nature of the Panel, and also excluded from the Panel's jurisdiction any complaint that would be susceptible to the United Nations Third Party Claims Process,<sup>12</sup> a UN General Assembly procedure covering primarily personal injury claims against UN bodies, on the basis that the General Assembly procedure is an alternative avenue for redress, and accordingly that any claim before the Panel susceptible to this procedure should be declared inadmissible for failure to pursue all available means of redress. Furthermore, the Directive provides that even where the Panel had declared a complaint admissible, UNMIK could nevertheless readdress the admissibility issue, and ask for the complaint to be declared inadmissible.

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<sup>11</sup> Administrative Direction No. 2009/1 of 17 October 2009, UNMIK/DIR/2009/1.

<sup>12</sup> 'The UN Third Party Claims Process is the object of Resolution 52/247 of the General Assembly of 17 July 1998 on 'Third-party liability: temporal and financial limitations'. The above-mentioned Section 7 of UNMIK Regulation No. 2000/47 constitutes the implementation of the said resolution in the UNMIK context.' Kosovo Human Rights Advisory Panel, Annual Report, 2009, fn 16.

This latter change was the subject of criticism by the Panel in its 2009 Annual Report, wherein it stated that the ability of UNMIK to re-open the question of admissibility after the complaint already had been determined to be admissible, had negative implications for legal certainty.<sup>13</sup>

## The Panel in Practice: Cases and Operation

### *Workload*

When established, the Panel's workload was grossly underestimated such that this is the primary problem facing the operation of the Panel. The basic workload problem has also been exacerbated by the uneven rate at which the complaints were submitted to the Panel. For instance, in 2006, its first year of operation, only three complaints were made, in 2007 there were 12, 69 in 2008, a remarkable 352 in 2009 and 89 in 2010, with no further complaints having been accepted since 31 March 2010. As such, the Panel has received a total of 525 complaints, and as of 31 December 2011, it had 359 cases pending. To provide a standard for comparison, under the Optional Protocol to the Convention on the Elimination of Discrimination against Women (CEDAW), adopted in 1999, the Committee on the Elimination of Discrimination against Women has as of December 2011 considered and given its opinion in 20 cases.

Given that the Panel sits part time, once a month for a period of between three and seven days in Pristina, concerns as to the timely completion of the workload are apparent. In particular, it is clear that the overwhelming influx of cases in 2009 was a significant factor in creating this problem.

### *Identity of Complainants and Nature of Complaints*

Since the Panel's jurisdiction extends only over the alleged violations by UNMIK, all complaints relate to the period after UNMIK commenced its administration, and accordingly they primarily come from the non-Albanian population of Kosovo and those minorities who had suffered hardship following the withdrawal of Serbia from Kosovo in accordance with Security Council Resolution 1244. Most complainants do not live in Kosovo; most fled from Kosovo to Serbia or elsewhere in the region in fear of further violence. Many who fled had their houses destroyed, looted and usurped, and lost their jobs, while those who stayed often could not find further employment in a situation of high unemployment. In general, complainants have not alleged direct mistreatment by UNMIK personnel; rather it is more frequently the case that complainants feel that UNMIK has failed to provide adequate protection, and that despite the formal prescription of non-discrimination, they feel that in practice UNMIK has failed to make the relevant institutions, such as Courts and administrative bodies, available to them. Thus invariably, the complaint against UNMIK is one of the inadequate provision of services, procedures and structures to protect the various complainants.

Taken together, the complaints paint an extremely vivid picture of the human rights consequences of conflict where the conflict was based on ethnic divisions and also where it is coupled with transition from a socialist regime – two characteristics operating in the context of Kosovo. Three main types of cases have predominated.

