

THE HUMAN RIGHTS ADVISORY PANEL
HISTORY AND LEGACY
KOSOVO, 2007-2016

Final Report

30 June 2016

Foreword

This Final Report of the Panel is addressed specifically to the UN and more generally to the international community at large – practitioners, activists, academics and all others concerned about UN accountability for violations of human rights.

More than eight years after its first session in November 2007, the work of the Human Rights Advisory Panel (HRAP) at the UN Mission in Kosovo (UNMIK) has come to an end. The Panel, established pursuant to UNMIK Regulation No. 2006/12, was one of the first human rights complaints mechanisms created to examine alleged violations of human rights by an international mission – in this case UNMIK – in order to provide an implementation mechanism for its human rights obligations.

Notwithstanding the challenges and obstacles it faced, the HRAP was able to achieve a lot in terms of its legal legacy. Specifically, the Panel contributed to international thinking concerning numerous important questions in terms of human rights protection standards, especially those related to the human rights accountability of international organisations, in this case the UN. For the first time, UNMIK, a UN mission, assumed the role of a “surrogate state”, pursuant to UN Security Council Resolution 1244 (1999). UNMIK’s tasks included “protecting and promoting human rights” in Kosovo in the context that arose there after the end of open hostilities in 1999. With reference to this key task, the Panel clarified often in its opinions that “*UNMIK’s interim character and related difficulties must be duly taken into account with regard to a number of situations, but 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.*”

Primarily as a consequence of Kosovo being under international administration, the complaints received and reviewed by the HRAP frequently detailed circumstances and issues not previously encountered by international human rights protection bodies, or at least not to such an extent. It was accordingly difficult to find adequate responses in existing jurisprudence or opinions. The Panel had to find answers to the questions it examined drawing upon (as it was mandated to do) the broadest range of relevant international human rights protection instruments, including the Universal Declaration of Human Rights and the UN human rights treaties. In most cases, however, the European Convention on Human Rights and European Court of Human Rights case-law constituted the basis of the Panel’s reasoning and the majority of its opinions. The *acquis* so developed should be deemed a material contribution to the development of the international standards in this field.

Another significant aspect of the Panel’s legal legacy is the experiences and the lessons it has drawn from operating as a quasi-judicial human rights body that was neither thoroughly considered nor comprehensively prepared for by the UN; as the history suggests, perhaps the HRAP was even unwanted by many inside the UN and was initiated only under international pressure. Despite all of these obstacles, however, the Panel developed its own modalities of operation and procedures which enabled it to fulfil its mandate to the fullest extent possible.

As described in detail in the Report, this experience offers a strong incentive for further discussions about what would be the optimal type of human rights review body to operate within the distinctive context of an international mission administering a defined territory. To that end, the Report offers conclusions as to the apposite structure and mode of operations such a body might have, in case there is need for another such future mission. They should be also of relevance for other bodies like peacekeepers or UN bodies administering refugee camps. The Report’s analyses, reflections and conclusions are based on a variety of sources reviewed by the Panel: archival documents related, in particular, to the Parliamentary Assembly of the Council of Europe’s debate on

human rights in Kosovo that culminated in 2005, the efforts and discussions preceding the adoption by UNMIK of Regulation No. 2006/12 and the subsequent process leading to the establishment of the HRAP. The Report contains valuable information in this respect, which was obtained through interviews with many persons involved in these developments. The Panel Members' recollections and their personal experiences over the course of the Panel's existence were also instrumental.

We wish to express our profound gratitude towards those who contributed to and assisted us with this Report, most especially Mr Brandon Gardner.

Despite the very painful subject matter, and the challenges discussed in this Report, we would also like to express that membership of the HRAP has been a rewarding, and even enjoyable experience, with warmth, friendship and collegiality.

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Prishtinë/Priština, June 2016

Table of Contents

Foreword	3
Executive Summary	7
Abbreviations and Acronyms	21
I. Introduction	23
II. Context of Kosovo	26
A. UNMIK Supreme	26
B. The Ombudsperson Institution.....	28
III. Prehistory of the Human Rights Advisory Panel	30
A. PACE and the Venice Commission.....	30
B. UNMIK and HRAP.....	32
C. Views from the OSCE	34
D. The HRAP Regulation and its Drafting	35
E. Adoption of the Regulation	37
IV. Early History of the Panel	38
A. UNMIK Regulation No. 2006/12.....	38
B. The First Composition of the Panel.....	40
C. Year One: Patching Up the Holes	42
D. Rules of Procedure.....	43
E. Access to the Panel.....	44
F. Adding Staff.....	44
V. The Administrative Direction and its Aftermath	47
A. The <i>Balaj and Others</i> Hearing	47
B. Fallout from the Hearing.....	49
C. Renewing and Replacing Panel Members	54
D. Reactions to the Administrative Direction	56
VI. Secretariat of the Panel	57
VII. Legal Legacy	60
A. General Overview	60
B. Property Cases.....	62
C. Missing and Murdered Persons (MMP) Cases	63
i. The Background	63
ii. The Complaints Received.....	66
iii. Article 2 of the ECHR	67
iv. Article 3 of the ECHR.....	72
D. Discrimination.....	74
E. Access to Justice	76
F. Economic and Social Rights.....	77
G. Violence Against Women.....	78
H. Lead Contamination in the IDP Camps.....	79
I. The <i>Balaj and Others</i> Case	82
VIII. Evaluation of the HRAP's Experience	83
A. Panel's Recommendations	84
B. UNMIK's Action.....	86
C. Other Constraints.....	89
IX. Conclusions	93

X. Annexes	97
A. Profiles of Members of the HRAP.....	99
i. Final Composition of the Panel.....	99
ii. Former Panel Members	99
B. Profiles of Members of the Staff of the HRAP Secretariat.....	101
i. Final Secretariat Staff	101
ii. Former Secretariat Staff	102
C. UNMIK Regulation No. 2006/12.....	105
D. UNMIK Administrative Direction No. 2009/1	111
E. HRAP Rules of Procedure	115
F. Bibliography	125
G. Statistical Table.....	129
H. Decisions and Opinions of the HRAP Referred to in this Report.....	131
I. Reports or Opinions in which HRAP is Discussed	133
J. HRAP Mentions in Secretary-General's Reports to the UNSC.....	135

Executive Summary

1. The Human Rights Advisory Panel (HRAP) was created by UNMIK Regulation No. 2006/12 “On the Establishment of the Human Rights Advisory Panel” to examine alleged violations of human rights by the United Nations Interim Administration in Kosovo (UNMIK). Its establishment constitutes an unprecedented development in the context of United Nations missions. In this respect, the Panel is a pioneer and unique mechanism concerning the imputability and the responsibility, with regard to human rights, for actions by international organisations.

2. This Final Report of the HRAP augments the Annual Reports of the Panel that have been published since 2008. The Report offers an account of the Panel’s history and evolution, its practice, caseload and contribution to human rights’ jurisprudence. It reflects also upon the constraints the Panel operated under. Finally, it suggests that there are lessons to be learned from the experience of the Panel that might form the basis of thinking about future mechanisms for securing UN accountability, a process that must continue.

The Context of Kosovo

3. The internal armed conflict during 1998 and 1999, between the Serbian forces on one side and the Kosovo Liberation Army (KLA) and other Kosovo Albanian armed groups on the other, is well documented. Following the failure of international efforts to resolve the conflict, on 23 March 1999, the Secretary-General of the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes against the Federal Republic of Yugoslavia (FRY), which ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo. On 9 June 1999, the International Security Force (KFOR), the FRY and the Republic of Serbia signed a “Military Technical Agreement” by which they agreed on the withdrawal of all FRY authorities from Kosovo, including military, judicial and police, and the introduction of an international security force.

4. On 10 June 1999, the UN Security Council (UNSC) adopted UNSC Resolution 1244 (1999). Acting under Chapter VII of the UN Charter, the UNSC decided upon the deployment of international security and civil presences – KFOR and UNMIK respectively – in the territory of Kosovo. All legislative and executive authority, including control over the judiciary, was vested in the Special Representative of the Secretary-General (SRSG). Thus UNMIK, as a surrogate state, had essentially the same powers as a state.

5. UNSC Resolution 1244 mandated UNMIK to “promote and protect human rights” in Kosovo in accordance with internationally recognized human rights standards. Indeed, the credibility and legitimacy of a UN mission mandated to carry out peace building tasks in a war-torn society is undermined without strict adherence to human rights. Therefore, after being established, UNMIK promulgated UNMIK Regulation No. 1999/1 of 25 July 1999 “On the Authority of the Interim Administration in Kosovo”, which stated that “all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards.” UNMIK also promulgated UNMIK Regulation No. 1999/24 of 12 December 1999 “On the Law Applicable in Kosovo”, which listed the specific internationally recognised human rights instruments to be observed.

6. It soon became apparent that in exercising these powers, UNMIK was faced with tension between the demands of security within Kosovo and the respect for human rights. Against the backdrop of emerging trends in international law concerning accountability for human rights violations, as early as June 1999, the SRSG foreshadowed an external accountability mechanism, the appointment of an Ombudsperson Institution to receive and investigate complaints regarding the

abuse, if any, of authority by the Interim Civil Administration, emerging local institutions and non-state actors claiming or exercising authority. Subsequently, on 30 June 2000, UNMIK promulgated UNMIK Regulation No. 2000/38 “On the Establishment of the Ombudsperson Institution in Kosovo”.

7. The Ombudsperson Institution was created to be independent of UNMIK and, as such, represented the first experiment in UN accountability. It was mandated to “ensure that all persons in Kosovo are able to exercise effectively, as far as circumstances allow, their human rights and fundamental freedoms safeguarded by international human rights standards”. The powers of the Ombudsperson Institution included providing advice and making recommendations to any person or entity concerning the compatibility of domestic laws and regulations with recognized international instruments. It was also empowered to investigate cases concerning violations of human rights and abuse of power by international and local bodies of UNMIK, as well as the authority to inspect detention facilities and visit individuals in detention. However, the Ombudsperson Institution did not have the power to issue binding decisions.

Prehistory of the HRAP

8. By 2004, alleged human rights violations by UNMIK were attracting the attention of UN human rights treaty bodies, regional bodies such as the Organization for Security and Cooperation in Europe (OSCE) and Non-Governmental Organisations (NGOs) such as Amnesty International (AI) and Human Rights Watch (HRW). The major criticism of the situation regarding UNMIK’s lack of adequate human rights accountability came from the Council of Europe (CoE). Already in September 2003, its Parliamentary Assembly (PACE) discussed a motion on the human rights situation in Kosovo. As a part of the process of preparing for the PACE debate on human rights in Kosovo, in May 2004, the PACE Committee requested the European Commission for Democracy through Law (“Venice Commission”) to present an opinion on “the human rights situation in Kosovo”.

9. In the Opinion adopted in October 2004, the Venice Commission provided an overview of the human rights situation in Kosovo at that time. They noted a wide array of human rights problems under UNMIK’s stewardship: a lack of security for non-Albanian communities; a lack of freedom of movement for non-Albanian communities, which affected the possibility of having access to basic public services; insufficient protection of property rights; lack of investigation into abductions, killings and other serious crimes; lack of fairness and excessive length of judicial proceedings; difficult access to courts; detentions without independent review; corruption; human trafficking; lack of legal certainty, judicial review and right to an effective remedy for human rights violations.

10. Against this background, it quickly became clear to the international community that it was not acceptable to leave, in the middle of Europe, a territory without human rights guarantees and protection. To fill this lacuna, three options have been considered: extending the jurisdiction of the European Court of Human Rights (ECtHR) to include the territory of Kosovo; establishing a Court of Human Rights in Kosovo, similar to the Human Rights Chamber established earlier in Bosnia and Herzegovina; creating an advisory committee which would not have the power to issue binding decisions. By mutual agreement between the UNMIK’s Office of the Legal Advisor (OLA) and the UN Headquarters (UN HQ) Office of Legal Affairs in New York, the last (minimal) option was chosen.

11. The mission of the OSCE in Kosovo (OMiK) immediately made some comments, which remain essential to date. It noted that “the establishment of a quasi-judicial institution which cannot issue binding decisions is contrary to the principles of the rule of law which states that no one,

especially a governmental authority (UNMIK), is above the law. This would clearly send the wrong message to the people and institutions of Kosovo.” The OMiK also thought that the UNMIK Regulation establishing the Panel should explicitly state what types of decisions the Panel would be authorized to issue. In this respect, the OMiK deemed that the Panel’s decisions should include the power to award a specific amount in just compensation to victim(s), including restitution.

Early History of the Panel

UNMIK Regulation No. 2006/12

12. The key legislative text for the operation of the Panel is Regulation No. 2006/12 of 23 March 2006 “On the establishment of the Human Rights Advisory Panel”. But some commentators observed that its establishment seven years after the deployment of UNMIK was seven years too late. This meant that from the outset, in addition to the inherent limitations in the model chosen, the Panel faced many challenges in its role as an effective mechanism with respect to UN accountability for the operation of a mission in the field.

13. With regard to its *ratione materiae* competence, the Regulation vests the Panel with jurisdiction to hear a wide range of human rights complaints allegedly attributable to UNMIK under all the international instruments applicable in Kosovo: the Universal Declaration of Human Rights (UDHR), the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto (ECHR), the International Covenant on Civil and Political Rights of 16 December 1966 and the protocols thereto (ICCPR), the International Covenant on Economic Social and Cultural Rights of 16 December 1966 (ICESCR), the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (ICERD), the Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979 (CEDAW), the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment of 17 December 1984 (CAT) and the Convention on the Rights of the Child of 20 December 1989 (CRC).

14. The Panel’s *ratione personae* competence, according to the Regulation, was limited to the examination of complaints brought before it by individuals or groups who claimed that they had been the victim(s) of a violation of human rights. Moreover, it concerned only violations of human rights committed by UNMIK and not by KFOR.

15. As far as the *ratione temporis* competence is concerned, the Regulation set the Panel’s temporal jurisdiction competence over complaints relating “to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights.” As UNMIK’s responsibility with regard to justice and police in Kosovo was on 9 December 2008 transferred to the European Union (EU) which established the European Union Rule of Law Mission in Kosovo (EULEX), the Panel’s competence was limited to facts occurring before that date.

16. Section 3 of the Regulation listed a number of criteria for the admissibility of complaints. These criteria corresponded in essence to those listed in Article 35 of the ECHR.

17. As to the outcome of the proceedings before the Panel, Section 17 of the Regulation provided that the Panel “shall issue findings as to whether there has been a breach of human rights and, where necessary, make recommendations”. It provided also that the SRSG shall have exclusive authority and discretion to decide whether to act on the findings of the Panel. Finally, both the Panel’s findings and recommendations and the SRSG’s decision were to be published promptly,

which means that the proceedings before the Panel, while confidential in themselves, were to be concluded in a fully transparent way.

Rules of Procedure

18. Section 18 of the Regulation provided that the Panel shall adopt rules of procedure for its proceedings. In fact, the Rules were inspired by the Rules of Procedure of the Human Rights Chamber for Bosnia and Herzegovina, a judicial body established under the General Framework Agreement for Peace in Bosnia and Herzegovina. For certain provisions, the Rules of Procedure of the ECtHR also served as a source of inspiration.

19. The Panel intended to give a concrete meaning to the quasi-judicial nature of the mechanism set up by the Regulation, notably by formalizing the procedure, by stressing the fact that it was in control of the conduct of the proceedings, by emphasizing that the Panel's views would be based on legal norms, by providing for an adversary type of proceedings and by clarifying that its decisions (on admissibility) and opinions (on the merits) would be drafted in the way that court judgments are normally drafted.

Administrative Direction No. 2009/1 of 17 October 2009

20. In fact, UNMIK did not seem to realize what an independent complaint mechanism entailed, as shown by the dispute about the Panel's decision to hold a public hearing in the case of *Balaj and Others*. The SRSG's opposition, which led to the cancellation of the hearing, speeded up the process which led to the adoption of Administrative Direction (AD) No. 2009/1 on 17 October 2009, which restricts substantially the action of the HRAP.

21. Two main provisions of the AD had an important impact. First, on the functioning of the Panel, it stated that issues of admissibility shall be examined "at any stage of the proceedings", which implies that new admissibility issues can be raised at any moment, even after a complaint has been declared admissible. Section 2.3 of the AD confirmed this reading where it provided: "If issues of admissibility of a complaint are addressed at any time after the Advisory Panel has made a determination on admissibility of a complaint and commenced its consideration of the merits, the Advisory Panel shall suspend its deliberation on the merits until such time as the admissibility of the complaint is fully re-assessed and determined anew". It meant that this provision could lead to situations where a new objection to the admissibility of a complaint previously declared admissible resulted in a considerable delay in the proceedings. Secondly, Section 5 of the AD provided for a cut-off date for the submission of complaints to the Panel: 31 March 2010. Complaints received after that date would have to be refused.

The Panel's Legal Legacy

22. The Panel's main legacy lies in its contribution towards the progress of human rights jurisprudence.

General Overview

23. The number of cases received by the Panel increased when its existence became better known. Two complaints were received in 2006, 12 in 2007, 69 in 2008, 352 in 2009 and 89 in 2010. Altogether 527 complaints were introduced. As to the identity of the complainants, most of them were Kosovo Serbs, only a few of them Kosovo Albanians. Some complainants belonged to minority groups, principally Roma, Ashkali and Egyptian (RAE). Many of the complaints concerned the death and disappearances of elderly relatives. As a matter of fact, 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. Against this background, the main aspect of the Panel’s legal legacy is its contribution to the human rights jurisprudence.

24. The decision of the Panel to rely upon the ECHR and jurisprudence of the ECtHR firmly planted the HRAP in Europe, in a context that was already well-known and established. Nevertheless, there are a number of cases where the Panel pushed the boundaries of the ECtHR jurisprudence, causing its cases to differ from (or extend) those of the ECtHR. They concerned, notably, the determination of legal standards applicable where the wrongdoings were committed by non-state actors; the applicability of the substantive protections of Article 2 of the ECHR to a UN body in the context of public protest; the extension of the Panel’s *ratione temporis* through the procedural obligations of Article 2 of the ECHR, in particular the continuing nature of the obligation to investigate deaths in suspicious circumstances and disappearances; the applicability of Article 3 of the ECHR to a UN body involving violations with respect to the inhuman and degrading treatment of relatives of missing and/or murdered persons; the procedural aspect of Article 5 of the ECHR.

25. But the Panel was unique in that it was not only wedded to the ECtHR. The inclusion of a broad range of international human rights treaties in the Panel’s constitutive instruments allowed it a flexibility to be innovative – a unique opportunity to develop jurisprudence as a quasi-judicial body drawing on various sources. Thus, the Panel made use of the case-law and general comments of other bodies like UN human rights treaties committees or of the institutions of the Inter-American human rights system. This diversity of sources permitted the Panel to fit, where possible, the most relevant human rights jurisprudence to the context in Kosovo, including even looking at special rapporteurs’ reports, for instance concerning the right to truth. This proved especially useful in the context of the Panel’s cases concerning violence against women, where the Panel made use of the CEDAW and its jurisprudence.