### *Property Claims*

In light of the number of persons who fled Kosovo during and after the violence, abandoning their property in the process and leaving it vulnerable to being taken over, it is unsurprising that a significant proportion of the complaints handled by the Panel are of a property nature. UNMIK established (and subsequently developed) a mass claims process to determine possession rights in properties, a process that has dealt with thousands of cases. However, the claims process has been faced with major problems and challenges, including inadequate resources, limited

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<sup>13</sup> Available at [http://www.unmikonline.org/human\\_rights/documents/annual\\_report2009.pdf](http://www.unmikonline.org/human_rights/documents/annual_report2009.pdf).

accessibility, and the lack of sufficient procedural rules.<sup>14</sup> Further problems can be found in the enforcement of rights of possession following a determination by the relevant body, insufficient support from the police, the failure of evictions to take place when a determination to that effect has been made, and the return of evictees to the property after having been evicted.

There is one particular type of property case that has dominated, the so-called '14,000 cases'. In Kosovo there exists a five year limitation period for claims for compensation for damage to property, which must be made to a municipal court. This limitation period meant that in 2004, five years on from the violence in 1999, there were a massive number of claims for damage to property submitted to the Kosovan courts, with reports ranging from 14,000 to 22,000 claims. Claims were brought against UNMIK and KFOR, as well as municipal authorities. Clearly, such an influx of cases threatened to overwhelm the fragile state of the Kosovan justice system at that time. Accordingly, the Department of Justice within UNMIK requested that all courts suspend the processing of all cases on this matter until it was collectively determined how best to resolve the problem. Consequently, for this class of cases, the justice system had in effect been suspended. In 2005, the Department of Justice permitted the processing of those claims that arose out of the violence of March 2004, leaving suspended those claims relating to the situation in 1999. Eventually, after failing to develop a suitable alternative strategy, in 2008 it was decided that the courts could commence processing all remaining claims. However, as the Panel has learned from the complaints it has received, in practice, many complainants have never heard anything from the courts.

Given that in most cases the substantive property violations occurred prior to the commencement of the Panel's jurisdiction, the Panel has been unable to consider the actual damage or harm caused by those original violations. However, in most cases the suspension of judicial proceedings resulted in a minimum delay of four years, and a substantial portion of that delay has fallen within the Panel's temporal jurisdiction. Accordingly, the Panel has taken the view that these cases can be considered under article 6 of the ECHR, namely issues of access to justice and delay in the judicial process.

The SRSG has argued, on behalf of UNMIK, that it must have special consideration in light of the extraordinary circumstances in which it faced the challenge of balancing the overall administration of justice with individual rights. However, having considered the arguments by both the complainants and UNMIK, the Panel concluded that there had been a denial of effective access to justice in violation of article 6 of the ECHR. In the Panel's words, 'under no circumstances could these elements be taken as an excuse for diminishing standards of respect for human rights, which were duly incorporated into UNMIK's mandate.'<sup>15</sup>

### *Missing Persons: Killings and Disappearances*

The majority of the complaints submitted in 2009 relate to the killings and disappearances of non-Albanians or those who had been suspected of collaborating with the Serbs that took place in the months after June 1999. The Panel's jurisdiction means that, as in the property cases, it is unable to consider the substantive violations (right to life), and indeed the complaints do not allege direct violation by UNMIK. Rather, the Panel has considered the complaints as allegations of violation of the positive procedural obligations under article 2 of the ECHR, on the right to life, requiring the effective investigation into the deprivation of life.

The Panel has only recently commenced the consideration of this class of case. It has adopted the practice of grouping cases together by reference to commonalities and formally joining them – such as when a number of complaints arise out of the same factual situation. Although the Panel's consideration of these cases is still at the admissibility stage of proceedings, it is anticipated that once the Panel begins its investigations into police and other official records, further trends and

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<sup>14</sup> OSCE, *Challenges in the Resolution of Conflict-related Property Claims in Kosovo*, June 2011.

<sup>15</sup> *Zivkovic and Others*, cases nos. 28/08, 65/08, 68/08, 40/09, Opinion of 6 August 2010, para 19 reaffirming *Milogoric and Others*, cases nos. 38/08, 58/08, 61/08, 63/08 and 69/08, Opinion of 24 March 2010, para. 44. See also *Danica Lalić and Others*, cases nos. 30/08, 66/08, 24/09, 25/09, 26/09, 28/09, 33/09, 115/09, 183/09, 186/09, 198/09, 305/09 & 350/09 (opinion 13 May 2011).

commonalities will be identified. This holistic approach to the complaints enables the Panel to develop and present an understanding of what actually occurred in Kosovo during the relevant time periods.

However, there is at least one instance where the question of the direct violation of article 2 by UNMIK has been raised, along with other issues such as peaceful assembly. This case arose out of the major protest in Pristina against the international presence. The UNMIK police who had been deployed to maintain order lost control and, in their attempts to regain control, used rubber bullets resulting in the death of two protestors and causing injury to many others.<sup>16</sup>

Another instance where UNMIK was alleged to have directly violated Convention rights involved the placement of Roma persons on contaminated land.<sup>17</sup> Here, the rights at stake were the right to health and the freedom of movement.

### *Privatisation Cases*

The final class of complaints arise out of the privatising of previously socially-owned enterprises, with complainants claiming their entitlements to some of the proceeds of privatisation. Once again, these complaints concern the accessibility of such claims procedures, particularly by those individuals who had left Kosovo and consequently have had difficulty accessing the procedures enabling them to make and pursue their claims.

## Reflection

Reflecting upon the practice of the Kosovo Human Rights Advisory Panel, it is possible to identify both strengths and challenges facing, and presented by, the Panel.

First, and foremost, the operation of the Panel means that now, albeit somewhat belatedly, UNMIK does face scrutiny over its conduct. Unlike previously, the administration is being questioned and responses are being demanded, with the Panel challenging both UNMIK's assertions and its conduct.

Secondly, for the purposes of international law, the Panel is developing an important body of jurisprudence and in particular in regards to two types of cases. The first concerns the violation of international human rights law by non-state actors, when the non-state actor is an international governmental organisation. Through its examination of complaints, the Panel has been required to grapple with such questions as whether an international organisation should be treated in the same manner as a state, and even where the organisation in question is exercising the functions and powers of a state, whether the situation is such that it justifies the adoption of different human rights standards and expectations. The second context in which the Panel is developing a body of valuable jurisprudence is in the field of post-conflict reconstruction and the transition from socialism.

Finally, from the perspective of the treatment of individual complainants, it can be said that through its consideration of complaints submitted to it, the Panel has been able to bring objective legal reasoning in responding to those complaints.

However, there are also a number of downsides that limit the Panel's potential and effectiveness.

The first relates to the unanticipated workload. The creation of a part-time panel, sitting once a month with a very small secretariat, has resulted in a system with significant delays. The administrative tasks alone are enormous; to take an example, all documents submitted to, and created by, the Panel must be translated from Serbian and Albanian into English, and vice versa. Delays cause further frustration and undermine confidence in the whole process.

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<sup>16</sup> *Mon Balaj v UNMIK*, case no. 04/07 (first decision on admissibility, 6 June 2008; second decision on admissibility, 31 March 2010).

<sup>17</sup> *N.M. and others v UNMIK*, case no. 26/08 (first admissibility decision 5 June 2009; second decision on admissibility, 31 March 2010).

Secondly, in many cases, particularly since the transition of justice matters from UNMIK to the European Union Rule of Law Mission in Kosovo (EULEX) in 2008, it is simply too late for the Panel to make any positive recommendations for steps that UNMIK could undertake.<sup>18</sup>

Related to this is the tension between peoples' expectations of what the Panel might do and the objectives for which it was set up. Whereas the expectation of victims might be that 'something will happen' following the investigation of a complaint by the Panel, in practice the objective from the institutional level is that the Panel will cast light on the ways in which an international organisation may be held accountable for human rights violations attributable to the organisation, and will suggest lessons learned and good practices that could be adopted in the future to prevent reoccurrence. However, there is a difficult tension between this objective and the objective of giving a voice to victims. As with all individual complaints mechanisms, the whole process of investigation is initiated by the victim, yet the jurisdiction, mandate, and capacity of the Panel means that in most cases, particularly the missing persons cases, the Panel simply is unable to provide what the victims want: the Panel cannot tell the victims what happened to their loved ones and why. The Panel can only inform the complainants whether enough was done to investigate the situation at hand under the investigative obligations under the ECHR.