Property Claims

26. 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, from the beginning of 2008, a significant proportion of the complaints handled by the Panel were of a property nature. Given that in most cases the substantive property violations occurred prior to the commencement of the Panel’s jurisdiction (i.e. 23 April 2005), it was unable to consider the actual damage or harm caused by those original violations. However, in most cases the suspension of judicial proceedings at the behest of the UNMIK Department of Justice (DOJ) resulted in a delay of at least four years in even commencement of proceedings and a substantial portion of that delay fell within the Panel’s temporal jurisdiction. Accordingly, the Panel has taken the view that these cases should be considered under Article 6 of the ECHR, namely issues of access to justice and delay in the judicial process.

27. 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 human rights. The Panel deemed that under no circumstances could these elements be an excuse for diminishing standards of respect for human rights, which had been duly incorporated into UNMIK’s mandate.

28. For all of the “14,000 cases” declared admissible, the Panel recommended that UNMIK endeavour, with all the diplomatic means available to it *vis-à-vis* the Kosovo authorities, to obtain assurances that the cases filed by the complainants would be duly processed. The Panel also

recommended that UNMIK award adequate compensation to each of the complainants for non-pecuniary damage suffered as a result of the prolonged stay of the proceedings instituted by them.

Missing and Murdered Persons (MMPs) cases

29. The majority of the complaints submitted in 2009 concerned the alleged lack of investigation by UNMIK police and judicial authorities into the events leading to abductions, disappearances and/or killings of complainants' close relatives in Kosovo.

Article 2 of the ECHR

30. As for the legal qualification of the complaints, the Panel relied on the procedural obligation under Article 2 of the ECHR. This concept of the procedural obligation largely emerged from situations of loss of life in life-threatening situations, where no firm evidence could be found on the basis of the investigative material to establish a substantive violation. It became a very effective tool to ensure that the authorities would not be able to avoid responsibility under Article 2 through conduct of poor investigation. The Panel also noted that the ECtHR has found a continuing violation of Article 2 of the ECHR when there has been a failure of the authorities to conduct an effective investigation, the effects of which continue over time allowing consideration of cases when the initial disappearance or killing occurred before the Panel's jurisdiction. Delaying crucial steps of the investigation or not taking necessary investigative steps may subsequently constitute a breach of Article 2 of the ECHR. Finally, the Panel deemed that the procedural obligation is not confined to cases where it has been established that the killing was caused by an "agent of the State" but applies also to non-state actors and it extends Article 2 to cover cases of disappearances.

31. As regards the applicability of Article 2 to UNMIK in the Kosovo context, while understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel notes that this process was completed in 2003 when the police and justice system in Kosovo were described as being "well-functioning" and "sustainable" by the UN Secretary-General. Therefore, it deems that, even if UNMIK's interim character and related difficulties must be duly taken into account, under no circumstances could these elements be taken as a justification for diminishing standards of respect for human rights, which were duly incorporated into UNMIK's mandate.

32. Concerning the situations of conflict or generalised violence, the Panel recalled that the ECtHR and HRC established that the procedural obligation to guard life and, subsequently, investigate any loss of life continues to apply in post-conflict situations, including in difficult security conditions. It is likewise understood that investigators may face obstacles and concrete constraints may compel the use of less effective measures of investigation or cause an investigation to be delayed. Nonetheless, the right to life, including its procedural guarantees, is an absolute right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.

33. As identified by the Panel, the most important issues affecting the investigative process and leading to finding a violation of the procedural obligation under Article 2 ECHR could be grouped into three main categories. Some are related to the investigation process itself, as for instance important delays in initial actions or lack of protection of witnesses from threats or intimidation. Others are structural issues, as for instance flaws in the coordination and cooperation between UNMIK and the ICTY, or absence of proper prosecutorial review. Finally, others are policy issues, as for instance inaction of the authorities because such investigations were not considered a priority.

Article 3 of the ECHR

34. In many cases, complainants also allege that the lack of an adequate criminal investigation into the incidents leading to the loss of their relatives and the lack of information from UNMIK authorities in relation to the investigations caused them mental pain and suffering, in violation of the substantive part of Article 3 of the ECHR.

35. The Panel looked into the periods of complete (or almost complete) inaction of the authorities, especially in the situations when the minimum necessary information to pursue investigation from the outset was available. The first opinion where Article 3 issues were considered alongside Article 2 was adopted by the Panel on 23 April 2013, in the *Jocić* case.

36. When proximity of family ties between the victim(s) and the complainants was established, the Panel thoroughly considered whether the complainants were kept regularly apprised of the process of investigation, or at all contacted by UNMIK authorities. For example, in many cases the complainants were left without any information and some of them had even undertaken their own investigations. Likewise, the Panel verified if the complainant was interviewed by the police, as an injured party or a witness. It appeared that in some cases they were contacted by phone but in most cases their statements were never officially recorded.

Discrimination Against Members of Minority Communities

37. Inter-ethnic tensions and discrimination have remained pervasive in Kosovo in the aftermath of the conflict. Nonetheless, the Panel received only a limited number of complaints directly about discrimination, mostly from members of Kosovo non-majority communities in the context of the privatization of socially-owned enterprises (SOEs). However, the Panel was always alert to underlying direct and indirect discrimination.

38. It emerged from the *Ristić* case that UNMIK had established an apparently neutral legal framework to regulate the distribution of privatization proceeds but which, inevitably, created inequalities among employees on the ground of ethnicity, due to the post-conflict environment. The Panel noted that certain rules, as well as their practical interpretation and implementation by the KTA and the Special Chamber, failed to take into account the specific needs and vulnerable situation of those employees.

39. Another key case on discrimination was *N.M. and Others*, the findings in which are examined below. This case brought the issue of the historical marginalisation of the Roma in Europe to the attention of the Panel, along with the issue of multiple and intersectional discrimination suffered by the complainants as internally displaced persons (IDPs), as members of the RAE community in Kosovo and, for the female complainants, as women, placed in lead contaminated camps in Northern Mitrovicë/Mitrovica.

40. The Panel found that UNMIK's failure to the situation of the complainants was tainted by racial prejudice when, for instance, the health crises in the camps was blamed on the "unhealthy" life-style of the RAE IDPs and the argument that UNMIK could not move them to an alternative safe location that was "acceptable" to all stakeholders. The Panel pointed out that UNMIK had, in addition to the obligation not to discriminate, the obligation to avoid the perpetuation of discriminatory practices against the RAE community by local authorities in Kosovo.

41. The Panel also highlighted UNMIK's failure to apply a gender-sensitive perspective to the situation, by omitting to consider how the lead contamination was differently and disproportionately affecting the health and well-being of the RAE women in the camps. Therefore, the Panel found that failing to take the required remedial actions – for example by not providing access to regular

screening and adequate health care for pregnant women – resulted in additional direct and indirect discrimination, in violation of Article 12 of the CEDAW and of the CEDAW Committee General Recommendation No. 24.

Access to Justice

42. Another significant category of complaints submitted to the Panel involved issues related to access to justice, as defined under Article 6 of the ECHR. By way of background, after the conflict in Kosovo in June 1999 approximately 225,000 ethnic Serbians, Roma, Gorani and other ethnicities fled for security reasons to other parts of former Yugoslavia. Immediately afterwards, a large number of residential, agricultural and commercial property was illegally occupied or destroyed. In order to create a legal mechanism to return these properties and not create unnecessary backlogs in the local courts, UNMIK established quasi-judicial bodies that specialized in property cases, respectively the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC).

43. In the *Vučković* case, the complainant argued that the HPCC, as a mass claims body for the settlement of disputes concerning residential property rights, violated his right to a fair trial on a number of grounds. The Panel was thus faced with the question of the applicability of Article 6 § 1 of the ECHR since this provision in principle only applies to proceedings before a tribunal which determines civil rights and obligations. In this context, the Panel noted although that the HPCC was not a classic court, it was a mass claims processing body which issued binding and enforceable decisions. On this basis, the Panel concluded that the HPCC was therefore judicial in function such that Article 6 of the ECHR applied to proceedings before it.

44. In the *Mitrović* case, where the HRAP was called upon to determine whether the HPCC was an impartial tribunal, it applied an objective test to determine whether there were ascertainable facts which could raise doubts as to its impartiality, whether there was a legitimate reason to fear that it lacked impartiality and whether the fear could be held to be objectively justified. The Panel looked to the relevant ECtHR jurisprudence, which has held that the participation in appellate proceedings of judges who have dealt with the case in the first instance proceedings may constitute a breach of Article 6 § 1 of the ECHR.

45. Other cases submitted to the Panel concerned the right to the enforcement of final domestic decisions, under Article 6 of the ECHR. In the *Kušić* case, the Panel had to determine whether the unimplemented execution of a HPCC decision more than nine years on had violated the right to the execution of a decision within a reasonable time. It concluded that the delay in the execution of the decision of the HPCC was unreasonably long and that a violation of Article 6 of the ECHR had taken place.

Economic and Social Rights

46. The Panel examined two cases of alleged violation of the right to social security to be protected from social risks and contingencies such as old age and unemployment even in time of resource constraints or restructuring of the economy. In the *Krasniqi* case, the Panel assessed the efforts made by UNMIK to resolve the situation of those pensioners who had contributed to and accrued pension rights within the pension scheme of the former Yugoslavia and had their pension discontinued by the Belgrade authorities as a consequence of the conflict. In line with the concerns expressed by the UN Committee on Economic, Social and Cultural Rights, and in consideration of the special needs and vulnerability of older persons, the Panel considered that the monthly pension

of 45 euros provided to the complainant during the Panel's jurisdiction, was not sufficient to guarantee his access to basic essential services and goods.

47. In the *Employees of the Kišnica and Novo Brdo Mines of Trepča Complex* case, the Panel re-affirmed the principle that state authorities have the obligation under the ICESCR to regulate by law and oversee the provision of social security benefits. In both of these cases, the Panel concluded that, as the complainants were left without adequate means to support themselves and their families, their right to an adequate standard of living was consequently also violated.

48. In the *B.K.* case, concerning the forced repatriation of the complainant to Kosovo in 2008, the Panel assessed the complaint under the ECHR as well as the ICESCR standards. It found that the failure by UNMIK to implement a readmission policy had placed the complainant in a situation of extreme poverty and want incompatible with human dignity, which amounted to a violation of UNMIK's minimum core obligations under Articles 9 and 11 of the ICESCR, as well as to a violation of Article 3 of the ECHR prohibiting inhuman and degrading treatment.

Violence Against Women

49. In the *Kostić* case, the Panel found that UNMIK did not exercise due diligence in the investigation of violence against women and indicated that its failure to conduct gender-sensitive investigations might have contributed to the general lack of documentation of conflict-related sexual violence in Kosovo and hampered access to justice and reparations by victims. The Panel referred to the jurisprudence of the UN Human Rights Committee (HRC) that a positive obligation exists under Article 9 of the ICCPR *vis-à-vis* arbitrary detention of women during armed conflict, which makes them particularly exposed to sexual violence. It referred also to international instruments, such as the CEDAW and the UN General Assembly (UN GA) Declaration on Elimination of Violence Against Women, qualifying arbitrary detention of women as a form of violence against women, that states have the obligation to prevent, investigate and punish whether committed by their agents or private persons.

50. In the *S.M.* case, the Panel, in line with the jurisprudence of the ECtHR, the UN CAT and the CEDAW Committee found that the rape and killing by the KLA in June 1999 of a young woman affected by disability in the presence of her mother, amounted to an act of torture as well as of sexual and gender-based violence and that UNMIK had violated its international obligations to diligently investigate and prosecute it.

51. Beside conflict-related violence, in the case of *N.M. and Others*, the Panel identified that conditions for self-abortion by female IDPs placed in lead contamination camps to avoid delivery of babies affected by abnormalities also constituted a form of gender-based violence.

Lead Contamination in the IDP Camps

52. The *N.M. and Others* case, concerning the placement of RAE IDPs in lead contaminated camps, raised very sensitive questions with regard to various human rights instruments. The Panel was concerned that UNMIK's inadequate response to this situation might have been driven by discriminatory stereotypes more than scientific evidence, as the latter would have shown that proximity to the Trepča/Trepča smelter and its tailing dams was the main source of lead contamination. Taking note of the findings, the Panel also considered it shameful that such a record was attributable to the action and/or inaction of an entity of the United Nations – UNMIK – at the core of whose mandate was the protection of displaced persons from the conflict.

53. Concerning the right to life, the Panel considered that the record showed that the heavy exposure to contamination, coupled with poor living conditions in the camps, a situation which

lasted for more than ten years, had been such as to pose a real and immediate threat to the complainants' life and physical integrity. In the regulatory and institutional vacuum within Kosovo in the aftermath of the conflict, the findings and recommendations of World Health Organisation (WHO) experts, as well as other specialised bodies, should have guided UNMIK's actions in response to the health crisis in the camps. In particular, the Panel observed that the most important preventive measures as spelled out by WHO were not implemented, or were implemented for only a very limited period of time.

54. The Panel also recalled that the ECtHR had established that positive obligations under Article 2 in the context of dangerous activities and environmental matters include the obligation on the competent authorities to provide access to essential information enabling individuals to assess risks to their health and lives. In this respect, the Panel deemed that UNMIK did not provide adequate information to the complainants on the risks to their health and lives deriving from their permanent presence in the camps.

55. Regarding the prohibition of torture and inhuman or degrading treatment, the Panel did not underestimate the burden that UNMIK had to face immediately following its arrival in Kosovo after the conflict and appreciated its efforts at reconstruction. However, the Panel did not exclude UNMIK's responsibility towards the complainants, especially when considering that the situation complained of had lasted for more than ten years.

56. Moreover, the Panel could not accept the SRSG's argument that the Roma have historically lived in substandard living conditions, even prior to the conflict. This comment could be discriminatory and debasing, since it suggests that the social and economic marginalisation of Roma is based on race and on their own actions and, as such, may be perpetuated without responsibility.

57. Regarding the right to health and an adequate standard of living, the Panel found that UNMIK failed to provide systematic monitoring of the lead contamination in the camps, through regular blood testing and also noted that the appropriate therapy was implemented only for a few months, with the result that most IDPs had been left without health treatment.

58. Concerning discrimination against female complainants, the Panel considered that there was little room for doubt that *de facto* the female complainants were additionally and disproportionately affected by the extremely unhealthy situation in the camps. The Panel observed that since its early days UNMIK had been aware of the high health risks posed by lead poisoning to pregnant women and children.

59. The Panel noted that, in these circumstances, UNMIK had the obligation under the CEDAW to adopt positive measures to adequately respond to their situation of particular disadvantage. These included, among others: the obligation to ensure that the pregnant women could carry out their pregnancy in a safe environment, providing easy access to regular screening and adequate health care, access to appropriate hygiene and nutrition, collection of data on still-births and miscarriages for the purpose of monitoring, and provision of psychological and support services to those women who had incurred miscarriage, abortion or still-birth.

60. Regarding children's rights, the Panel considered that the lives and health of children, as protected by the CRC, should have been the overriding consideration guiding UNMIK's response to the situation. However, the Panel noted that UNMIK did not explain or provide any documentation in this respect to show how the best interest of the children in the camps was considered, assessed and determined when deciding and enacting measures in response to the situation.

61. Consequently, the Panel found that, through its actions and omissions, UNMIK was responsible for compromising irreversibly the life, health and development potential of the complainants who were born and grew as children in the camps.

The Balaj and Others Case

62. The Panel had to evaluate whether UNMIK had violated both the substantive limb and the procedural limb of Article 2 of the ECHR concerning the right to life. In the *Balaj and Others* case, the complainants complained that UNMIK Police used excessive force during a crowd control operation in Kosovo on 17 February 2007, resulting in the deaths of two victims and the serious bodily injury of others. This case had a complicated procedural history as a direct result of the AD.

63. At the merits stage, the Panel found that the force used to disperse the demonstrators was not “absolutely necessary” within the meaning of Article 2(2) of the ECHR. In addition the Panel found that, although the investigation into the circumstances leading to those tragic consequences was prompt, it did not display sufficient guarantees of independence and impartiality and did not satisfy the requirement of thoroughness. Finally, it found that the forceful intervention of the police officers was disproportionate and not necessary in a democratic society for the prevention of disorder in violation of Article 11(2) of the ECHR.

Critical Evaluation of the HRAP Experience

Panel’s Recommendations

64. By far, the biggest limitation of the entire HRAP experience was the fact that UNMIK did not follow any of the Panel’s recommendations. Despite the lengthy process of the Panel collecting information from the complainants and UNMIK, issuing admissibility decisions, opinions and recommendations, essentially nothing tangible came from this activity, as UNMIK failed to ever take any meaningful action in relation to the Panel’s recommendations.

65. In the MMP cases, which represented both the biggest group of claims the Panel received as well as some of the most serious human rights violations, in relation to the Panel’s recommendations that UNMIK make a public apology, including through media, to the complainants and their families, the SRSG only sent a form letter in which he stated: “I deeply regret that there was a lack of an effective investigation into the abduction and death of your [loved one] which has caused you additional distress and mental suffering.” The Panel found that expressing only “regrets” could not constitute a meaningful apology.

66. Concerning the Panel’s recommendation to award adequate compensation for moral damage suffered by the complainants, the SRSG underlined that current UN GA instructions on compensations, under Resolution 52/247 (1998), do not permit the United Nations Organization and its missions to pay compensation other than for material damage or physical harm.

67. In May 2015, the SRSG alerted the UNSC of the situation, advocating the establishment of a suitable mechanism to compensate for moral damages, as well as for further investigation by appropriate judicial authorities of inconclusive cases. The SRSG repeated this same point nearly a year later but, despite asking for information about this issue, the Panel has never been made aware of any result.

68. Due to UNMIK’s failure to follow any of the Panel’s recommendations, the HRAP process has obtained no redress for the complainants. As such, they have been victimized twice by UNMIK: by the original human rights violations committed against them and again by receiving no compensation through this process. For many years, the Panel has carried out detailed analysis of the

complaints brought before it and exhorted UNMIK and the UN to undertake some beneficial activity on behalf of the complainants before the HRAP's mandate concluded; shamefully, this did not occur.

Other Constraints

69. The Panel is aware that its experience was also weakened by a number of factors, most of which have been mentioned previously, relating to the way the Panel was set up and by the limitations imposed by UNMIK upon its jurisdiction and operation from the outset. The Panel was further restricted in dealing with the merits of the complaints by the AD.

70. Furthermore, the Panel's relationship with UNMIK was also a factor affecting its efficiency. In general, but more especially in the MMP cases, there were problems related to the Panel's access to the investigation files. Indeed, these files proved difficult to obtain, thereby contributing to delay in the Panel's work.

71. Additionally, the Panel was only established upon the insistence of outside bodies, primarily the CoE, the OSCE and the international Ombudsperson Institution in Kosovo. The early history of the HRAP makes clear that it was unwanted by many inside the UN and was initiated under international pressure. The fact that the Panel did not in fact become operable until almost two years after Regulation No. 2006/12 was adopted was a source of serious difficulties.

Conclusions

72. The importance of the HRAP was the very fact of its existence and its mandate to evaluate UNMIK's actions against international human rights instruments. When establishing such a quasi-judicial body, it seemed clear to the international human rights community that the UN's legitimacy and credibility is undermined where there is no such legal accountability. Further, the human rights system as a whole is weakened when states can observe the UN – one of the main guardians of the world's human rights system – itself failing to live up to the obligations it has promoted. So, the Panel was created mainly to be a contributing component to UN accountability – the first of its kind; secondarily, it was also hoped that the Panel would be able to provide some gains in ensuring the protection of human rights in Kosovo.