The third main weakness of the Panel can be derived from the frustrations of the Panel itself and (like all human rights individual complaints mechanisms) its ability to investigate and respond only to what has been submitted to it. This takes on a number of dimensions.

On the one hand, it can often be challenging to identify in human rights terms what the complainant is complaining about from the information submitted; in such cases, the process is delayed further by protracted correspondence with the complainant in order to obtain the appropriate information. For example, the Panel often receives little more than a decision from the property claims commission indicating a proprietary right. In such cases one can presume that the case involves the non-enforcement of that decision; however, of course it is necessary to seek further clarification from the complainant.

An important matter is the consequences of framing the complaint within the appropriate human rights terms, so that the issue falls within the Panel's competence. Quite often, the terms in which the complaint is addressed by the Panel does not coincide with what victims see their concern to be actually about. For example, those victims submitting complaints regarding the forced disappearance or killing of a family member are unlikely to see their primary concern as relating to the inadequate investigation of the situation; rather, it is likely to be the actual disappearance or killing.

The Panel cannot investigate what it believes to be an important human rights issue, when that particular issue has not been the subject of any complaint. For instance, although it is commonly known that sexual violence and gender-based violence did occur in Kosovo, there has been almost no mention of sexual violence in any of the complaints. Accordingly, while there may be grounds for the Panel to examine whether appropriate investigations by UNMIK into any allegations of sexual and gender-based violence reported to it were in fact pursued, the Panel has been unable to consider this matter.

The lack of an overall accountability and review mechanism for UNMIK's administrative practices should also be noted. The Panel is only mandated to consider UNMIK's compliance with its human rights obligations and there has been no broader enquiry into UNMIK's conduct.

In sum, to a large degree, the Panel was the product of a number of unique factors that were at play in Kosovo: the temporal and spatial factors, and the role of NATO leading to the creation of the situation in Kosovo that led to the establishment of a UN territorial administration - UNMIK. To that extent, it is debatable whether the Panel's model will be repeated in the future. Should any future UN administration adopt such a model, it is hoped that it does so in a more timely fashion.

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<sup>18</sup> <http://www.eulex-kosovo.eu/en/front/>.

## DISCUSSION

### Accountability of International Organisations

In response to a question whether UNMIK has acted upon the Panel's recommendations and paid compensation or any other kind of satisfaction, it was remarked that although the Panel has recommended that UNMIK award 'adequate compensation for non-pecuniary damage' to date no compensation has been paid out on the basis of the Panel's recommendations. The position regarding the payment of compensation by the UN is complicated by the existence of the UN Third Party Claims Process, which only provides compensation for material harm, limited to only personal injury and property damage, not for human rights violations as such.

Payment of compensation by the United Nations – especially in the unique situation of recommendations from the Panel - raises complex legal issues. UNMIK has stated that it will continue to 'address the issue with the United Nations Headquarters in New York with the aim of drawing the attention of the General Assembly to this problem, also taking into account the human rights standards that prevail in the context in which UNMIK is operating.'<sup>19</sup> However the question remains unresolved and it may be that it will remain that way until all complaints have been processed by the Panel in order to assess the total potential liability.

This calls into question the seriousness with which the UN is taking this question of accountability. Even if it is the case, as is often asserted, that victims of human rights abuses would be satisfied by an acknowledgement of the violation and an apology by those responsible, if the UN wishes to be seen to take a serious approach to accountability, it must be willing to demonstrate a genuine willingness to follow through on the acknowledgement of responsibility by providing some means of redress or reparation. One can speculate as to the reasons behind this apparent reluctance to accept liability for human rights violations; perhaps there is a concern that to do so would open the floodgates for claims against the UN, or perhaps it could be that it is deemed unreasonable to hold UN bodies accountable by the same standards of human rights when it is acting in situations of extreme insecurity and devastation in the aftermath of conflict, and where that body is also responsible for the establishment of order and security.

Rejecting the suggestion that the Panel's work in Kosovo raised questions that are familiar to the 'peace versus justice' debate, it was pointed out that whereas in the case of international criminal charges and the issuance of arrest warrants, it is possible to see a tension between establishing peace and security on one hand, and ensuring justice on the other, the same questions do not arise from the Panel's activities. On the contrary, the Panel's work concerns good governance within Kosovo, which must surely be important for stability, security and justice.

### Precedential Value of the Panel

In light of the restricted nature of the Panel's jurisdiction and powers and the failure to date of any compensation being paid to victims, participants asked whether the Kosovo Advisory Panel 'experiment' is, in fact, too costly on a number of levels to be repeated again. But the counter-argument posited was that the question of accountability is too costly to *ignore* as the culture of accountability within the broader framework of the international order and international law continues to strengthen. As civil society and NGOs push for further accountability, and accountability mechanisms are established in so many different contexts, it will become increasingly difficult for the UN to sustain its sense of exceptionalism. To a degree, through the internal investigations and the publication of its reports into the UN's conduct in Srebrenica and Rwanda, the UN has recognised and accepted the need for scrutiny over its actions, and the need to make some public acknowledgment of its actions and their implications. Accordingly, one can view the establishment of the Panel as part of this trend, a trend that includes the International Law

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<sup>19</sup> Venice Commission, *Opinion on the Existing Mechanisms to Review the Compatibility of Acts by UNMIK and EULEX in Kosovo*, CDL-AD(2010)051, 21 December 2010, para 45.

Commission's enquiry into the responsibility of international organisations under international law, rather than as an isolated experiment.

Building upon the potential precedential value of the Panel, the question was posed whether, since the establishment of UN Administrations such as UNMIK is very likely to continue to be a rare occurrence, could the Panel provide a model for the establishment of similar panels to examine the conduct of the UN and its agents, in other fields of its activity, for instance, human rights violations committed by UN peacekeepers? This again goes back to the question of how seriously the UN is taking matters of accountability for its own actions. In the case of UNMIK, the decision to establish the Panel was quite clearly the result of increasing external pressure to create a mechanism of oversight and accountability. There has often been talk of establishing some kind of UN Ombudsman for external matters;<sup>20</sup> however, if such a body is to be given quasi-judicial powers in assessing UN actions, then ultimately the important question is: what will be the consequences that flow from any investigation and how will assessments or decisions be made effective? In the case of UN peacekeepers, the questions of responsibility and the attribution of obligations are complicated further by the position of troop deploying nations, and questions of national investigations and so forth. To some extent, the instance of a UN administration is easier to deal with, because it has been given a specific mandate.

It was further observed that if the UN, in certain instances, is to act as a 'quasi-state', as in the case of UNMIK in Kosovo, then it too should be obliged to comply with the rule of law and principles of justice that are expected of all states. If the UN was indeed serious about upholding the rule of law through its conduct, a more effective mechanism would have been to establish a tribunal with the authority to make binding decisions and to award and enforce compensation or other forms of satisfaction or reparation. The UN Compensation Commission, established after the first Gulf war to quantify and allocate compensation for losses incurred as a result of Iraq's invasion and occupation of Kuwait,<sup>21</sup> was highlighted in this regard as an example of a tribunal that had functioned in a relatively efficient manner. Participants were, however, reminded of the limitations of the precedential value of the UN Compensation Commission in this regard. Firstly, in the case of the first Gulf war, the Security Council had already pre-determined Iraqi responsibility for all losses.<sup>22</sup> Accordingly, the Commission was not tasked with determining responsibility in each case. Secondly, the Commission was not mandated to determine responsibility for human rights violations or to quantify and allocate compensation on the basis of human rights principles.

## Jurisprudential Contribution of the Panel

Moving on to the Panel's legacy, it was suggested that this may be found in its *jurisprudential* value. The ability of the Panel to consider and apply a broad spectrum of international and regional instruments, including the UDHR, could produce a rich body of jurisprudence particularly in respect of application and enforceability against non-state actors. The Panel's jurisprudence, available on its website and detailed in its Annual Reports, had the potential to be the forum for (quasi-)judicial cross-referencing and cross-fertilization between the numerous different human rights bodies. For instance, in the Panel's consideration of complaints of forced displacement of Roma peoples, it could draw upon the jurisprudence of the Committee on Economic, Social and Cultural Rights, and interpret that jurisprudence in light of the status of UNMIK as a non-state actor.