73. With respect to the impact of the Panel on the protection of human rights within the territorial area subject to a UN mission, the main issue relevant to any future such mechanism is the weight that should be given to the Panel's opinions. In particular the non-payment of compensation for non-material damage remains a constant problem. This is said to be a structural problem of the UN and thus outside UNMIK's control but this should have been considered at the time of the setting up of the Panel. If the UN does not intend to follow the Panel's recommendations, it undermines the entire process.

74. Today, there are still at least more than 400 families of persons who went missing or were murdered in Kosovo under "UNMIK Supreme" time. However, after HRAP's closure, there is no mechanism which can address their grievances. The ECtHR will not decide on any case against UN and KFOR/NATO, because of their status; the same stands for the UN "special procedures". The EULEX Human Rights Review Panel, because of limitations of its mandate, is only in position to decide over violations committed by the EULEX structures and it is even more limited in its recommendations. The soon-to-be-established Specialist Chambers and Specialist Prosecutor's Office are being created only for investigation of, and prosecution for, the war crimes and crimes against humanity, which were committed between 1 January 1998 and 31 December 2000. The current Ombudsperson Institution in Kosovo has no jurisdiction over international presence in the area. This vacuum is highly problematic.

75.If we consider any future UN accountability mechanism and the optimum form such a mechanism should take, it has to be designed in a holistic way and crafted to the factual situation of the people on the ground and the political context of the mission. In particular, three main elements should be taken into account: (i) how it could operate effectively from the outset to take account of the human rights concerns of a vulnerable population in a post-conflict situation; (ii) how to ensure appropriate recommendations from the Panel with respect to complainants; and (iii) how to ensure an appropriate response from the UN mission in question.

76.The Panel identified some of the most important factors to be considered in any future institution set up for the same or similar purpose. Among them: a human rights Panel, not an “advisory” Panel; set up by UN HQ, not by the mission (UN body, not UNMIK body); applicable to the whole international presence; established immediately after the mandating of the mission and included in its mandate; with procedures based on principles of fair, transparent adversarial processes; effective mechanisms for reparations, including payment of compensation, including for non-pecuniary damage.

77.Lastly, appropriate legal and policy planning would address ways to ensure independence from the UN mission but also its co-operation. It is also necessary to adopt measures to ensure public awareness right from the outset while also making sure that reality and expectation are compatible. At the end of the day, the UN must ensure not just compliance with recommendations in individual cases. It is hoped, more generally, the UN will adopt changes in practice and operations of its relevant missions to respect its promise to “promote and protect human rights”.

Abbreviations and Acronyms

AD – Administrative Direction No. 2009/1 of 17 October 2009
ADL – Kosovo Anti-Discrimination Law
AI – Amnesty International
CAT – Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment
CCIU – Central Criminal Investigation Unit
CCPR – International Covenant on Civil and Political Rights
CEDAW – Convention on the Elimination of All Forms of Discrimination against Women
CESCR – International Covenant on Economic, Social and Cultural Rights
CoE – Council of Europe
Convention on Immunities – Convention on Privileges and Immunities of the United Nations
CRC – Convention on the Rights of the Child
DOJ – Department of Justice
DPI – UNMIK Department of Public Information
DRC – Danish Refugee Council
DSRSG – UNMIK’s Deputy SRSG
ECHR – European Convention on Human Rights
ECtHR – European Court of Human Rights
EU – European Union
EULEX – European Union Rule of Law Mission in Kosovo
FRY – Federal Republic of Yugoslavia
HPCC – Housing and Property Claims Commission
HPD – Housing and Property Directorate
HRAP – Human Rights Advisory Panel
HRC – United Nation Human Rights Committee
HRW – Human Rights Watch
IACtHR – Inter-American Court of Human Rights
ICCPR – International Covenant on Civil and Political Rights
ICERD – International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR – International Covenant on Economic Social and Cultural Rights
ICMP – International Commission of Missing Persons
ICRC – International Committee of the Red Cross
ICTY – United Nations International Criminal Tribunal for the former Yugoslavia
IDP – Internally Displaced Person
ILC – International Law Commission
KFOR – International Security Force (commonly known as Kosovo Force)
KLA – Kosovo Liberation Army
KPA – Kosovo Property Agency
KTA – Kosovo Trust Agency
MMP – Missing and Murdered Person
MoU – Memorandum of Understanding
MPU – Missing Persons Unit
NGO – Non-governmental Organisation
OHCHR – Office of the UN High Commissioner for Human Rights
OLA – Office of Legal Affairs
OMiK – OSCE Mission in Kosovo
OMPF – Office on Missing Persons and Forensics
OSCE – Organization for Security and Cooperation in Europe
OSRSG – Office of the Special Representative of the Secretary-General
PACE – Parliamentary Assembly of the Council of Europe
PAK – Privatization Agency of Kosovo
P-DSRSG – UNMIK’s Principal Deputy SRSG
PISG – Provisional Institutions of Self-Government

RAE – Roma, Ashkali and Egyptian
SOE – Socially Owned Enterprise
SRSG – Special Representative of the Secretary-General
UDHR – Universal Declaration of Human Rights
UN – United Nations
UNCTAD – United Nations Conference on Trade and Development
UNDP – United Nations Development Programme
UN HQ – United Nations Headquarters
UN GA – United Nations General Assembly
UNMIK – United Nations Interim Administration Mission in Kosovo
UNSC – United Nations Security Council
UNV – United Nations Volunteers
WCIU – War Crimes Investigation Unit
WHO – World Health Organisation

I. Introduction

1. The Kosovo Human Rights Advisory Panel (HRAP) was created by United Nations Interim Administration in Kosovo (UNMIK) Regulation No. 2006/12, “On the Establishment of the Human Rights Advisory Panel”, to examine alleged violations of human rights by UNMIK. UN Security Council Resolution 1244 of 10 June 1999 (UNSC Resolution 1244)¹ envisaged that the international civil presence that the Secretary-General was authorized to establish would have far-reaching powers in Kosovo. These were formalized in the first Regulation that UNMIK promulgated, which set out that “[a]ll legislative and executive authority with respect to Kosovo, including the administration of the judiciary, is vested in UNMIK and is exercised by the Special Representative of the Secretary-General.”² Essentially UNMIK, a UN mission in Kosovo, had the powers of a state pending “the development of provisional democratic self-governing institutions” in Kosovo. UNSC Resolution 1244 also determined that the responsibilities of the international civil presence that the Secretary-General was authorized to establish would include “Protecting and promoting human rights.” This responsibility assumes that the mission would observe international human rights standards in its own operations and activities, as well as ensuring that others comply.
2. The deployment of UNMIK in June 1999 brought to the fore trends in international affairs that have led in sometimes opposing directions. Thus there has been an international commitment to the rule of law and human rights as key components of post-conflict reconstruction, given effect to in a number of instances by the mandating of an international presence. As the tasks demanded of international organisations, for instance as peacekeepers, as peace builders in a civilian administrative mission, as those responsible for refugees, have multiplied, so too has the opportunity and need for direct contact with the inhabitants of the territory to which they have been deployed. In UNMIK’s case, these tasks were varied and vast: UNMIK’s administration touched on all aspects of life – both political and institutional –; from the smallest municipality to the decisions as to what relations Kosovo would have with its neighbours, all decisions on the territory of Kosovo were taken by UNMIK.
3. UNMIK’s complete control of Kosovo also had the consequence of increasing the potential for the commission of violations of human rights, such as arbitrary detentions, interference with freedom of expression, interference with the judiciary. Such violations may be seen by the international organization as justified by the need to suppress hostile or divisive elements and to neutralize security threats in a turbulent post-conflict setting but the credibility and legitimacy of a UN mission mandated to carry out peace building tasks in a war-torn society is undermined without strict adherence to human rights.

¹ UNSC Resolution 1244 on the situation relating to Kosovo, S/RES/1244 (1999), 10 June 1999.

² UNMIK Regulation No. 1999/1 “On the Authority of the Interim Administration in Kosovo”, 25 July 1999.

4. The situation was aggravated by the long-standing immunity from jurisdiction in the place of deployment that has been accorded to UN personnel since the adoption of the 1946 Convention on the Privileges and Immunities of the United Nations (Convention on Immunities).³ In Kosovo this has been supplemented by Regulation No. 2000/47 “On the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo”, promulgated in August 2000 by UNMIK and providing that, *inter alia* “UNMIK personnel shall be immune from any form of arrest or detention”, except when waived by the Secretary-General in extraordinary circumstances. Thus, there was no way of holding those in UNMIK responsible for human rights violations committed in Kosovo. This too was against the trend of a larger number of states retreating from absolute state immunity and accepting restrictive immunity. It seems somewhat perverse that sovereign states are prepared to accept accountability more readily than the international institutions they mandate to perform functions on their behalf.
5. However, concern about the lack of accountability for the commission of human rights violations committed by international organisations was not limited to Kosovo. Abuses committed by UN personnel had become a matter of concern after revelations of sexual abuse and exploitation and involvement in organized crime and trafficking in missions in Africa, the Balkans and elsewhere. And these too were occurring as the need to ensure legal accountability for the commission of international wrongful acts by different actors, including the personnel of international organisations, was becoming the focus of considerable attention and innovative practice. For instance, during the last decade of the 20th century, the international financial institutions had led the way with the institution of the World Bank Inspection Panel in 1993, followed by other regional development banks. The creation of the *ad hoc* international criminal tribunals for the former Yugoslavia and Rwanda, and the hybrid court for Sierra Leone provided some – albeit limited – practical application at the international level of the concept of individual criminal responsibility for the commission of international crimes. These territorially and temporally limited tribunals were followed by the adoption of the Rome Statute in 1998 and the establishment of the permanent International Criminal Court in 2002. The responsibility of international organisations was taken up in the early years of the 21st century. In 2001 the UN General Assembly (UN GA) adopted the International Law Commission’s (ILC) Articles on the Responsibility of States for Internationally Wrongful Acts, which were stated to be “without prejudice to any question of the responsibility under international law of an international organization.”⁴ The ILC considered, in light of the existing number of international organisations and their ever-increasing functions, these issues to be of particular importance. In 2002 the ILC embarked upon its work on Draft Articles on the Responsibility of International Organizations, which were adopted in 2011.⁵ Prospects for securing the accountability of international organisations were also

³ *Convention on the Privileges and Immunities of the United Nations*, adopted by the UN GA on 13 February 1946.

⁴ Annex to UN GA Resolution 56/83 of 12 December 2001, Article 57.

⁵ *Draft Articles on the Responsibility of International Organizations*, adopted by the ILC on 3 June 2011, A/66/10 (2011).

explored in depth by an international committee of the International Law Association. In 2005, the UN GA adopted “A Comprehensive Strategy to Eliminate Future Sexual Exploitation and Abuse in United Nations Peacekeeping Operations”⁶ that addressed both organizational and individual accountability.

6. Against this backdrop of emerging trends in international law and institutions, as early as June 1999, the Secretary-General foreshadowed an external accountability mechanism, the establishment of an ombudsperson institution to receive and investigate complaints “regarding the abuse, if any, of authority by the Interim Civil Administration and any emerging local institutions and any non-state actors claiming an exercising authority.”⁷ Subsequently, on 30 June 2000, UNMIK promulgated UNMIK Regulation No. 2000/38 “On the Establishment of the Ombudsperson Institution in Kosovo”. However, the Ombudsperson did not have the power to issue binding decisions; his recommendations could be ignored by the SRSG. In the words of the first (and only) international ombudsperson in Kosovo: “The Ombudsperson may, if he considers that a human rights violation has taken place, report this directly to the SRSG, thereby submitting his findings directly to the final supervisor of that same international or local organ which was responsible for the violation in the first place. It is very questionable whether such a system can lead to an effective human rights protection, in particular in cases of violations in areas under the direct responsibility of the SRSG.”⁸
7. By 2004, alleged human rights violations by UNMIK were attracting the attention of the Council of Europe (CoE), UN human rights treaty bodies, regional bodies such as the Organization for Security and Cooperation in Europe (OSCE) and Non-Governmental Organisations (NGOs) such as Amnesty International (AI) and Human Rights Watch (HRW). It was becoming impossible for UNMIK to ignore the demands for accountability, made after two decades of legal developments in the allocation of responsibility for international wrongs beyond those committed by states to encompass international organisations and individuals. In 2006, the HRAP was eventually created with the competence to “examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights”⁹ set forth in the Universal Declaration of Human Rights, the European Convention on Human Rights and its Protocols, and the major United Nations human rights conventions. But its establishment seven years after the deployment of UNMIK was seven years too late and meant that from the outset the Panel faced many challenges to its role as a pioneer mechanism with respect to UN accountability for the operation of a mission in the field.

⁶ UN GA Resolution 59/710, 25 March 2005.

⁷ UNMIK Regulation No. 2006/12 “On the Establishment of the Human Rights Advisory Panel”, 23 March 2006, Section 1.2.

⁸ Marek A. Nowicki, “The Human Rights Situation in Kosovo”, Address at a Meeting of the Committee on Legal Affairs and Human Rights of the Parliamentary Assembly of the Council of Europe held in Paris on 16 March 2004.

⁹ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 July 1999, S/1999/779, § 89.

8. This Report examines the work of the HRAP as it draws to a close from the perspective of its current and former members and secretariat. It augments the Annual Reports of the Panel that have been published since 2008. The Report offers an account of the Panel's establishment and evolution, its practice, caseload and contribution to jurisprudence. It reflects upon the constraints the Panel operated under and the Panel's shifting relationship with UNMIK (and more broadly the UN). Finally, it suggests that there are lessons to be learned from the experience of the Panel that might form the basis of thinking about future mechanisms for securing UN accountability, a process that must continue. Although this Report's authors, as Panel Members and its Secretariat, had a particular "insider" viewpoint, it is left to others to carry out a different type of evaluation, for example the cost effectiveness of the HRAP and the political implications of such a body.

II. Context of Kosovo

A. UNMIK Supreme

9. The internal armed conflict during 1998 and 1999 between the Serbian forces on one side and the Kosovo Liberation Army (KLA) and other Kosovo Albanian armed groups on the other is well documented. Following the failure of international efforts to resolve the conflict, on 23 March 1999, the Secretary-General of the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes against the Federal Republic of Yugoslavia (FRY). The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo. On 9 June 1999, the International Security Force (KFOR), the FRY and the Republic of Serbia signed a "Military Technical Agreement" by which they agreed on the withdrawal of all FRY authorities from Kosovo, including military, judicial, and police, and the introduction of an international security force following an appropriate UNSC Resolution. In effect, the whole Serbian and Yugoslav governmental system was withdrawn from Kosovo to Serbia proper, which left a vacuum for the UN interim administration to fill. Additionally, for the time being, it left only the KLA and their related armed groups in operational control of many areas within Kosovo, although the Serbian state exercised some control over Northern Kosovo and Serbian enclaves in Kosovo for many years.
10. On 10 June 1999, the UNSC adopted UNSC Resolution 1244 (1999). Acting under Chapter VII of the UN Charter, the UNSC decided upon the deployment of international security and civil presences – KFOR and UNMIK respectively – in the territory of Kosovo. Pursuant to UNSC Resolution 1244 (1999), the UN was vested with full legislative and executive powers for the interim administration of Kosovo, including the administration of justice. KFOR was tasked with establishing "a secure environment in which refugees and displaced persons can return home in safety" and temporarily ensuring "public safety and order" until the international civil presence could take over responsibility for this task. At the outset, UNMIK comprised four main components led, respectively, by the United Nations (civil administration), the

United Nations High Commissioner for Refugees (humanitarian assistance, which was later phased out), the OSCE (institution building) and the EU (reconstruction and economic development).¹⁰ Each component was placed under the authority of the Special Representative of the Secretary-General (SRSG). UNSC Resolution 1244 mandated UNMIK to “promote and protect human rights” in Kosovo in accordance with internationally recognised human rights standards.

11. All legislative and executive authority, including control over the judiciary, was vested in the SRSG.¹¹ Thus, UNMIK had essentially the same powers as a state. 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.

12. Nevertheless, soon after being established, UNMIK promulgated UNMIK Regulation No. 1999/1 of 25 July 1999 “On the Authority of the Interim Administration in Kosovo”, which stated that “all persons undertaking public duties or holding public office in Kosovo shall observe internationally recognised human rights standards ...”.¹² Soon after, UNMIK promulgated UNMIK Regulation No. 1999/24 of 12 December 1999 “On the Law Applicable in Kosovo”, which listed the specific internationally recognised human rights standards which all persons undertaking public duties or holding public office in Kosovo needed to observe, including:

- the Universal Declaration of Human Rights of 10 December 1948 (UDHR)
- the European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto (ECHR)
- the International Covenant on Civil and Political Rights of 16 December 1966 and the protocols thereto (ICCPR)
- the International Covenant on Economic Social and Cultural Rights of 16 December 1966 (ICESCR)
- the International Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965 (ICERD)
- the Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979 (CEDAW)
- the Convention Against Torture and Other Cruel and Inhuman or Degrading Treatment or Punishment of 17 December 1984 (CAT)
- the Convention on the Rights of the Child of 20 December 1989 (CRC).

¹⁰ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 16 September 1999, S/1999/987.

¹¹ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 July 1999, S/1999/779, § 35.

¹² UNMIK Regulation No. 1999/1 “On the Authority of Law Applicable in Kosovo”, 25 July 1999, Section 2.

13. However, as the supremacy of the international human rights laws over domestic laws was not expressly stated in UNMIK Regulation No. 1999/24, nor in its amended version UNMIK Regulation No. 2000/59,¹³ it created some ambiguity regarding the status of those norms, especially applied to the exercise of executive and legislative authority in UNMIK.
14. Similarly, from the outset, the opportunities to hold UNMIK accountable for any alleged violations of human rights were limited; essentially the SRSG could not be challenged. UNMIK personnel enjoyed immunity before the Kosovo courts in line with regular practice in accordance with the 1946 Convention on Immunities, and subsequent UNMIK regulations.

B. The Ombudsperson Institution

15. Concerns about accountability for human rights violations in Kosovo emerged early. Although UNSC Resolution 1244 made no mention of any such institution, the 1998 Rambouillet Accords (recalled in the Resolution) had provided for the creation of an Ombudsman in Kosovo, to offer “an accessible and timely mechanism for independent review, redress and appeal of non-judicial actions” and to receive, *inter alia*, “complaints regarding the abuse, if any, of authority by the Interim Civil Administration and any emerging local institutions and any non-state actors claiming or exercising authority”.¹⁴
16. It was hoped that some of these complaints would be addressed by the Ombudsperson, which UNMIK established in 2000.¹⁵ The Ombudsperson was created to be independent of UNMIK and, as such, represented the first experiment in UN accountability. The Ombudsperson was mandated to “ensure that all persons in Kosovo are able to exercise effectively, as far as circumstances allow, their human rights and fundamental freedoms safeguarded by international human rights standards”. The powers of the Ombudsperson included providing advice and making recommendations to any person or entity concerning the compatibility of domestic laws and regulations with recognized international standards.
17. To this end the Ombudsperson was able to investigate complaints by any person or entity with respect of human rights violations and abuse of power by international and local bodies, as well as the authority to inspect detention facilities and visit individuals in detention. He received a high number of complaints alleging a wide array of human rights abuses. The Ombudsperson conducted field visits, visited places of detention and regularly challenged the UNMIK administration (and later also the local institutions of self-government), but the response from UNMIK was frequently one of non-cooperation and a failure to carry out his recommendations.