There was agreement that the Panel could make a valuable contribution to developing an understanding of the applicability of international human rights standards to non-state actors. Referring to the missing persons cases before the Panel, it was noted that the ECtHR's jurisprudence setting the high standard of investigation under article 2 of the ECHR was developed in cases where either the state itself was suspected of being responsible for the disappearances/killings, or where the state was in control of submission of the relevant documentation (for instance the cases with respect to claims against Turkey in Cyprus and the

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<sup>20</sup> A UN Ombudsperson has been established with respect to employment issues within the UN; General Assembly resolution 62/228, 6 February 2008.

<sup>21</sup> SC Res 687, S/RES/687, 8 April 1991.

<sup>22</sup> *ibid*, para.16.

Chechnya cases). UNMIK operates in a very different manner to how one would expect a state to operate in a whole host of ways, and has considerable constraints on its actions, including in respect to law enforcement. Therefore, once the Panel has considered the admissibility of the missing persons cases, it will be necessary for it to determine what standard to apply when considering the compatibility with human rights obligations with respect to investigation of UNMIK's conduct in order to opine upon the merits of those complaints. The Panel has engaged in such standard-setting in the context of the property cases in order to determine the compatibility with article 6 ECHR of the delays in the judicial process, but it is yet to make such a determination on the investigatory standard under article 2 ECHR.

Insofar as the Panel's legacy was concerned, one participant suggested that, as the Panel completes its mandate, it would be a worthwhile enterprise for it to publish a report or series of reports identifying the weaknesses in the current mandate that would benefit from reform. Such reports could include suggestions for measures that the UN might adopt to effect broad reform, and reiterate the need for the UN to take more concrete steps to act on complaints. Such a report, from a body established by the UN itself, would provide NGOs and human rights activists with a firmer foundation upon which to pursue their efforts to lobby for greater UN accountability.

There was agreement that such an initiative could be a worthwhile pursuit for the Panel once all the complaints had been processed. Although the Panel had expressed its concern about the restrictions placed upon its mandate in past annual reports, not least those imposed by the 2009 Administrative Directive, the Panel had not yet had a chance to reflect upon its work in a more holistic manner since its attention had been consumed with responding to the caseload. In its follow up report to the 2004 Report, the Venice Commission had made a number of recommendations to expedite the Panel's functioning.<sup>23</sup> One of its key recommendations was that members of the Panel could undertake more work during the time they are not convened in Pristina. However, from an operational perspective, the practicality of this recommendation was questioned. Investigations into the merits of complaints, in particular the missing persons cases, would require the Panel to inspect appropriate police records, something that can only be done when in Pristina.

## Workload

On the question of the Panel's workload, it was suggested that the Panel could adopt a 'pilot case' system similar to that adopted by the ECtHR, whereby a leading case is established so that the jurisprudence developed therein can be applied to all the other cases presenting the same or similar facts and legal situation. While a similar approach had been adopted through omnibus decisions with regard to the article 6 property cases, the Panel had not discussed the use of a similar system for the missing persons cases. However, it was felt that greater caution was warranted since these two types of violations are fundamentally distinguishable. Adopting such an approach in respect of particularly sensitive cases involving missing persons, risked depriving individuals of the respect to which they were entitled by the Panel. Furthermore, in these kinds of cases, there is likely to be a greater difference in the facts of each case and the information available, such that it would be more difficult to implement a pilot system.