¹³ UNMIK Regulation No. 2000/59 “Amending UNMIK Regulation No. 1999/24 on the Applicable Law in Kosovo”, 27 October 2000.

¹⁴ *Rambouillet Accords: Interim Agreement for Peace and Self-Government in Kosovo*, S/1999/648, 7 June 1999, Article III (e) 89.

¹⁵ UNMIK Regulation No. 2000/38 “On the Establishment of the Ombudsperson Institution in Kosovo”, 30 June 2000.

18. In 2001, UNMIK promulgated Regulation No. 2001/9 of 15 August 2001 “On a Constitutional Framework for Provisional Self-Government in Kosovo”. This Framework incorporated most of the rights and freedoms set forth in the different human rights documents, building upon the rights enshrined in UNMIK Regulation No. 1999/1 and UNMIK Regulation No. 1999/24. However, by issuing UNMIK Regulation No. 2000/47 “On the Status, Privileges and Immunities of KFOR and UNMIK”, UNMIK ensured immunities for its personnel. The Regulation provides: “UNMIK, its property, funds and assets shall be immune from any legal process ... UNMIK personnel, shall be immune from legal process in respect of words spoken and all acts performed by them in their official capacity.”
19. This grant of immunity by UNMIK set off alarm bells in Kosovo. The OSCE Mission in Kosovo (OMiK) noted at the time that such privileges and immunities made accountability of these actors difficult and made it almost impossible for individuals to defend their rights against these governmental authorities.¹⁶ The Ombudsperson in Kosovo noted that the main purpose of granting immunity to international organisations is to protect them against unilateral influence by the individual government of the state in which they are located. But this rationale did not apply to UNMIK, as they were acting as a surrogate state. The Ombudsperson stated that “[n]o democratic state operating under the rule of law affords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for the impunity of the state.”¹⁷ For these reasons, the Ombudsperson continued that UNMIK Regulation No. 2000/47 was incompatible with recognised international human rights standards.
20. The Ombudsperson in Kosovo continued to excoriate UNMIK for committing various human rights violations while essentially being immune from any responsibility. In a 2003 Report, the Ombudsperson noted that this on-going situation, four years after the end of the conflict, “leads to continuing violations of human rights and abuses of authority by UNMIK, reflecting its indifference to the rule of law by which the rest of Europe is bound”.¹⁸
21. Further, on 17 March 2004, there was a major outbreak of violence in Kosovo resulting in 19 deaths, nearly 1,000 people being injured, and many more people displaced. Hundreds of houses belonging to Kosovo Serbs and other non-Albanian minorities were burned, as were Orthodox churches and monasteries.¹⁹ This was followed by another exodus from Kosovo of numbers of Kosovo Serbs and other non-Albanians. 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.

¹⁶ Didier Pacquée & Steven Dewulf, “International Territorial Administrations and the Rule of Law: the Case of Kosovo”, 4 *Essex Human Rights Review* (2007), pp. 1-14.

¹⁷ Ombudsperson Institution in Kosovo, *Special Report No. 1*, 26 April 2001.

¹⁸ Ombudsperson Institution in Kosovo, *Third Annual Report*, 30 June 2003.

¹⁹ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 30 April 2004, S/2004/348, § 3.

III. Prehistory of the Human Rights Advisory Panel

A. PACE and the Venice Commission

22. The major criticism of the situation regarding UNMIK's lack of adequate human rights accountability came from the CoE. In September 2003, its Parliamentary Assembly (PACE) discussed a motion on the human rights situation in Kosovo. On 16 March 2004, its Committee on Legal Affairs and Human Rights (PACE Committee) held a hearing on the issue. As a part of the process of preparing for the PACE debate on human rights in Kosovo, in May 2004, the PACE Committee requested the European Commission for Democracy through Law ("Venice Commission") to present an opinion on "the human rights situation in Kosovo".
23. In the Opinion adopted on 8 and 9 October 2004,²⁰ the Venice Commission first gave an overview of the human rights situation in Kosovo at that time. It noted a wide array of human rights problems under UNMIK's stewardship: a lack of security for non-Albanian communities; a lack of freedom of movement for non-Albanian communities, which affected access to basic public services; insufficient protection of property rights; lack of investigation into abductions and serious crimes; lack of fairness and excessive length of judicial proceedings; difficult access to courts; detentions without independent review; corruption; human trafficking; lack of legal certainty, judicial review and right to an effective remedy for human rights violations. Some of these same issues, especially involving property rights, also affected the Kosovo Albanians who lived in the northern part of Kosovo that was controlled by Serbs.
24. One of the questions that the PACE Committee asked the Venice Commission to address was whether "[i]nstead of bringing the international and local, provisional authorities within the jurisdiction of the European Court of Human Rights, would it be preferable to establish some form of 'human rights chamber', perhaps similar to that set up in Bosnia and Herzegovina?" The Venice Commission considered that an independent Advisory Panel, even established within UNMIK itself, would be the preferred provisional mechanism to review UNMIK's compatibility with human rights standards (through acts or omissions), pending the establishment of a Human Rights Court in Kosovo. This independent Advisory Panel would be competent to examine "any complaint lodged by any person claiming that his fundamental rights and freedoms have been breached by any laws, regulations, decisions, acts and failures to act emanating from UNMIK, but only in cases where the Ombudsperson has found human rights breaches, without his/her report resulting in UNMIK recognizing its responsibility for the human rights violation."
25. The Venice Commission Opinion noted that the "possibility for the individual (or the Ombudsperson on behalf of applicants, with their agreement) to apply to the Advisory

²⁰ European Commission for Democracy through Law ("Venice Commission"), *Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanism*, Opinion No. 280/2004, CDL-AD (2004)033, Strasbourg, 11 October 2004.

Panel would provide UNMIK “with the opportunity to receive confirmation – through its own body of independent experts – that a situation is indeed in breach of human rights standards.” The Commission considered that “UNMIK should commit itself to accepting the finding should its own panel express the view that UNMIK is violating human rights.”

26. Several components of what would later become the legal framework of the HRAP, as established by UNMIK Regulation No. 2005/28, were already formulated in the Venice Commission Opinion. For example, the Opinion had recommended the Human Rights Advisory Panel be composed of three independent international experts with demonstrated expertise in human rights (particularly the European system) who would be formally appointed by the SRSG, upon the proposal of the President of the European Court of Human Rights (ECtHR). The Opinion had also made clear that the Panel would have advisory functions. Nevertheless, “UNMIK would commit itself to accepting its findings, except if the SRSG personally determines that extraordinary reasons exist that do not make this possible.”
27. The Venice Commission Opinion stressed that “this Advisory Panel would not offer the same guarantees as an independent judicial body such as the Human Rights Court for Kosovo. It considers however that it would constitute a significant improvement as it would provide the public with a visible sign that UNMIK does not shield its acts from scrutiny by a body of independent members of a human rights panel.” It noted that “[i]n this respect, it seems essential that, as suggested above, the decisions by the Advisory Panel should ... be promptly made public. It would be equally important that UNMIK commit itself to giving reasons – in due time and publicly – why it would exceptionally not follow the finding of the panel.”
28. One Venice Commission recommendation that did not make it into the UNMIK Regulation, concerning restitution, would critically affect HRAP’s functionality. The Venice Commission Opinion stated that, should the HRAP find that there had been a human rights violation, “UNMIK should provide appropriate redress (ranging from public recognition of the violation, to *restitutio in integrum*, and to possible compensation). In this respect, the Commission considers that the UNMIK regulation setting up the Advisory Panel should also explicitly provide for the possibility of the applicants to seek appropriate individual measures from UNMIK, following the Panel’s finding of human rights breaches in their own case.”
29. In the Report of the PACE Committee on Legal Affairs and Human Rights, which was prepared for the PACE plenary debate on “Protection of Human Rights in Kosovo” and adopted by the PACE Committee on 6 January 2005,²¹ the PACE Committee Rapporteur mostly agreed with the Venice Commission’s recommendations. However, the Rapporteur wanted to ensure that the proposed Regulation would not have the human rights panel duplicate any of the functions of the Ombudsperson in

²¹ PACE Committee on Legal Affairs and Human Rights (Rapporteur: Mr Tony Lloyd), Report on “Protection of Human Rights in Kosovo”, Doc. 10393, 6 January 2005.

Kosovo. Following the debate, which took place on 25 January 2005, the PACE recommended that UNMIK, in accordance with the UNSC Resolution 1244, “create an advisory panel/human rights commission consisting of independent international human rights experts nominated by the President of the European Court of Human Rights and appointed by the Special Representative of the Secretary General of the United Nations.” The advisory panel would be primarily charged with “scrutinizing (draft) [UNMIK] regulations and subsidiary instruments for compliance with international human rights standards ... and addressing to [UNMIK] opinions on issues, other than individual complaints, brought to its attention by the ombudsperson.”²²

B. UNMIK and HRAP

30. Meanwhile, others outside Kosovo were expressing concern about the lack of any adequate mechanism for Kosovo residents to seek redress for alleged human rights violations during UNMIK’s administration. In September 2004, UNMIK received a letter from the Chairperson of the UN Human Rights Committee (HRC) requesting a report on the human rights situation in Kosovo. UNMIK’s Legal Advisor noted that UNMIK was prepared to respond to the HRC’s request and also to “consider the establishment of such arrangements as may be necessary to ensure that the procedures set out in Article 40 of the ICCPR²³ are followed as far as possible in Kosovo”.²⁴ In October 2004, UNMIK officials began ongoing discussions with members of the Venice Commission concerning the possibility of establishing another mechanism, besides the Ombudsperson of Kosovo, for seeking redress for alleged human rights violations in Kosovo.

31. Different opinions about the proposed mechanism persisted within UNMIK. After reviewing the Venice Commission Opinion, UNMIK’s Principal Deputy SRSG (P-DSRSG) stated with concern that more than half of the Opinion was devoted to establishing a human rights court in Kosovo, which would have jurisdiction over UNMIK staff and KFOR, a prospect that he found unacceptable. The P-DSRSG noted that “while thanking the Council of Europe for its continual and valuable assistance in capacity building in Kosovo ... I did not hide the fact that the implementation of their conclusions would not be a priority for UNMIK”.²⁵ The P-DSRSG stated that the Venice Commission had based too much of its Opinion on the views of the Ombudsperson in Kosovo and AI without questioning their erroneous assertions. He was especially forceful in challenging the fact that UNMIK staff members are immune from prosecution. He noted that in a significant number of cases the immunity of

²² PACE Resolution 1417 (2005), 25 January 2005.

²³ Article 40 (1) of the ICCPR provides that “States Parties to the present Covenant undertake to submit reports on the measures they have adopted which give effect to the rights recognized herein and on the progress made in the enjoyment of those rights.”

²⁴ See HRC, *Report Submitted by the United Nations Interim Administration Mission in Kosovo to the Human Rights Committee on the Human Rights Situation in Kosovo since June 1999*, CCPR/C/UNK/1, 13 March 2006; and HRC, *Consideration of Reports Submitted by States Parties under Article 40 of the Covenant, Concluding Observations of the Human Rights Committee, Kosovo (Serbia)*, CCPR/C/UNK/CO/1, 14 August 2006.

²⁵ P-DSRSG memo to SRSG “On the Venice Commission”, 11 October 2004.

UNMIK staff members had been waived by the Secretary-General. He was against the establishment of any new mechanisms for judicial review.

32. Others within UNMIK were more receptive towards the idea. For example, UNMIK's Legal Advisor disagreed with the P-DSRSG's assessment of the proposals for possible institutional mechanisms for human rights protection in Kosovo, calling it "overly negative".²⁶ He also stated that the reason the Venice Commission proposed the establishment of new mechanisms for human rights protection in Kosovo was due to the "current lack of an adequate and consistent mechanism for the examination of alleged human rights breaches by UNMIK and KFOR, and in particular, the lack of an international mechanism of review to the acts of UNMIK and KFOR." However, the Legal Advisor agreed with the DSRSG that the UN would not allow for supervision and sanctioning by an outside body. But he thought that it would support an independent advisory Panel, as an interim arrangement; such a body would provide a sound basis for addressing the legal lacuna caused by the ECtHR's lack of jurisdiction over UNMIK.
33. After a couple of months of internal debate within UNMIK about the shape and jurisdiction of the proposed human rights body in Kosovo, on 12 January 2005 UNMIK's SRSG informed the Under Secretary-General at UN Headquarters (UN HQ), describing the three primary suggestions from the CoE and putting forward what he deemed to be the best choice. In simplest terms, the three options to address the legal lacuna in Kosovo were: an arrangement whereby UNMIK would be subject to the jurisdiction of the ECtHR; the establishment of a Human Rights Court for Kosovo on the basis of an agreement between UNMIK and the CoE that would have the power to issue binding decisions; or the establishment of a Human Rights Advisory Panel which would not have the power to issue binding decisions. Of these choices, the SRSG argued that the third option should be chosen because the first two would be problematic, considering the privileges and immunities of UNMIK and its personnel, and also considering that the other options might give rise to constraints on the discretion of the institutions of the UN to interpret the mandate of UNMIK under UNSC Resolution 1244. The SRSG noted that this Human Rights Advisory Panel could be established relatively quickly, with internationally renowned legal experts appointed with the assistance of the CoE. He also stated that the HRAP would examine allegations of violations of the ECHR by UNMIK and issue formal findings and conclusions as well as recommendations deemed appropriate.
34. In February 2005, UN HQ wrote back to UNMIK agreeing that the establishment of HRAP would be acceptable and, on 15 February 2005, UNMIK's OLA drafted a Note that set out the nature and workings of the HRAP. This Note launched many of the legal points that would later be adopted in the UNMIK Regulation establishing the HRAP. For example, this is the first UNMIK document to set out certain parameters: the three Member composition (and their expected service to be "a few days per

²⁶ OLA note to SRSG "On the 60th Session Venice Commission and the Development of a New Human Rights Mechanism", 13 October 2004.

month”), the Panel Members’ appointment by the SRSG for two year terms in consultation with the President of the ECtHR, the possibility for oral public hearings and the power to compel persons to attend and, most importantly, the non-binding nature of the Panel’s recommendations, which would be subject to the SRSG’s determination whether to take action.²⁷

C. Views from the OSCE

35. When UNMIK sent the abovementioned Note to the OMiK for comment, the OMiK produced a Discussion Paper on the Establishment of a Human Rights Advisory Panel, which found many flaws with UNMIK’s draft language regarding the creation of a human rights accountability mechanism.²⁸ Paramount among those flaws was the Panel’s proposed advisory character. The OMiK Paper noted “that UNMIK’s concerns about its immunity should not exclude it from the application of human rights protection standards applicable universally.” It also stated that “the ECtHR has held that state immunity as an implicit restriction of the right to access to a court is only acceptable in so far as it is necessary to achieve the purpose of the rule of the immunity. Therefore, it would not seem reasonable to say that establishing an effective independent human rights mechanism as such would hinder UNMIK or its personnel to perform their respective tasks.”
36. The OMiK was troubled that if the HRAP could not issue binding decisions, it would mostly duplicate the office of the Ombudsperson. It found the distinction between the two given by OLA – the fact that, unlike the Ombudsperson, HRAP would have the power to hold public hearings and require persons to attend, as well as access to all relevant files – was not enough, in the OMiK’s opinion, to warrant a human rights body being created that did not exercise binding authority. To this end, the OMiK noted that “the establishment of a quasi-judicial institution which cannot issue binding decisions is contrary to the principles of the rule of law which states that no one, especially a governmental authority (UNMIK), is above the law. This would clearly send the wrong message to the people and institutions of Kosovo.”
37. The OMiK recommended that the UNMIK Regulation establishing the Panel should explicitly state what types of decisions the Panel would be authorized to issue. For example, the OMiK suggested that the Panel’s decisions should include the power to award a specific amount in just compensation to victim(s), including restitution. It also considered that the Regulation should make plain that any deviation that the SRSG wanted to make from an HRAP decision awarding compensation would be made on an exceptional basis only. The OMiK was clear that an HRAP that did not issue binding decisions could only be effective if the non-execution of its recommendations was strictly an exception from the rule. To accomplish this, “[i]n practical terms, the Advisory Panel’s views should become effective within a certain space of time unless

²⁷ OLA Note “On the Nature and Operation of a Human Rights Advisory Panel in Kosovo”, 15 February 2005.

²⁸ OSCE Discussion Paper “On The Establishment of a Human Rights Advisory Panel”, 28 February 2005.

the SRSG decides to intervene. Decisions of the SRSG not to follow recommendations of the Advisory Panel should be made public including the reasoning given.”

38. Concerning the Panel’s jurisdiction, the OMiK recommended widening the temporal jurisdiction of the Panel beyond violations that occurred after entry into force of the Regulation, which is what UNMIK had been advocating. Such an arrangement, the OMiK argued, would exclude complaints for human rights violations which occurred in the period between the establishment of UNMIK, i.e. 10 June 1999, and the prospective entry of force, which would have amounted to a period of over six years. The OMiK concluded by noting that if an HRAP was created that could only issue non-binding decisions, this should be seen as a provisional, short-term mechanism, which should be replaced or altered in the medium term by a Human Rights Court for Kosovo that would have the power to issue binding decisions.
39. This turned out to have been very prescient advice, and perhaps the entire HRAP experience could have been much more effective and rewarding if some of the OMiK’s suggestions had been heeded. Instead, most of the officials in UNMIK went ahead with planning HRAP’s governing Regulation based primarily on the OLA’s original plan, ignoring OSCE’s suggestions. During this time, the OLA circulated a draft of the Regulation among UNMIK’s various legal offices for comments. UNMIK Department of Justice (DOJ) remained uncomfortable with the proposed Regulation. They were concerned that HRAP might detract from UNMIK’s immunity, even with non-binding decisions. The DOJ was also adamant that HRAP should not have the authority to comment on whether the UNMIK draft Regulations were in compliance with international human rights standards.²⁹

D. The HRAP Regulation and its Drafting

40. In May 2005, the OLA produced a revised draft of its Note of 15 February 2005 on the establishment of the HRAP.³⁰ The new text used almost exactly the same language, except it removed HRAP’s ability to examine the compatibility of UNMIK draft Regulations, which had been a large part of the proposed Panel’s jurisdiction and power. The OLA also explained that although OMiK and parts of its own DOJ continued to prefer a Human Rights Court with binding authority, this would not be possible, as OLA in UN HQ would only approve the non-binding model. It was already becoming quite clear that, by reining in the jurisdiction and power of the HRAP, UNMIK had removed the possibility that the HRAP would be able to remedy any of the human rights violations, at least not without significant buy-in from UNMIK.
41. By July 2005, the OLA informed the CoE that it had produced a draft Regulation establishing the HRAP, after taking into account the comments provided by the Venice Commission, among others.³¹ Specifically, on the Venice Commission’s

²⁹ Memo from DOJ to OLA “On the Establishment of HRAP”, 4 March 2005.

³⁰ OLA Note on “The Nature and Operation of a Human Rights Advisory Panel in Kosovo”, 25 May 2005.

³¹ OLA letter to CoE Kosovo attaching the Note “Establishment of HRAP in Kosovo”, 19 July 2005.

advice, the OLA had included all of the human rights instruments applicable in Kosovo into the HRAP draft Regulation. This would turn out to be a key development, as it would allow the Panel to consider other human rights instruments beyond the ECHR, making it, along with the Ombudsperson in Kosovo, unique among human rights bodies and of wider significance than just incorporating the ECHR in Kosovo. At the same time, the SRSG sent the UN HQ the draft Regulation “for final review” and stated his intention to promulgate it by the end of August. This optimistic timeframe ended up being considerably slowed down by UN HQ, which did not want to see the draft Regulation drift in the direction mapped out by the CoE and the OMiK. In fact, its Department of Peacekeeping Operations had, in August 2005, decided to involve the wider UN family in the drafting process, including the UN Office of the High Commissioner for Human Rights (OHCHR) in Geneva.

42. In September 2005, upon UNMIK’s request, the President of the ECtHR contributed his views on the draft Regulation, and made two salient points. First that he agreed to nominate Panel Members, but that he understood that the SRSG should not have any discretion with regard to appointments after the members had been nominated. Second, he wanted more clarification on how the SRSG would use his “authority and discretion” in respect of the Panel’s recommendations.³² He stated in a follow-up letter in October 2005 that such power should be exercised “with due regard for the status and authority of the Panel”; in other words, he assumed that the SRSG would generally follow the Panel’s recommendations.³³ Both of these issues would become highly contentious in due course.
43. Finally, in January 2006, UN HQ submitted its legal analysis to UNMIK concerning the HRAP, containing substantive objections. For example, OLA at UN HQ challenged the proposal that an advisory body should “make determinations of a ‘quasi-judicial’ nature”; it should merely “be empowered to examine allegations and submit its findings and recommendations to the SRSG”. This had, in fact, already been addressed: the draft language stipulated that “[t]he SRSG shall have exclusive authority and discretion to decide whether to act on a determination”.³⁴ Secondly, OLA at UN HQ took issue with the draft provision authorising the Panel to obtain evidence (including files and documents in the possession of UNMIK) and generally require UNMIK officials to cooperate by appearing before it and providing oral testimony in the interest of justice. The OLA at UN HQ thought that the Panel should not be endowed with any “subpoena” powers. “The powers to enforce the appearance of UN personnel ... is tantamount to exercising judicial or executive functions. It is also inconsistent with the status of UNMIK, its privileges and immunities ...”.
44. As one commentary noted, “This comment is significant as it demonstrates the determination of UN Headquarters to not only delay the inauguration of the Panel, but render it virtually ineffective. From a substantive point of view, the OLA failed to

³² ECtHR President letter to the SRSG, 20 September 2005.

³³ ECtHR President letter to the SRSG, 13 October 2005.

³⁴ OLA Note to UN OLA, “UNMIK-Establishment of a Human Rights Advisory Panel”, 19 January 2006.

heed best practices that guide the work of national human rights institutions, some of which have quasi-judicial competences in the area of the administration of justice, including direct powers of intervention. Fully aware that receiving information from officials and having access to documentation is essential if a full investigation is to be ensured, OLA successfully prevented full disclosure and hence the provision of appropriate remedies.”³⁵ The Regulation’s next version stated that “all requests for the appearance of UNMIK personnel and for the submission of documents shall be submitted to the SRSG who, in deciding whether to comply, shall take into account the interest of justice, the promotion of human rights and the interests of UNMIK and the United Nations as a whole.” With this last tweak and after chipping away at another, final, area of the Panel’s independent authority, thereby allowing compliance with HRAP’s requests for information to reside solely with the SRSG, on 23 March 2006, UNMIK promulgated UNMIK Regulation No. 2006/12 “On the Establishment of the Human Rights Advisory Panel.” By determining the rules and curtailing the Panel’s independence, UNMIK sought to weaken the Panel from the outset.

E. Adoption of the Regulation

45. As had been expected, the Regulation specified the date of 23 April 2006 for the submission of complaints to the Panel, and set the Panel’s jurisdiction over complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 – exactly one year previously. In a note from the OLA to the SRSG, the anodyne rationale for this choice was elaborated as reflecting “a balance between a concern that alleged violations occurring before the promulgation of the Regulation should be covered as far as possible and the need to exclude alleged violations for which evidence is no longer sufficiently reliable because of the passage of time.”³⁶ What was left unsaid was that by choosing this date – 23 April 2005 – as the starting point of the Panel’s jurisdiction, UNMIK excluded the riots of 17 March 2004 from HRAP’s mandate, when hundreds, if not thousands, of human rights violations occurred in Kosovo under UNMIK’s watch. This date also excluded a large part of the violations that had occurred in the six previous years of UNMIK’s administration.
46. In setting this very late date for the Panel’s starting jurisdiction, UNMIK essentially blocked the main rationale that the CoE had proposed for the Panel in the first place: the establishment of another forum that would allow Kosovo residents to seek redress for alleged human rights violations in Kosovo during UNMIK’s administration. The effect of this reduction of the Panel’s temporal jurisdiction was even more evident considering that by the time of entry into force of the UNMIK Regulation, plans were already being circulated for the end of UNMIK’s administration: many within and without UNMIK expected its mandate to conclude by 2008 at the latest, meaning that HRAP would perhaps exist for only one or two years.

³⁵ Bernard Knoll and Robert-Jan Uhl, “Too Little, Too Late: the Human Rights Advisory Panel in Kosovo”, 7 *European Human Rights Law Review* (2007), pp. 534-549.

³⁶ OLA Note to SRSG, “Regarding Human Rights Advisory Panel”, 14 June 2006.

IV. Early History of the Panel

A. UNMIK Regulation No. 2006/12

47. The key legislative text for the operation of the HRAP is Regulation No. 2006/12, which vests the Panel with jurisdiction to hear a wide range of human rights complaints allegedly attributable to UNMIK under the following international instruments: the UDHR, the ECHR, the ICCPR, the ICESCR, the ICERD, the CEDAW, the CAT and the CRC.³⁷ Thus, the Panel, through its applicable law, was uniquely mandated to apply the full panoply of international human rights instruments.
48. The Panel's competence, according to the Regulation, was limited to the examination of complaints brought before it by individuals or groups who claimed that they had been the victim(s) of a violation of human rights. Provided that a complaint was admissible, its examination had to result in "findings" to be submitted to the SRSG. These findings were "of an advisory nature" and could "include recommendations" (Section 1.3).
49. The Regulation entered into force on 23 March 2006, *i.e.* on the date of its adoption (Section 21). However, it would be possible to submit complaints only as of 23 April 2006, *i.e.* one month later (Section 21). That date apparently was also the basis for the determination of the Panel's temporal jurisdiction: complaints indeed had to relate "to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights" (Section 2). The Panel's jurisdiction thus ran from 23 April 2005, *i.e.* one year prior to the date from which complaints could be submitted. While the Panel's jurisdiction was extended to a certain period before its coming into existence, it should be recalled that, except for "continuing violations", this extension did not go as far back as the start of UNMIK's administration or even the riots of 17 March 2004.
50. A number of provisions are to be mentioned concerning the organization of the Panel. Section 4.2 provided that the Panel "shall consist of three members, of whom one shall be designated as the presiding member. At least one member of the ... Panel shall be a woman".³⁸ Section 4.3 provided that "the members of the ... Panel shall be international jurists of high moral character, impartiality and integrity with a demonstrated expertise in human rights, particularly the European system". According to Section 5.2, as replaced by Regulation No. 2007/3 of 12 January 2007, members were appointed for a term of one year, but their appointment could be renewed for one or more further terms. While the independence of the Panel was not explicitly guaranteed, it resulted from the combination of the following provisions: Section 5.1, which provided that the members were appointed by the SRSG "upon the proposal of

³⁷ See above, § 12.

³⁸ Interestingly, the wording of Section 4.2 did not exclude that the Panel would be composed exclusively of women. It seems that the drafters assumed that one or two men would naturally be part of the Panel.

the President of the European Court of Human Rights”, thus placing the selection process within the hands of an independent body unrelated to UNMIK; Section 7.2, which granted the Panel Members the same immunities as UNMIK personnel.

51. Section 3 of Regulation No. 2006/12 listed a number of criteria for the admissibility of complaints. These criteria corresponded in essence to those listed in Article 35 of the ECHR. The most important admissibility criteria – in terms of the number of complaints that the Panel had to declare inadmissible – was Section 3.1, which states that the “Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued, and within a period of six months from the date on which the final decision was taken.”
52. There were a few provisions relating to the procedure before the Panel. Section 10.1 provided that complaints were to be submitted in writing, and Section 10.5 provided that there would be no charge for the submission of a complaint. Section 11 provided for an examination of complaints in two stages. First, the Panel would have to determine whether the complaint was admissible. It could do so on the basis of the information provided by the complainant and upon a request for further information by the Panel (Section 11.2). Next, when a complaint was declared admissible, the Panel was to refer it to the SRSG with a view to obtaining a response on behalf of UNMIK relating to the merits of the complaint (Section 11.3). It could also request the complainant and UNMIK to make further written submissions “if such submissions are in the interests of justice” (Section 11.4). Section 14 provided as follows: “Where it is in the interests of justice, the ... Panel shall hold oral hearings”; Section 16.1 further specified that hearings of the Panel would be “in public unless the ... Panel in exceptional circumstances decides otherwise”. Section 15 provided for the possibility for the Panel to “request... the submission of any documents, including files and documents in the possession of UNMIK” (Section 15.1), and for the obligation of the SRSG to “cooperate with the ... Panel and (to) provide it with the necessary assistance in the exercise of its powers and authorities, including, in particular, in the release of documents and information relevant to the complaint” (Section 15.2).
53. As to the outcome of the proceedings before the Panel, in cases where the complaint was declared admissible and where it had been examined on the merits, Section 17.1 provided that the Panel “shall issue findings as to whether there has been a breach of human rights and, where necessary, make recommendations”. The nature of such recommendations was not specified. Section 17.3 provided that the SRSG “shall have exclusive authority and discretion to decide whether to act on the findings of the ... Panel”. No further rules were set with respect to the exercise by the SRSG of the discretionary power to react to the findings and recommendations of the Panel. Finally, both the Panel’s findings and recommendations and the SRSG’s decision were to be “published promptly” (Sections 17.2 and 17.4). This meant that the proceedings before the Panel, while confidential in themselves (see Section 12), were to be concluded in a fully transparent way.

54. In conclusion, as the Panel noted in its first Annual Report, the Panel was “fully independent”, and its organization and mandate were such that it could best be qualified as a “quasi-judicial body”.³⁹

B. The First Composition of the Panel

55. On 6 April 2006, the SRSG informed the President of the ECtHR that UNMIK Regulation No. 2006/12 had been promulgated and invited him to propose three members of the Panel. On 14 June 2006, the ECtHR President proposed Mr Paul Lemmens, Mr Marek Nowicki and Ms Michèle Picard to be the first Panel Members. The three proposed Panel Members awaited a letter of appointment from the SRSG, pursuant to the Regulation, and began preparing to regularly spend time in Kosovo for the Panel’s sessions. Inside UNMIK, plans were drafted by the OLA to put in place an action plan for making the HRAP operational including: finding a temporary address for receipt of complaints to the Panel, finalizing its website, issuing a press release and moving staff from other offices to provide the Panel with its Secretariat in order that the Panel could hold its first session by 1 June 2006.⁴⁰

56. However, there had been no planning for HRAP in the 2006-2007 budget year, which began on 1 July 2006. When UNMIK’s Director of Administration was queried on the matter, he noted that in order to establish the Panel’s Secretariat, UN rules required that any newly created functions must be transparently advertised with a full job description following the normal competitive recruitment process. He stated “[t]his, together with the project description, its panel functions/secretariat, the relevant organizational chart and full job descriptions of the required posts would hence need to be submitted to Administration.”⁴¹ Of course, this is an intensive process and it is striking that these questions, concerning whether the functioning of the HRAP and its Secretariat would follow the normal UN protocols or some special process, apparently did not come up until after the Panel and Secretariat were scheduled to commence their operations. It would take many more months before UNMIK was able to iron out the internal disagreements. As such, the SRSG delayed the appointment of the Panel Members for the next six months of 2006, and the three nominees received no official word from UNMIK about when they would be appointed.

57. On 12 January 2007, the SRSG appointed the three nominees as Panel Members. They waited for instructions from UNMIK about the technical details of their mandate; for example, how often should they plan to come to Kosovo and what kind of administrative support would they have. But again, for weeks, no information was forthcoming. All three Panel Members wrote emails to contacts in UNMIK trying to get some answers. On 28 February 2007, Panel Member Mr Lemmens was told in an email that the HRAP Secretariat was still in the process of being established and that more details would soon be provided. Then again, there was silence from UNMIK. On

³⁹ HRAP, *Annual Report 2008*, § 1.

⁴⁰ Note of OLA to SRSG, “Strategy for Making the Human Rights Advisory Panel Operational”, 21 April 2006.

⁴¹ Internal Memorandum from UNMIK Department of Administration Head to UNMIK Acting Chief of Staff, 23 August 2006.

12 April 2007, the three Panel Members wrote a joint letter to the SRSG expressing their concern that “we will not be able to fulfil the mandate entrusted upon us, if we cannot start with its exercise in the very near future.” The Panel also noted that, pursuant to UNMIK Regulation No. 2006/12, the HRAP had been legally open for accepting complaints for almost one year at that point, since 23 April 2006, and yet the Panel had not been able to convene and commence its work.⁴²

58. Prompted in part by a constant stream of questions from the Panel Members and from the Head of the OHCHR in Kosovo about when the Panel would start its work, UNMIK sought advice from UN HQ on 15 June 2007. As UNMIK was already beginning to plan for the expiry of its mandate and the end of its mission, some inside UNMIK argued to UN HQ that perhaps it was too late to convene the Panel at all, or at the very least, the Panel could not become operational without a deadline for the submission of complaints. On 5 July 2007, UN HQ sought action from UNMIK, imploring it to convene the HRAP without delay and that setting a deadline for submission of claims was not a prerequisite to adjudicating the current caseload.
59. The inaugural Panel session eventually took place in November of 2007; even then, the Panel found that many of the things needed to allow the Panel to function had either not been accomplished or had been done haphazardly, starting with the Secretariat’s inadequate staffing, which at that point consisted of only one executive officer⁴³ and one administrative assistant. In December 2007, the Secretariat was slightly augmented to include a legal officer and another administrative assistant.
60. On 10 March 2008, AI, HRW and the Norwegian Helsinki Committee put out a joint press release which stated that “UNMIK has recently taken steps to improve its accountability ... UNMIK also took steps to constitute the Human Rights Advisory Panel ... after an almost two-year delay ... [this step does not] however, provide effective redress for abuses that took place during the almost two-year period in which the Ombudsperson Institution was unable to accept complaints against UNMIK and the Human Rights Advisory Panel had yet to begin its work.”⁴⁴
61. In hindsight, one can trace (from the very beginning) the same approach emerging from UNMIK regarding the HRAP. First, UNMIK would fight to weaken the legal authority of the Panel, in order to minimize the possibility that the Panel could conduct proper oversight. Subsequently, UNMIK would undermine the Panel’s functionality by putting little to no effort and coordination into the Panel’s support structures. In any event, the Panel would expend a considerable amount of energy during its first year trying to remedy UNMIK’s lack of adequate planning and execution.

⁴² Joint Letter from Panel Members Mr Marek Nowicki, Mr Paul Lemmens and Ms Michèle Picard to SRSG Mr Joachim Rucker, 12 April 2007.

⁴³ The Executive Officer was Mr John J. Ryan. His biography is included in Annex B.

⁴⁴ AI, HRW and Norwegian Helsinki Committee, “Kosovo: EU Should Ensure International Mission is Accountable”, press release, 10 March 2008.

C. Year One: Patching Up the Holes

62. When the Panel Members convened for their first session in Prishtinë/Priština in November 2007, the HRAP had already received some 15 complaints, despite the meager job that UNMIK had done in publicizing the HRAP to the population of Kosovo and those displaced outside. Initially, on 10 May 2006 and not long after the entry into force of UNMIK Regulation No. 2006/12, UNMIK's Department of Public Information (DPI) had given a press conference about HRAP that was also covered in the local media. Recognizing that this was insufficient, the Panel quickly realized that public relations would have to be done in the little allotted time that they had during their monthly visits to Kosovo. They could not rely on UNMIK's structures and operational capacity to accomplish this task.
63. Notwithstanding its restricted capacity, the Panel and its Secretariat conducted a limited public awareness campaign and engaged in dialogue with various national and international organizations throughout 2008 in order to inform the public at large about the existence and mandate of the Panel as a human rights complaints mechanism. This campaign included public meetings, media interviews, press releases, meetings with NGOs and international organizations, in particular with those involved in the promotion and protection of human rights in Kosovo. The Panel and the Secretariat held an early meeting on 13 March 2008 with representatives of NGOs, civil society, legal aid offices and minority communities actively engaged in the human rights sector in Kosovo.
64. The Panel and its Secretariat further engaged in a few media appearances including radio and TV interviews in various minority areas to highlight the work of the Panel, for instance with the Serbian media KiM Radio in Čaglavica and TV Most in Mitrovicë/Mitrovica. The broadcast of a public service announcement on the Panel's operations was aired on Albanian and Serbian-speaking TV on 2 June 2008. Additionally, there was a TV spot produced by UNMIK DPI in English, Albanian and Serbian languages, but the Albanian version never aired. In practice, the dissemination of the spot was limited to only TV Most, which had agreed to air it for free. But TV Most, a Serbian language channel had a relatively small broadcast range. Although UNMIK DPI produced the TV spot, apparently UNMIK did not budget to pay for the time for it to be aired. The Secretariat's Executive Officer expended significant effort trying to find a way for UNMIK to pay, but to no avail. As such, the TV spot ran only a few times.
65. The Secretariat of the Panel also conducted a public information campaign in the region. UNMIK produced information leaflets in Albanian, Serbian and English, which were disseminated in court houses, municipal and government buildings, and through the NGOs. In September 2008, the Secretariat presented information about the mandate and operations of the Panel to the Kosovo Legal Aid Commission Panel. This was followed in October 2008 by a meeting with representatives of the Legal

Assistance Program to the Institutions of the Government of Serbia, which deals with refugees and internally displaced persons (IDPs) in Serbia.

66. The Secretariat of the Panel continued with the public information campaign during a visit to Serbia on 26 and 27 November 2008 where it met with the Association of the Families of Kidnapped and Murdered Persons in Prokuplje and with the Team Leader of the EU-funded (and Danish Refugee Council (DRC)-implemented) Legal Aid Project in Belgrade. The Secretariat also met with representatives of the Ministry for Kosovo and Metohija, UN High Commissioner for Refugees, the DRC, the International Organization for Migration, NGO Praxis, the International Center for Migration Development, the Initiative for Development and Cooperation and the Balkan Centre for Migration and Humanitarian Activities and concluded the campaign with a meeting with the Serbian Assistant Minister for the Ministry for Kosovo and Metohija.
67. Overall, the Public Awareness campaign for the Panel, into which UNMIK should have put planning and resources, was instead performed haphazardly and without a sufficient budget. There was no overall strategy implemented by UNMIK: perhaps, because UNMIK planned on the Panel having a relatively short shelf life – one or two years – the proper investment was not made into HRAP’s public awareness. For the most part, the Panel was unknown to prospective complainants, which ultimately resulted in those persons not submitting complaints to the Panel. This problem may have been further exacerbated by the specific cultural imperatives within Kosovo society, in that people are not litigiously inclined and have a general mistrust of police, courts and other institutional structures.