## Victim Experience

Reflecting upon the question of 'for whose benefit the Panel had been established', and drawing upon her own experience, one participant emphasised that for many victims of human rights violations within Kosovo, the Panel's consideration of their situation is the first instance that any authority has shown interest in the abduction or disappearance of their relative since it was originally reported. One particular situation was recalled where the last time that relatives of a missing person had heard from UNMIK was in 2003, when they were informed by the investigating UNMIK police officer that the case would no longer be pursued. In these cases, what is important

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<sup>23</sup> European Commission for Democracy Through Law, Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards, Opinion No. 545/2009 (CDL-AD(2010)051), 21 December 2010, available at: [http://www.venice.coe.int/docs/2010/CDL-AD\(2010\)051-e.pdf](http://www.venice.coe.int/docs/2010/CDL-AD(2010)051-e.pdf).

for many victims is that the Panel is taking on board article 3 of the ECHR (the prohibition of inhuman and degrading treatment, and torture), so that the pain and suffering of the relatives for the failure by authorities to investigate the disappearance or killing of their loved one is recognised. However, it was also often the case that very many simply still do not understand the Panel's process – causing frustration.

## Subject Matter of Complaints

Discussing the kinds of complaints submitted to the Panel, a number of participants expressed surprise at the lack of complaints alleging sexual violence or gender-based violence notwithstanding the well publicised reports of such violence having occurred in Kosovo and throughout that region during the conflicts and in the post-conflict period. Speculating as to why it may be the case that no complaints were raised, it was observed that often men and women who have been subject to sexual violence are reluctant to complain and to discuss the incident/s and to make it a matter of public investigation. Whilst all persons respond to sexual violence differently, there is a greater willingness to talk when there is a support mechanism to facilitate their doing so. However, the Panel lacks such support structures.

Alternatively, whereas situations of murder and disappearances are generally reported, it may be the case that incidences of sexual violence are reported less often, such that any notion of a failure to investigate falls away since the violation would not have come to UNMIK's attention in order for it to investigate. In a similar vein, it was suggested that rather than turning to the human rights procedures, victims of sexual violence are more likely to seek prosecution of the perpetrator of the crime committed against them, rather than redress for the ancillary failure to investigate that crime by the authorities.

One participant noted that the Kosovo Women's Human Rights' Network has started to press the Ministry of Justice to investigate the commission of sexual and gender-based violence as war crimes. There are a handful of cases currently being investigated by the Kosovo war crimes police and there have also been a handful of convictions, with a couple of them going to appeal.

Whilst the need to address and investigate allegations of sexual violence is becoming increasingly recognised within the international criminal justice paradigm, so that sexual and gender-based violence committed in these kinds of circumstances are prosecuted as war crimes and/or crimes against humanity, such recognition has yet to occur in the context of other mechanisms. The failure of any complainants to raise the issue of human trafficking before the Panel, notwithstanding a number of reports by prominent NGOs into the incidences of human trafficking in Kosovo,<sup>24</sup> was also discussed. The question of human trafficking implicates the manner in which peace agreements, and the structures post conflict reconstruction can often be conducive to turning a 'blind eye' to trafficking networks, yet the linkages are not being made to comprehensively address these issues through the accountability mechanisms that do exist. The UN has reiterated a zero tolerance stance towards the involvement of UN peacekeepers in any form of sexual violations, to include trafficking, initially in UN Security Council Resolution 1325, but also in subsequent resolutions and in various reports of the Secretary General.<sup>25</sup> Once again however, the challenge is to make that policy effective.

## Summary by Hemi Mistry

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<sup>24</sup> Amnesty International, Kosovo (Serbia and Montenegro): 'So does it mean that we have the rights?' Protecting the human rights of women and girls trafficked for forced prostitution in Kosovo, 5 May 2004, available at <http://www.amnesty.org/en/library/asset/EUR70/010/2004/en/53c916cf-d5e4-11dd-bb24-1fb85fe8fa05/eur700102004en.pdf>

<sup>25</sup> Including, SC Res 1325 (2000), op. para. 5-6, 17; SC Res 1820 (2008), op para. 6-9; SC Res 1983 (2011), op. para.9; along with references in each SC Resolution addressing specific peacekeeping mandates. Reports include, UN Secretariat, 'Secretary General's Bulletin: Special measures for protection from sexual exploitation and sexual abuse', 9 October 2003, ST/SGB/2003/13; UN GA, 'A comprehensive strategy to eliminate future sexual exploitation and abuse in United Nations peacekeeping operations', 24 March 2005, A/59/710.