D. Rules of Procedure

68. Section 18 of Regulation No. 2006/12 provided that the Panel “shall adopt rules of procedure for its proceedings”. Drafting these rules was the principal task of the Panel in the beginning of its operation. The Rules of Procedure were adopted on 5 February 2008. They were later slightly amended on 11 September 2009 and 21 November 2009 (insertion of Rules 39*bis* and 39*ter*). More substantial amendments were adopted on 12 February 2010, following the entry into force of Administrative Direction (AD) No. 2009/1.⁴⁵
69. In drafting its Rules of Procedure, the Panel sought guidance in existing rules of bodies of a similar nature, notably the Rules of Procedure of the Human Rights Chamber for Bosnia and Herzegovina,⁴⁶ a judicial body established under Annex 6 to the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Peace Agreement). For certain provisions, the Rules of Procedure of the ECtHR also served as a source of inspiration.

⁴⁵ Specifically, Rule 33 § 1 and Rule 33 § 2 were amended to incorporate the requirement laid out in Section 2.3 of the AD directly into the Rules of Procedure.

⁴⁶ The Human Rights Chamber for Bosnia and Herzegovina was operational between March 1996 and 31 December 2003.

70. It is clear that, by adopting these and other rules of procedure, the Panel intended to give concrete meaning to the quasi-judicial nature of the mechanism set up by Regulation No. 2006/12: by formalizing the procedure, by stressing that it was in control of the conduct of the proceedings, by emphasizing that the Panel's views would be based on legal norms and not on policy considerations, by providing for an adversary process and by clarifying that its decisions (on admissibility) and opinions (on the merits) would be drafted in a legal and judicial manner.

E. Access to the Panel

71. Another early issue that was never really remedied concerned the Panel's physical location. From its first session in November 2007, the Panel was housed in the centre of Prishtinë/Priština, inside the walled UNMIK compound with no public access. But this location was considered transitional and temporary, at least at first. The Panel, having in mind the nature of the body and the need for the public to have access to it, considered that the placement of its Secretariat should be in the centre of the city, outside the UNMIK compound. The Panel's Secretariat raised this issue with various UNMIK personnel during the first year and having no success with UNMIK's administration, the Panel eventually reached out to the SRSG himself on the issue. The Presiding Member voiced his concern to the SRSG that the Panel was scheduled to move, along with the rest of UNMIK, from the UNMIK compound in the centre of Prishtinë/Priština to a new walled UNMIK compound outside of the city that was even more inaccessible.

72. Similarly, the UN Committee on Economic, Social and Cultural Rights in its 41st Session Report of 10 November 2008 regarding UNMIK recommended "that UNMIK provide the Human Rights Advisory Panel with adequate office space outside its premises to fully guarantee its independence, as well as with sufficient financial and human resources ...".⁴⁷ However, the SRSG apparently was not convinced and he denied the request.

F. Adding Staff

73. One of the most chronic problems the Panel would face involved the Secretariat's staffing; from its outset through at least 2012, UNMIK did not provide it with enough legal officers. When the Panel convened for its first session in November 2007, the Secretariat comprised only one executive officer and one administrative assistant.⁴⁸ In December 2007, one legal officer⁴⁹ and one more administrative assistant⁵⁰ joined the Secretariat, but with the Panel's docket of complaints quickly swelling to 50 and increasing through the early months of 2008, the Panel needed to find more help. As UNMIK seemed unwilling or unable to assign more experienced lawyers to the

⁴⁷ UNCESCR, *Consideration of Reports Submitted by States Parties Under Articles 16 and 17 of the Covenant, Document submitted by the United Nations Interim Administration Mission in Kosovo (UNMIK), Concluding Observations of the Committee on Economic, Social and Cultural Rights*, E/C.12/UNK/CO/1, 1 December 2008, § 11.

⁴⁸ The administrative assistant was Mr Ruzvelt Frrokaj. His biography is included in Annex B.

⁴⁹ The legal officer was Ms Leanne Ho. Her biography is included in Annex B.

⁵⁰ The administrative assistant was Ms Snezana Martinović. Her biography is included in Annex B.

Panel, the Presiding Member or the Executive Officer had to reach out for assistance from all sides: to the Registry of the ECtHR and also to various embassies in Kosovo, including those of Finland, Sweden, Belgium, Austria, Switzerland, Norway, as well as the OMiK, the United Nations Volunteers (UNV) and the OHCHR Office in Kosovo. Some of this activity is chronicled below to highlight the time and effort the Panel Members spent working on auxiliary issues, in addition to their case work.

Secondment from the Registry of the ECtHR

74. In February 2008, the Panel Members approached the Registry of the ECtHR, requesting urgent assistance in sending a senior human rights lawyer with expertise in dealing with such cases. The Registry was accommodating and it even intimated that it was ready to share some of the financial burden with UNMIK for the secondment of one of its staff members. However, when the Panel requested some assistance from UNMIK concerning splitting the administrative costs, UNMIK declined. Notwithstanding UNMIK's intransigence, the Registry decided that it was imperative to help the Panel to function and so it decided to shoulder the entire burden of secondment. However, due to the expense, the Registry could only continue the arrangement for a two-month period, which lasted from May through July 2008. This ended up being an important development in the life of the Panel, as the lawyer⁵¹ brought additional institutional knowledge of the ECtHR case-law and helped strengthen the operations of the Secretariat of the Panel.

Finnish Government's Assistance

75. The Panel's Executive Officer, Mr John Ryan, expended significant time throughout the summer and fall of 2008 liaising with diplomats representing the various embassies in Kosovo, trying to find help in locating and funding legal officers specialized in human rights law to work in the Secretariat. Around that time, the Executive Officer conducted productive meetings with representatives from the Finnish Office in Kosovo and the Finnish government promised that it would be able to provide a legal officer for the Panel. Again, with little to no assistance from UNMIK, the Panel Members negotiated with the Finns to second a legal officer to the Secretariat of the Panel. In the meantime, partially due to the downsizing in UNMIK, the Secretariat received an additional legal officer from September 2008 through December 2008.⁵² The need for staff became even more acute in November 2008 when the Panel's other legal officer resigned, leaving no long-term legal officers on staff. In January 2009, the Finnish legal officer finally started her secondment with the Panel; around the same time, the Panel received its 100th complaint. Unfortunately, she was only able to spend six months with the Panel before leaving for another job, and it was not possible for the Finnish government to send any further legal officers to

⁵¹ The lawyer was Ms. Magda Mierzevska. Her biography is included in Annex B.

⁵² This legal officer was Mr Martin Clutterbuck. His biography is included in Annex B.

assist the Panel. This Finnish assistance allowed the Panel's Secretariat to continue working during an especially trying period.⁵³

UNV / UN Staff

76. A confluence of factors led to more upheaval in the HRAP Secretariat during 2009. Due to a general downsizing and reconfiguration throughout UNMIK through June 2009, as UNMIK began to adjust to its new smaller role in Kosovo due to the "Kosovo's authorities continued [action] on the basis of the 'Constitution of the Republic of Kosovo'",⁵⁴ there was a lot of staff movement between various UNMIK offices. One benefit to the HRAP Secretariat from this movement was the re-assignment of three legal officers from the UNV to assist the Secretariat. Although they each only stayed a few months, the HRAP appreciated the help they were able to contribute.⁵⁵ Similarly, the Panel was assisted greatly by another legal officer who was temporarily reassigned to the Panel for a six month period through June 2009.⁵⁶
77. As a consequence of UNMIK reconfiguration, the Secretariat's Executive Officer left UNMIK. Again, UNMIK took its time finding a new Executive Officer – the next one joined the Secretariat only in February 2010.⁵⁷ In the interim, while the Executive Officer post was vacant from the end of June 2009, the Executive Officer duties were undertaken by the two legal officers.⁵⁸ All told, the Secretariat staff fluctuated from a high of ten staff members in May 2009 down to four full time staff by the end of June 2009, comprising only the two legal officers and two administrative assistants. The disruption caused by the staff turnover, combined with the legislative changes provided in the Administrative Direction (AD),⁵⁹ limited the Secretariat during the second half of 2009, although it still managed to process cases and prepare them for determination by the Panel.

OHCHR, Swedish Government's Assistance and Other Temporary Staff Additions from within the UN

78. Even into 2010, the HRAP Secretariat was still spending a significant portion of time seeking legal officers with experience in human rights law from the OHCHR to try to ameliorate the Secretariat's staffing problems that were not addressed properly by UNMIK. The Executive Officer made clear that, although the Secretariat was finally at full complement as per UNMIK's allotted budget, with three lawyers on staff (including the Executive Officer) for the first time in 2010 – more than three years after the Panel had been established – based on the amount of cases in its backlog and extrapolating current projections, it would take several years for the Panel to complete

⁵³ This legal officer was Ms Elina Castren. Her biography is included in Annex B.

⁵⁴ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 10 June 2009, S/2009/300.

⁵⁵ These UNV legal officers were Ms Jerina Dampier, Ms Sarah Enright, Mr Butera Mpira and Ms Chiara Rojek. Their biographies are included in Annex B.

⁵⁶ This legal officer was Ms Bernadette Foley. Her biography is included in Annex B.

⁵⁷ This Executive Officer was Mr Rajesh Talwar. His biography is included in Annex B.

⁵⁸ These two legal officers were Mr Nedim Osmanagić and Mr Ravi K Reddy. Their biographies are included in Annex B.

⁵⁹ See below, V. The Administrative Direction and its Aftermath.

its mandate. Unfortunately, despite a lengthy dialogue on this issue, the OHCHR's Headquarters in Geneva was not able to supplement the Secretariat with additional lawyers.

79. In March 2010, the Presiding Member also requested financial assistance or the secondment of a legal officer from the Swedish Government. After being informed that the Swedish Government would be willing to provide funding for an additional legal officer, the Panel was informed by UNMIK that it was unable to receive such funding and unable to pay a staff member in that manner. This setback required the Panel to reach out to other bodies and the United Nations Development Programme (UNDP) was able to use one of its projects to receive the Swedish money and support the Panel through the appointment of a human rights specialist.⁶⁰ However, this extra complication pushed back the start date of the human rights specialist with the HRAP Secretariat to May 2011. Notwithstanding, the Swedish Government graciously provided assistance, enabling the Panel's Secretariat to employ a lawyer in this capacity for almost two years, until UNMIK finally regularised her position as a legal officer.⁶¹

80. The Panel was also assisted with a legal officer⁶² on temporary loan from United Nations Conference on Trade and Development (UNCTAD) in Geneva from October 2010 until September 2011.

V. The Administrative Direction and its Aftermath

A. The *Balaj and Others* Hearing

81. On 19 March 2009, a hearing was held in the case of *Balaj and Others*⁶³ that was closed to the public. At the request of the complainants, the Panel decided on the same day that a further hearing would be held, this time in public, on 4 June 2009. This decision accelerated a process which ended with the adoption by the SRSG of Administrative Direction (AD) No. 2009/1 on 17 October 2009. Before describing the content of the AD, it is useful to give some background to its drafting.

82. The *Balaj and Others* case would become one of the most contentious matters between HRAP and UNMIK. This case concerned the killing of two demonstrators and the serious injury of two others during a political demonstration in Prishtinë/Priština in March 2004 by officers from the Romanian Force Police Units under UNMIK's command authority firing deadly rubber bullets. The complainants claimed that these actions by UNMIK constituted violations of their right to life, the prohibition of torture and inhuman or degrading treatment and the right to peaceful assembly. Unlike most of the other complaints to the Panel, the *Balaj and Others*

⁶⁰ See HRAP, *Annual Report 2011*, § 3.

⁶¹ This human rights specialist and later legal officer was Ms Anna Maria Cesano. Her biography is included in Annex B.

⁶² This legal officer was Ms Anila Premti. Her biography is included in Annex B.

⁶³ *Balaj and Others*, no. 04/07.

complainants had legal representation.⁶⁴ Considering the complexity of the case, in late 2008 the Panel started planning to hold a public hearing and locating an appropriate space for it.

83. After reviewing the available facilities, the Panel's Secretariat concluded that the District Court of Prishtinë/Priština would be the best venue, as it was the only facility that had simultaneous interpretation equipment, adequate and appropriate accommodation for the Panel, as well as the legal representatives and the complainants, and was open and easily accessible to the public. On 15 December 2008, the SRSG informed the Panel that "the venue for any public hearing of the [*Balaj and Others*] case needs to exclude local courts and in particular the District Court of Prishtinë/Priština. Such venue is inappropriate for HRAP's hearings since the HRAP is neither a judicial or quasi-judicial body, but simply an advisory panel ... [its] recommendations are non-binding and the UNMIK SRSG has the exclusive authority to decide whether to act on the findings of the Advisory Panel. Holding a public hearing in a court house will send the wrong signal to the public and leave an entirely inappropriate impression that a court is sitting over UNMIK. This has to be avoided in any event."⁶⁵ After explaining to the SRSG why the Secretariat had chosen the District Court of Prishtinë/Priština, on 10 March 2009 the Executive Officer of the Panel's Secretariat wrote to the UNMIK OLA stating that "the Panel was acting in the best interests of all concerned" and that after discussing the matter fully with the SRSG they had agreed on an alternative venue for the *Balaj and Others* public hearing.
84. In fact, after a month of correspondence with the relevant personnel from UNMIK's engineering, legal, security and the SRSG's offices, the Panel had decided that the hearing would take place on 19 March 2009 in the main auditorium in the European Union Rule of Law Mission in Kosovo (EULEX) Headquarters in the centre of Prishtinë/Priština. All of the parties had been advised and UNMIK had chosen and prepared the installation of the appropriate simultaneous translation equipment. Additionally, UNMIK Police and EULEX Security had liaised about the issue: UNMIK Security had informed that they would be responsible for the physical security of the hearing room.⁶⁶ But suddenly, just a few days before the scheduled hearing, EULEX had further concerns that apparently could not be assuaged;⁶⁷ UNMIK informed the Panel by letter on 17 March 2009 that it would not be possible to hold a public hearing anywhere in Prishtinë/Priština at that time. This greatly surprised the Panel Members and they wondered if UNMIK would ever allow them to hold oral hearings, despite such hearings being part of the Panel's governing

⁶⁴ The complainants were represented by Mr Halim Sylejmani from Kosovo and had also representation from the English law firm Took's Chambers, including Mr Michael Mansfield QC and Mr Paul Troop.

⁶⁵ Letter from SRSG to HRAP Secretariat Executive Officer, 15 December 2008.

⁶⁶ Memorandum from the UNMIK Senior Police Advisor to the Head of the EULEX Police Contingent, 13 March 2009.

⁶⁷ Email from Head of EULEX Private Office to the HRAP Executive Officer. The email stated that "[u]pon reflection it is decided that EULEX is not in a position to accommodate the hearing in EULEX premises... [because] EULEX would by default end up being associated with a very sensitive part of UNMIK legacy, which association could potentially jeopardize our at times fragile relationship with the local interlocutors."

Regulation.⁶⁸ The Panel was then confronted with a difficult choice: whether to cancel the hearing, or to hold it as a closed hearing, only between the parties.

85. Reluctantly, the Panel opted for the closed hearing, and the Secretariat informed the complainants' law firm that "[s]uch a hearing will still offer the Panel an opportunity to obtain some clarification on the factual and legal issues involved, and will thus continue to serve the interests of justice. The Panel cannot but take note of the existence of exceptional circumstances, making it impossible to hold the hearing in public."⁶⁹
86. On 19 March 2009, the Panel held a closed hearing in the *Balaj and Others* case, in the only place that the Secretariat was confident that UNMIK would attend – in the HRAP's container, on the premises of the UNMIK HQ. After considering the arguments from both sides, the Panel decided to postpone the public hearing until 4 June 2009, assuming that UNMIK would not contest a public hearing in the future, provided that all of its security concerns could be addressed. Nevertheless, that hearing never took place.

B. Fallout from the Hearing

87. On 16 April 2009, the Panel was called to a meeting with the SRSG, in which he made his displeasure known with the quasi-judicial manner of the Panel's closed hearing in the case of *Balaj and Others* on 19 March 2009. Then he went a step further and announced that it was his intention not to allow UNMIK to be represented at the public hearing in the *Balaj and Others* case at all.
88. On 8 May 2009, he sent the Panel a letter stating that: "[i]t became evident to me and also to other stakeholders in this process that the recent hearing on the Mon Balaj complaint clearly indicates the need to avoid that future hearings be openly misused by complainants' counsels as a forum that holds court over UNMIK or the UN. Although an open and instant correction of the misperceptions of the Panel's nature as an advisory body would have averted damage to the good cause of establishing effective human rights remedies, it is evident to me that such hearings always have their own dynamic that are not easy to be controlled." Therefore, in order to clarify the nature of any subsequent hearings to be held by the Panel as well as "other functional deficiencies that have been perceived in the Human Rights remedy process", he would promulgate an AD.⁷⁰
89. In the letter, the SRSG noted that the new AD would set appropriate parameters for hearings, requiring that they be conducted on the basis of an inquisitorial system, such that the Panel would be reduced to only making factual inquiries and taking evidence. In contrast, any consideration of legal arguments would have to be confined to the Panel's own consideration and to written submissions made upon request by the Panel.

⁶⁸ UNMIK Regulation No. 2006/12, Section 14, states: "[w]here it is in the interests of justice, the ... Panel shall hold oral hearings."

⁶⁹ Letter from HRAP Executive Officer to the complainants' lawyer, 18 March 2009.

⁷⁰ Letter from SRSG to the HRAP Presiding Member, 8 May 2009.

What thus had to be avoided, was that a public hearing would be held “in an adversarial manner.” The SRSG also informed the Panel of his intention to clarify that in all cases the Panel would have to examine all admissibility issues before any material consideration of alleged human rights violations could take place. Additionally, the SRSG announced that he intended to set a closing date for the submission of complaints to the Panel, in view of the fact that UNMIK was no longer able to effectively exercise executive authority in many areas from which human rights complaints had emanated. Finally, the SRSG requested the Panel to postpone the hearing in the *Balaj and Others* case until the administrative direction had clarified the nature of it.

90. In reaction to the SRSG’s letter, on 12 May 2009, the Panel informed the complainants in the *Balaj and Others* case that it had decided to cancel the hearing scheduled for 4 June 2009; the Panel considered that a hearing with the limited purpose as envisaged by the SRSG would no longer serve the interests of justice.
91. Later during the year 2009, the Panel received successive drafts of the AD. During the process, more issues were taken up. While the Panel was formally consulted, it had little or no impact on the final outcome. And in these successive drafts, the Panel could see the writing on the wall. The SRSG was going to further limit the jurisdiction and authority of the Panel, in order to minimize the oversight (or appearance of oversight) that the Panel had previously purported to exercise. The Panel received support from the OHCHR, the Human Rights Commissioner of the CoE and other international human rights advocates. In one final attempt to explain why the new restrictions would be contrary to the interests of justice, on 27 September 2009, the Panel sent a letter to the SRSG outlining through pages of reasoned arguments how many of the new provisions would be incompatible with both the letter and the spirit of the UNMIK Regulation establishing the Panel.⁷¹
92. However, all of this activity against the newly planned restrictions was for naught. Administrative Direction No. 2009/1 was adopted on 17 October 2009. It altered the admissibility criteria and procedures for the processing of complaints, as well as the manner of conducting public hearings and the appointment procedure for Panel Members; it regulated the manner of publishing press releases and announcements of the Panel; and it provided a cut-off date for the submission of complaints to the Panel.⁷²
93. A first procedural issue determined by the AD concerned the opportunity for the SRSG to comment on the admissibility of a complaint. Indeed, unless a complaint was at once declared inadmissible (*de plano*), the Panel had usually communicated the complaint to the SRSG for his comments on the admissibility. Since one of the admissibility requirements was that the complaint may not be manifestly ill-founded,⁷³

⁷¹ Letter from the Panel Members to the SRSG, 27 September 2009.

⁷² For further information, see HRAP, *Annual Report 2009*, §§ 35-45.

⁷³ UNMIK Regulation No. 2006/12, Section 3.3.

it had been a standard practice to invite the SRSB to comment at the same time on the admissibility and the merits. However, Section 2.3 of the AD now provided that “comments on the merits of an alleged human rights violation shall only be submitted after the Advisory Panel has completed its deliberation on and determined the admissibility of such complaint.”

94. In some cases, where the Panel found that the admissibility of the complaint was closely linked to the merits, *e.g.* in cases where the complaint was about the ineffectiveness of a remedy or an investigation, or about the lack of access to a court, it had in its admissibility decision joined the admissibility issue to the examination of the merits. Section 2.1 of the AD seems to have reacted to this practice, where it provided that the Panel “shall examine all issues of admissibility before examining the merits.”
95. Section 2.1 of the AD also stated that issues of admissibility shall be examined “at any stage of the proceedings”, implying that new admissibility issues can be raised at any moment, even after a complaint had been declared admissible. Section 2.3 of the AD confirmed this reading: “If issues of admissibility of a complaint are addressed at any time after the Advisory Panel has made a determination on admissibility of a complaint and commenced its consideration of the merits, the Advisory Panel shall suspend its deliberation on the merits until such time as the admissibility of the complaint is fully re-assessed and determined anew.” The Panel was right to be concerned that the latter provision would lead to situations where a new objection to the admissibility of a complaint previously declared admissible would result in a considerable delay in the proceedings.⁷⁴
96. As far as the admissibility criteria were concerned, Section 2.2 of the AD was of utmost importance. It stated: “Any complaint that is or may become in the future the subject of the UN Third Party Claims process⁷⁵ ... shall be deemed inadmissible for reasons that the UN Third Party Claims Process ... are available avenues pursuant to Section 3.1 of [Regulation No. 2006/12].”⁷⁶ This provision removed the Panel’s competence to assess the effectiveness of the UN Third Party Claims Process, in the light of the requirement that “all ... available avenues for review of the alleged violations have been pursued.”⁷⁷ The AD applied not only to complaints filed after its issuance, but also to all pending complaints.

⁷⁴ In fact, these two changes from Section 2.1 and 2.3 of the AD may have extended the lifespan of the Panel for two or three years, despite producing no tangible benefits for the Panel, the complainants, UNMIK or the UN.

⁷⁵ The UN Third Party Claims Process is the object of UNGA Resolution 52/247 on “Third-Party Liability: Temporal and Financial Limitations” of 17 July 1998. The above-mentioned Section 7 of UNMIK Regulation No. 2000/47 constitutes the implementation of the said resolution in the UNMIK context.

⁷⁶ The AD also included as inadmissible claims under Section 7 of UNMIK Regulation No. 2000/47 “On the Status, Privileges and Immunities of KFOR and UNMIK and their personnel in Kosovo” which reads as follows: “Third party claims for property loss or damage and for personal injury, illness or death arising from or directly attributed to KFOR, UNMIK or their respective personnel and which do not arise from ‘operational necessity’ of either international presence, shall be settled by Claims Commissions established by KFOR and UNMIK, in the manner to be provided for.”

⁷⁷ UNMIK Regulation No. 2006/12, Section 3.1.

97. The concrete effect of these provisions was profound, especially on some of the most high profile cases, including *Balaj and Others*⁷⁸ and *N.M. and Others*⁷⁹. Based on the AD, the Panel was forced to declare these cases inadmissible because the complainants had ongoing claims within the UN Third Party Claims Process.⁸⁰ As indicated above, an admissibility issue on the basis of Section 2.2 of the AD could be raised even in cases where the Panel had declared the complaint admissible and where it was examining the merits.
98. The AD also regulated the organisation of public hearings. Section 1.1 stated that “public hearings ... shall be conducted in such manner and settings that allow a clear sense of non-adversarial proceedings to be conveyed to all participants and to the public at large, including to any media presence in case such presence is permitted by the Advisory Panel.” The non-adversarial character of the proceedings is spelled out again in Section 1.4, according to which “the venue and seating arrangements for public hearings conducted by the Advisory Panel shall be consistent with the non-adversarial nature of the proceedings.” While it may be surprising for the SRSG to give instructions and to micro-manage the Panel with respect to the venue of a hearing and even the seating at a hearing, it is clear that the main purpose of the provision was to stress the non-adversarial character, not only of the hearing, but of the proceedings before the Panel as a whole.
99. On this point, the Panel considered that it is hard to reconcile the AD with the spirit, if not the wording, of UNMIK Regulation No. 2006/12. For example, Section 11.3 of UNMIK Regulation No. 2006/12 provided that the SRSG shall have an opportunity to submit a response on behalf of UNMIK to the complaint, once it has been declared admissible, and Section 11.4 allowed the Panel to request the complainant and UNMIK to make further written submissions. These provisions show that it was the intention of the drafters to involve the complainant and UNMIK in a procedure whereby they would be able to present their views and to comment on each other’s views. It was then the task of the Panel, according to Section 17.1, to issue findings as to whether there had been a breach of human rights, which necessarily involved taking into account the submissions made by both the complainant and UNMIK. In any other legal contexts, these actions would accurately be described as adversarial.
100. Furthermore, the AD considerably reduced the usefulness of any hearing. Section 1.2 indeed provides that “during public hearings, complainants or their representative, shall be permitted to make a statement summarizing the alleged human rights violation, as contained in the written submissions to the Advisory Panel”, and “the Advisory Panel shall ask such questions of the parties, or their representatives, which clarify the factual basis of the complaint and are necessary for the Advisory Panel to fully assess the human rights allegation before it.” This provision not only confirmed

⁷⁸ *Balaj and Others*, no. 04/07.

⁷⁹ *N.M. and Others*, no. 26/08.

⁸⁰ However, the Panel left open for the claims to be revived upon the completion of the UN Third Party Claims Process (see below, § 226).

that any hearing would be non-adversarial, in that the parties could not comment on each other's submissions, but it also limited the purpose of the hearing to a mere clarification of the facts (already mentioned in the written submissions), thus excluding any discussion of legal issues. In the light of the provisions of the AD, which significantly limited the purpose of holding a hearing, the Panel decided that it was not worthwhile to hold such a hearing in the *Balaj and Others* case. Nor has a hearing been held in any other case.

101. Another issue regulated by the AD was the procedure for the appointment of its members. According to Section 5.1 of UNMIK Regulation No. 2006/12, "the Special Representative of the Secretary-General shall appoint the members of the Advisory Panel, upon the proposal of the President of the European Court of Human Rights." This provision can be seen as a guarantee of the independence (*vis-à-vis* UNMIK and the SRSG) of the Panel and its members. But Section 3.1 of the AD amended that process to "the President of the European Court shall propose in compliance with the applicable UN procurement rules a sufficient number of suitable candidates for appointment ... If no proposals or an insufficient number of proposals are received by UNMIK within a period of one calendar month of such request, the Special Representative of the Secretary-General may make the necessary appointment without the requested proposal and following consultation with relevant international Human Rights bodies."
102. This amendment proved to be extremely controversial. From UNMIK's perspective, this apparently amounted simply to a clarification of the original meaning of UNMIK Regulation No. 2006/12. From the Panel and the President of the ECtHR's perspective however, this limited the role of the latter in proposing Panel Members, which might have affected the Panel's independence.
103. Section 4 of the AD ordered the Panel to make its publications, announcements and press releases through the UNMIK Office of the Spokesperson and Public Information. While the Panel appreciated the confirmation of this Office's availability to assist it in its announcements, prior to the AD the Panel had been able to send out its annual report and its (relatively rare) press releases directly to persons and organisations on its mailing list. Although this did not become a contentious issue, as the SRSG never chose to use this power to directly censor the Panel, the AD again underscored the fact that the Panel's public voice, outside of its decisions and opinions, were distributed at the discretion, and under the control, of the SRSG.
104. Finally, Section 5 of the AD provided for a cut-off date for the submission of complaints to the Panel: 31 March 2010. Complaints received after that date would have to be refused. According to UNMIK, this provision must be read in the context of UNMIK's reconfiguration, due to the difficulties it was facing in exercising its mandate under UNSC Resolution 1244.⁸¹ However, this time-bar is better seen as

⁸¹ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 24 November 2008, S/2008/692, § 21.

another in a series of restrictions that UNMIK placed on the Panel's jurisdiction, all of which went against the original concept of the Panel.

105. Overall, the Panel understood this AD as an uncovering of UNMIK's strategy *vis-à-vis* itself that had been covertly present from the outset: UNMIK would only be scrutinized on its own terms. For years, the Panel's effectiveness had been limited by UNMIK's lack of planning and allocation of proper resources and staff. And just as the Panel had started to overcome these difficulties and began taking independent action, for example, as in the case of the attempted *Balaj and Others* public hearing, UNMIK responded by changing the rules. With the promulgation of the AD, the Panel Members started to understand just how challenging it was going to be to use this process to enhance accountability for human rights violations attributable to UNMIK and to effectuate change in the human rights situation in Kosovo.

106. Unfortunately for the Panel Members, when Panel Member Ms Snezhana Botusharova resigned in June 2009 and a replacement had to be found, things were about to worsen. Another amendment in the AD was Section 3.2 which provided that, "in case one or more members of the Advisory Panel resign from their position, the Panel shall make no determinations until new appointments have been made ...". This provision had the effect of precluding the Panel from taking any decision on admissibility or adopting any opinion on the merits from the date of issuance of the AD until the date of the solemn declaration to be made by the Panel's new third member.

C. Renewing and Replacing Panel Members

107. Meanwhile, starting in January 2009, a different crisis was "brewing" regarding the Panel. The Panel Members started out the year without being re-appointed by the SRSG; the three of them came to Prishtinë/Priština and continued their case work without letters of appointment. According to Section 5.1 of UNMIK Regulation No. 2006/12, "the Special Representative of the Secretary-General shall appoint the members of the Advisory Panel ...", and the term in office for Panel Members was reduced to one year, renewable, by the UNMIK Regulation No. 2007/3 of 12 January 2007. In the previous years, the Panel Members had been renewed around the end of their current appointments, but this time, it was not until 25 February 2009 that the SRSG sent re-appointment letters to the Panel Members, and those re-appointments were only for a three-month period, retroactive from 1 January 2009 through 31 March 2009.

108. When the Presiding Member asked the SRSG for clarification about why the appointments were only being renewed for three months, in apparent contradiction with the governing UNMIK Regulations, the SRSG responded with a novel interpretation of the relevant provisions. According to him, the three month extensions were allowable because after the first term of appointment, "[s]uch appointment may be renewed for a 'further term', subject to any decision of the Security Council regarding UNMIK's mandate under United Nations Security Council resolution 1244. As you will note, the Regulation refers to the initial term of one (1) year, however,

subsequent terms are not specifically defined. Thus the current appointment is made in accordance with the Regulation.”⁸² This interpretation caused the Panel’s Executive Officer to send two urgent letters to the OLA at UN HQ, in which he laid out several areas where UNMIK had been obstructing the HRAP’s functioning. In the second letter, after noting that there was no legal basis underpinning the SRSG’s three month extension of the Panel Member’s contracts, the Executive Officer stated that “[a]t this point, there is no clarity as to whether or not the Panel may conduct a session in April. The Panel is in the midst of working on approximately one-hundred cases, two of which are somewhat voluminous ... Continuity is of critical importance to the Panel’s work.”⁸³

109. In March, the Panel was informed that the SRSG had sent a letter to the President of the ECtHR asking him to submit five or six names for nomination, from which the SRSG could pick three. The ECtHR President responded that the SRSG should re-appoint the three sitting Members so that the Panel could fulfil its mandate. Apparently, the SRSG was given a similar message from UN HQ, to renew the Panel Members’ contracts for the rest of the year and let them do their jobs. Instead, the SRSG sent the Panel Members another three-month extension until 30 June 2009, which again raised their concerns that the SRSG would continue his quest to replace them as soon as possible. This issue, combined with the problems with the *Balaj and Others* hearing, gave the Panel Members some reason to doubt UNMIK’s commitment to having a functioning and independent human rights advisory body.
110. The situation regarding Panel Member’s re-appointments became more tense when Panel Member Ms Snezhana Botusharova resigned from 15 June 2009 to become a Judge of the Constitutional Court of Kosovo. The SRSG informed the ECtHR President that “Ms. Botusharova’s resignation necessitates that I appoint a new member to the UNMIK Human Rights Advisory Panel, which requires that I receive your respective proposals.” Along with the letter, the SRSG attached the relevant documentation for UN consultants and contractors.⁸⁴ The ECtHR President told the SRSG that the members of the Human Rights Advisory Panel did not fall within those definitions. He considered that UNMIK Regulation No. 2006/12 designated them as members of a panel and that their role could not be compared to that of a consultant or contractor but rather to that of an international judge. The ECtHR President put forth one highly qualified candidate, as the former ECtHR President had done with the original Panel Member vacancies.
111. The SRSG’s response crystallized the problem that UNMIK had with the Panel throughout its entire lifespan, a disagreement about the nature of the role that the Panel should play. In response to the ECtHR President, the SRSG wrote “your analysis of the UN regulatory framework for consultants and individual contractors

⁸² Letter from SRSG to the Presiding Member, 12 March 2009.

⁸³ Letter from the HRAP Secretariat’s Executive Officer to the Legal Counsel to the Under Secretary-General, 17 March 2009.

⁸⁴ Letter from SRSG to the ECtHR President, 29 June 2009.

and its applicability on members of the Human Rights Advisory Panel erroneously defines the members of the Human Rights Advisory Panel as international judges, while their role is that of advisors to the SRSG. UNMIK Regulation No. 2006/12, as amended, establishing this Panel, clearly states that the Panel is advising the SRSG by issuing non-binding advisory opinions and recommendations ... I also need to dispel you the notion that your predecessor or you have in the past appointed, or have been called on to appoint, the Panel members. You will note that UNMIK Regulation No. 2006/12, as amended, clearly states that the UNMIK SRSG is the appointing authority for Human Rights Advisory Panel Members. In this context, I look forward to receiving your further proposals at your earliest convenience ...”⁸⁵

112. This problem would become exacerbated with the promulgation of the AD in October 2009, as Section 3.2 provides that, “in case one or more members of the Advisory Panel resign from their position, the Panel shall make no determinations until new appointments have been made ...”. This ensured that the Panel was unable to adopt admissibility decisions or opinions until the situation was finally resolved with the appointment of Panel Member Ms Christine Chinkin in February 2010. For the record, the ECtHR President did not put forth any other nominees to the SRSG; apparently the SRSG was finally persuaded to accept the ECtHR President’s nomination.⁸⁶ Still, this eight-month period during which the HRAP was not fully empaneled negatively affected the Panel’s output at this time.

D. Reactions to the Administrative Direction

113. As a result of the entry into force of the AD, the Panel had to adapt its Rules of Procedure on a number of points. The amendments were adopted on 12 February 2010. More importantly, in light of all of the negative ramifications from the adoption of the AD, specifically for potential complainants, the Panel undertook a public information initiative at the beginning of 2010 to inform the population about its new deadline for receiving complaints – 31 March 2010. Advertisements were placed in regional newspapers (in *Danas* and *Politika* published in Belgrade in Serbian and in *Koha Ditore* published in Prishtinë/Priština in Albanian) to ensure that the general public was aware of the deadline. In addition, the cut-off date was indicated on the welcome page of the Panel’s website. The Panel understood that after 31 March 2010, formerly eligible people would still want to file complaints and would be now unable to do so.

114. On 6 April 2010, the Serbian Minister for Kosovo and Metohija sent a letter to the SRSG noting that “[t]here are more than 40,000 requests for property rights cases that take place before the Kosovo Property Agency ... Negative implications can only be imagined if we take into account that at the moment when the issue of the appellate body for the first instance decisions of the Property Agency has not been resolved, we

⁸⁵ Letter from the SRSG to ECtHR President, 28 July 2009.

⁸⁶ The same was true with the appointment of Ms Françoise Tulkens to the Panel in September 2012: the ECtHR President nominated only her and the SRSG appointed her without incident.

face a decision to disable further legal protection after March 31, 2010 before the Advisory Panel ... Therefore, we kindly ask you to reconsider the Administrative Direction No. 2009/1 and in accordance with your authority pass a new decision that will ... significantly extend this time limit.”⁸⁷

115. Additionally, on 7 June 2010, the PACE issued a report on the Situation in Kosovo and the role of the CoE, which commented on the unique nature of the Panel.⁸⁸ The Report was the basis for PACE Resolution 1739 on the situation in Kosovo and the role of the CoE, which made some specific recommendations concerning legislative developments affecting the Panel in 2009.⁸⁹ Similarly, on 21 December 2010, the Venice Commission published its follow-on Opinion on the Existing Mechanisms to Review the Compatibility of Acts by UNMIK and EULEX in Kosovo.⁹⁰ The Opinion made recommendations concerning a number of challenges faced by the Panel. Likewise, various other institutions, including AI⁹¹ and HRW⁹² publicly expressed their disquiet.

116. But these and other concerns of different international NGOs essentially went unheeded by UNMIK. The AD would be the final change to the rules the Panel had to operate within, and any success that the Panel later achieved was through its working through these changes, through its processing of cases, its method of treating complainants and its formulation of recommendations. This included the manner in which the Panel interpreted its quasi-judicial nature, which it grounded in the *travaux préparatoires* originating from the initial PACE debate and Venice Commission Opinions of 2004 and the Regulation itself. Thus, the Panel used this framework in its more expansive, human rights-based reading of the governing UNMIK Regulation and subsequent AD in order to implement its mandate, notwithstanding UNMIK’s more restrictive intentions.

117. Although some decisions and opinions were adopted by the Panel before the AD, it was primarily after that time that it settled down and became able to develop its working practices in accordance with its Rules of Procedure, on a step by step basis.

VI. Secretariat of the Panel

118. The final, and, as proved by the results of its work, optimal and self-sufficient composition of the Secretariat of the Panel consisted of an Executive Officer, three full-time Legal Officers, a Legal Assistant and a Team Assistant. The maintenance of the Panel’s case files, preparation of individual file-copies for Panel Members and

⁸⁷ Letter from the Republic of Serbia’s Minister for Kosovo and Metohija to the SRSG, 6 April 2010.

⁸⁸ See PACE Committee on Political Affairs and Democracy (Rapporteur: Mr Björn von Sydow), Report on “The Situation in Kosovo and the Role of the Council of Europe”, Doc. 12281, 17 June 2010, §§ 65-68 in particular.

⁸⁹ See PACE Resolution 1739 (2010), 22 June 2010, § 12 in particular.

⁹⁰ European Commission for Democracy through Law (“Venice Commission”), *Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and EULEX in Kosovo*, Opinion No. 545/2009, CDL-AD(2010)051, Strasbourg, 21 December 2010.

⁹¹ AI, “Kosovo: Justice Delayed is Justice Denied”, Public Statement, EUR 70/001/2010, 8 February 2010.

⁹² HRW, *World Report 2010*, p. 443-449.

lawyers and much other administrative work was done by local assistants, under the overall supervision of the Executive Officer.

119. The lawyers assigned to particular cases prepared drafts, under the instructions of the Rapporteurs (Panel Members assigned by the Presiding Member), of the Panel's opinions and decisions. They also performed important preparatory tasks. Their work included reviewing the numerous and sometimes voluminous investigative files, background research, and analysis of court and other institutional documentation. The Secretariat also conducted internal quality control of the texts, kept statistics, monitored deadlines and kept the website updated in the three languages.
120. The Secretariat also handled a countless number of other tasks. To name a few: it communicated with the SRSG and other relevant UNMIK offices, international and local institutions; provided input to the SG's reports to the UNSC; liaised with local and international NGOs and others interested in the Panel's work. The Secretariat also maintained contact with other bodies such as the OHCHR, EULEX Human Rights Section, the Registry of the ECtHR, as well as regional institutions providing free legal assistance, such as the Serbian project "Further Support to Refugees and IDPs in Serbia" and the DRC.
121. The major challenge for the Secretariat was that, as UNMIK staff, it had to negotiate the space between UNMIK and the independent Panel. The Secretariat was tasked to facilitate the work of the Panel and to protect its interests, notably confidentiality of its proceedings.
122. At times, cooperation with UNMIK was not easy, with conflicts of interest related, for instance, to office space allocation and distribution of material. The Secretariat also had to arrange sometimes difficult logistical matters. In the last few years of the Secretariat's work, the number of disagreements was small and most of the Panel's and Secretariat's operational needs were met.
123. From the very beginning, the Secretariat was confronted with the difficulty of obtaining the relevant files when such files, for various reasons, had not been presented by UNMIK. The Secretariat's counterparts in this exercise were local courts, prosecutors' offices, police departments, the Kosovo Property Agency, the Kosovo Privatisation Agency (KPA), the Special Chamber of the Supreme Court on KPA-Related Matters, various municipal and administrative bodies in Kosovo and in Serbia proper. In general, there was a relatively high level of cooperation.
124. At times, the officers and assistants were shouted at, or cried to, by the people they were speaking to on the phone. Many times they themselves were deeply disturbed by the stories they heard or read about in the documents which passed through their hands. What made it more difficult for the local staff was that there were cases they had heard of before or when they had even lived through similar experiences. However, despite all the pressure, they managed to maintain the highest level of professional attitude.

125. The knowledge of local languages was always a challenge for the Secretariat. Although some of its staff spoke Serbian or Albanian, the biggest burden was always on the Secretariat's local assistants, who always performed their work in the most professional, reliable and respectful manner. Most of the work related to contacts with the complainants, on a daily basis, sometimes even over the weekends, was undertaken by these assistants.
126. As most material submitted to the Panel was in local languages, the translation of the written submissions was also a problematic issue from the beginning of the Panel's work. While the UNMIK Language Unit was able to cope with translation from Serbian or Albanian into English, when the Panel started producing its decisions and opinions *en masse*, the situation became much worse. To resolve the matter, UNMIK contracted two companies to provide translation services; thus the backlog was eliminated within a year and no further delays with translations was experienced.
127. As the Panel received quite a significant number of confidential investigative files, there was a need to develop a secure mechanism for their safekeeping. In most cases, the files were received from UNMIK OLA, upon guarantee of non-disclosure to any outside parties and their return at the end of the process. The Secretariat established and maintained the highest level of security.
128. As allowed by the Rules of Procedure, some complainants wished to remain anonymous. Ensuring that none of the publicly available documents included the names and contact details of these people, or of their relatives, was a sensitive task of the Secretariat. Furthermore, at times, the Secretariat had to draft these documents so as to minimise the risks of revealing their identities.
129. The work of serving the SRSG's decisions on the complainants and liaising with EULEX and other relevant parties with regard to the implementation of the Panel's recommendations, was done by the UNMIK Rule of Law Liaison Office and the Office of the Senior Human Rights Advisor. The Secretariat requested regular updates from those offices as to the actions taken. Although UNMIK offices usually forwarded them to EULEX or other relevant authorities in a timely way, no proper mechanism for further monitoring of the actions was ever established by UNMIK.
130. By the end of the Panel, the Secretariat carried out a substantial amount of work related to winding down the whole operation, which included archiving and safekeeping of the original and electronic files, as well the continuous maintenance of the Panel's website. As long as any of the former HRAP Secretariat's staff still work in UNMIK, they will continue carrying out the residual functions related to HRAP. Although in the short run these issues are resolved, it is unclear at the moment what is going to happen to the website and the Panel's archives in case UNMIK closes down; this matter will be attended to in due course.

VII. Legal Legacy

131. The Panel's legal legacy is its main contribution towards the progress of human rights jurisprudence. The Panel was created to bring some accountability over UNMIK for alleged human rights violations. Through its very existence, as well as through the numerous cases where the Panel found that UNMIK had committed human rights violations, the Panel reinforced the position that the UN and its missions, like UNMIK, are required to maintain the same human rights standards as they purport to embody.

A. General Overview

132. It is important to situate the Panel in the context in which it operated. During the Panel's mandate, Kosovo was moving forward from both the conflict and its socialist past. As a post-conflict region, the complaints that were communicated to the Panel represented this reality. More precisely, most of the complaints that the Panel received involved a failure by UNMIK to remedy the damage to the population that had come from the conflict and its aftermath. They concerned, for example, persons with missing and murdered family members from the conflict and its aftermath that had not been properly investigated and persons who had lost property or employment as a result of the conflict who had never been properly compensated. As these were the majority of the complaints that were submitted to the Panel, these are the areas that the Panel's jurisprudence primarily covers.

133. Kosovo was transitioning from being part of a socialist government, in the former Yugoslavia. As such, UNMIK administered entities, including the Kosovo Trust Agency (KTA) and the Special Chamber, were tasked with overseeing the privatisation of socially-owned property. Complaints alleging that these UNMIK administered entities had committed human rights violations, mostly regarding the failure to protect property rights, made up another significant portion of the Panel's caseload.

134. Kosovo was also attempting to move forward from a serious ethnic conflict. The former multi-ethnic tapestry of Albanians, Serbs, Turks, Roma and other minorities had long been torn apart. UNMIK was mandated to administer the law in a fractured territory. When UNMIK failed to do so in a human-rights compliant fashion, complaints were submitted to the Panel, concerning discrimination as such, both *de facto* and *de jure*. Discriminatory activities and practices also undergird many of the other alleged human rights violations.

135. The decision of the Panel to rely upon the ECHR and jurisprudence of the ECtHR firmly planted the HRAP in Europe, in a context that was already well-known and established. Of course, this was a natural fit, considering the role that the President of the ECtHR had in nominating Panel Members, as well as the fact that the ECHR was already the applicable law in Kosovo pursuant to UNMIK Regulation No. 1999/24 and in the Panel's jurisdiction under UNMIK Regulation No. 2006/12. Additionally,

this fit well with the Venice Commission's initial understanding of what the Panel would be, a quasi-judicial human rights body to operate in the legal lacuna in Kosovo, pending the establishment of a Human Rights Court and Kosovo's accession to human rights treaties.

136. Nevertheless, there are a number of situations where the Panel pushed the boundaries of the ECtHR jurisprudence, causing its cases to differ from (or to extend) those of the ECtHR. It concerned, notably, the determination of legal standards applicable in the context of investigation of disappearances and killings where the wrongdoing was committed by non-state actors; the applicability of the substantive protections of Article 2 of the ECHR to a UN Body in the context of public protest; in the missing and murdered persons (MMP) cases, the extension of the Panel's jurisdiction *ratione temporis* through the procedural obligations of Article 2 of the ECHR, in particular the continuing nature of the obligation to investigate deaths in suspicious circumstances and disappearances; in other MMP cases, the applicability of Article 3 of the ECHR to a UN body involving violations with respect to the inhuman and degrading treatment of relatives of missing and/or murdered persons; the procedural aspect of Article 5 of the ECHR and in taking into account the need for gender-sensitive investigations.
137. But the Panel was unique in that it was not only wedded to the ECtHR. The inclusion of a broad range of treaties in the Panel's constitutive instruments allowed it to have a flexibility to move beyond the ECHR and be innovative – a unique opportunity to develop jurisprudence as a quasi-judicial body drawing on a range of international legal sources. Thus, the Panel also made use of the case-law and general comments of other bodies like the UN human rights treaties committees and the institutions of the Inter-American human rights system. This diversity of sources allowed the Panel to fit, where possible, the most relevant human rights jurisprudence to the context in Kosovo, including even looking at special rapporteurs' reports, for instance concerning the right to truth. This proved especially useful in the context of violence against women, where the Panel made extensive use of the CEDAW and its jurisprudence.
138. Further, there were a number of cases where the Panel's complaints presented other issues that had not reached the ECtHR, for example, the overall accountability of a UN-mission (UNMIK) when its power was divested to local authorities. In addressing this type of issue, the Panel noted that even though the local authorities, including municipal courts, the Independent Media Commission and others, were part of the Provisional Institutions of Self-Government (PISG),⁹³ the SRSG retained oversight over the PISG, their officials and their agencies. Since the PISG had to observe and ensure the rights and freedoms set forth in a number of international human rights instruments, it was within the power of the SRSG to take action if these rights

⁹³ Pursuant to the Constitutional Framework for Provisional Self-Government from UNMIK Regulation No. 2001/9 of 15 May 2001, Section 1.5.

were violated.⁹⁴ This reasoning was later adapted to fit the specifics of other types of cases and Kosovo bodies, for instance UNMIK's oversight of the municipal courts.

B. Property Cases

139. A substantial number of the complaints submitted to the Panel fitted a particular fact pattern, so that the Panel grouped them under the heading "14,000" or "14k" cases. Specifically, these cases involved property-owning ethnic Serb complainants who left their homes for security reasons, during and mostly at the end of the armed conflict in Kosovo in 1999. In many instances, their properties were later damaged or destroyed. In order to obtain compensation for the usurpation and/or destruction of their properties, between 17,000-18,000 compensation claims were lodged before the Kosovo courts against UNMIK, KFOR and/or Kosovo PISG in 2004. The civil compensation claims were submitted in 2004 because the relevant statute of limitations was 5 years for these types of claims, and the claimants faced the prospect of having them time-barred.
140. Apparently concerned about the strain that such a high volume of claims placed on the Kosovo judicial system, on 26 August 2004, the Director of the UNMIK DOJ sent a letter to all of the courts in Kosovo, asking them to suspend all of these cases until it could be determined how to better process them.
141. Four years later, on 28 September 2008, the DOJ advised the courts that cases which had been suspended according to its request should now be processed. When the complainants submitted their applications to the Panel, between 2008 and 2010, their compensation claims still languished – they had not been contacted by the courts and no dates for hearings had been set.
142. The Panel analysed the "14k" cases under Article 6 § 1 of the ECHR. Specifically, the Panel considered that the municipal courts had stayed the proceedings in these cases and that they had accordingly not been concluded (or even started) within a reasonable time.⁹⁵ This constituted a violation of the right of access to court and the right to have judicial proceedings conducted within a reasonable time according to Article 6 of the ECHR. The Panel also noted that with regard to the "14k cases", most significantly, it was the direct action of UNMIK's authority which effectively prevented the courts from dealing with the complainants' cases".⁹⁶
143. Regarding the issue of access to court, the Panel observed that the complainants enjoyed the possibility of bringing legal proceedings in their cases pursuant to the relevant legislation in force. They used this opportunity to lodge the lawsuits suing various authorities before the municipal or district courts for damages. However, the complainants' civil cases were, at the very moment of the lodging of their lawsuits, directed to a standstill by the DOJ request. Accordingly, no action was instituted or

⁹⁴ See *Spahiu*, no. 02/08, partial opinion of 20 March 2009, §§ 25 and 28-29.

⁹⁵ See *Milogorić and Others*, nos. 38/08 *et al*, opinion of 24 March 2010, §§ 42-46.

⁹⁶ *Ibid.*, § 18.

took place with respect to these lawsuits. The relevant courts did not issue any decision related to the standstill of proceedings in the complainants' cases. The rest of the cases in this particular category of cases faced the same impasse. The Panel concluded that the complainants' right of access to a court was restricted because of an initiative taken by an UNMIK organ, the DOJ.

144. The Panel agreed with UNMIK's reasoning that significant planning and organisation were required to ensure access to justice for those whom UNMIK acknowledged to be "vulnerable minority plaintiffs". The Panel considered this to be a legitimate aim for UNMIK's involvement in the matter and generally recognized the situation facing UNMIK in trying to oversee the proper functioning of the courts.

145. However, in assessing all the elements, the Panel found that UNMIK did not manage to achieve a reasonable relationship of proportionality between the means employed and the aim sought to be achieved. The four years of uncertainty experienced by the complainants over whether and when their cases would be processed by the courts was intensified by the fact that the August 2004 letter contained no time-frame to enable anyone to reasonably anticipate when the courts would start processing the cases, if at all. For example, no new legislation was adopted in the meantime, nor were any mechanisms provided to assist the courts in enabling the complainants to have their claims determined. In sum, instead of ensuring access to justice to vulnerable minority plaintiffs, the Panel found that UNMIK in fact denied them this access in violation of Article 6 § 1 of the ECHR.

146. Regarding the length of the proceedings, the Panel decided that it had already taken that aspect into account in its consideration of the complainants' right of access to a court, and found that the issue of the length of the proceedings must be regarded as having been absorbed by the issue of access to a court, in line with analogous ECHR jurisprudence.

C. Missing and Murdered Persons (MMP) Cases

147. In about a half of the Panel's overall caseload, the complainants alleged lack of investigation by UNMIK Police and judicial authorities into the abductions, disappearances and/or killings of their close relatives. The events related to this kind of complaints took place in Kosovo in 1998-2000 some before and some after the establishment of UNMIK, in June 1999.

i. The Background

148. Estimates regarding the effect of the Kosovo conflict on the displacement of the Kosovo Albanian population range from approximately 800,000 to 1.45 million. Following the adoption of UNSC Resolution 1244, the majority of Kosovo Albanians who had fled, or had been forcibly expelled from their houses by the Serbian forces during the conflict, returned to Kosovo. Members of the non-Albanian community – mainly but not exclusively Serbs, Roma and Slavic Muslims – as well as Kosovo

Albanians who were suspected of collaboration with the Serbian authorities, became the target of widespread attacks by Kosovo Albanian armed groups. Current estimates relating to the number of Kosovo Serbs displaced after that time are between 200,000 and 210,000. Whereas most Kosovo Serbs and other non-Albanians fled to Serbia proper and the neighbouring countries, those remaining behind became victims of systematic killings, abductions, arbitrary detentions, sexual and gender based violence, beatings and harassment.

149. As explained before, UNMIK started a new phase in the UN's work when it was called upon to govern a territory where "local judicial and legal capacity was found to be non-existent, out of practice or subject to intimidation by armed elements."⁹⁷ The "legal vacuum" created in Kosovo after the complete withdrawal of all Serbian Government services needed to be filled immediately. The UN Secretary-General reported to the international community that "the KLA has rapidly moved back into all parts of Kosovo, in particular the south-west, and a large number of Kosovo Serbs have left their homes for Serbia ... [because of] an increasing number of incidents committed by Kosovo Albanians against Kosovo Serbs. ... The security problem in Kosovo is largely a result of the absence of law and order institutions and agencies. ... Criminal gangs competing for control of scarce resources are already exploiting this void. ... The absence of a legitimate police force ... will have to be addressed as a matter of priority."⁹⁸

150. In its efforts to restore law enforcement in Kosovo, the UN decided to deploy international police personnel to UNMIK, forming what became known as UNMIK Police. By September 1999, approximately 1,100 international police officers were already in Kosovo. By December 2000, the deployment of UNMIK Police was almost complete with 4,400 personnel from 53 different countries. UNMIK had assumed primacy in law enforcement responsibility in all regions of Kosovo, except for Mitrovicë/Mitrovica.

151. The newly-established UNMIK Police, inexperienced with the specifics of policing in this post-conflict region, had to handle a high crime rate and faced many practical difficulties. According to the 2000 Annual Report of UNMIK Police, 675 murders, 115 rapes and 351 kidnappings had been reported to them in the period between June 1999 and December 2000. However, UNMIK Police had no access to any sources of information, which would be at hand for a national police force not affected by conflict, such as criminal record databases, vehicle or weapon registries.

152. In parallel to the restoration of the police structures in Kosovo, UNMIK had also to restore the system of administration of justice. At the end of June 1999, an Emergency Justice System was initiated. It was composed of a limited number of local judges and prosecutors and was operational until a regular justice system became operative in

⁹⁷ *Comprehensive review of the whole question of peacekeeping operations in all their aspects*, Report of the Panel on United Nations Peace Operations ("Brahimi Report"), A/55/305-S/2000/809, 21 August 2000, § 79.

⁹⁸ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 12 July 1999, S/1999/799, §§ 5 and 6.

January 2000. However, by February 2000, UNMIK had authorised the appointment of international judges and prosecutors, initially in the Mitrovicë/Mitrovica region and later across Kosovo, to strengthen the local justice system and to guarantee its impartiality. As of October 2002, the local justice system comprised 341 local and 24 international judges and prosecutors. In his report to the UNSC, in January 2003, the UN Secretary-General defined the police and justice system in Kosovo as being “well-functioning” and “sustainable”.

153. In July 1999, the UN Secretary-General reported to the UNSC that UNMIK considered the issue of missing persons as a particularly acute human rights concern in Kosovo. Although figures remain disputed, it is estimated that more than 15,000 deaths or disappearances occurred during and in the immediate aftermath of the Kosovo conflict (1998-2000). More than 3,000 ethnic Albanians, and about 800 Serbs, Roma and members of other minority communities went missing during this period. More than half of the missing persons had been located and their mortal remains identified by the end of 2010. As of May 2015, 1,653 individuals were listed by the International Committee of the Red Cross (ICRC) as still missing in relation to the conflict in Kosovo.

154. In November 1999, a Missing Persons Unit (MPU), mandated to investigate with respect to either the possible location of missing persons and/or gravesites, was set up within UNMIK Police. The MPU, jointly with the Central Criminal Investigation Unit (CCIU) of UNMIK Police, and later a special War Crimes Investigation Unit (WCIU), were responsible for the criminal aspects of missing persons cases in Kosovo. As of June 2002, the newly established Office on Missing Persons and Forensics (OMPF) in the UNMIK DOJ became the sole authority mandated to determine the whereabouts of missing persons, identify their mortal remains and return them to the family of the missing. Starting from 2001, based on a Memorandum of Understanding (MoU) between UNMIK and the Sarajevo-based International Commission of Missing Persons (ICMP), supplemented by a further agreement in 2003, the identification of mortal remains was carried out by the ICMP through DNA testing.

155. On 9 December 2008, UNMIK’s responsibility with regard to police and justice in Kosovo ended with EULEX assuming full operational control in the area of the rule of law, following the Statement made by the President of the UNSC on 26 November 2008,⁹⁹ welcoming the continued engagement of the European Union (EU) in Kosovo.

156. On the same date, UNMIK and EULEX signed an MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK

⁹⁹ UNSC, Statement by the President of the Security Council, S/PRST/2008/44, 26 November 2008.

authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were supposed to be handed over to EULEX.

ii. The Complaints Received

157. The first complaint concerning MMP cases was registered by the Panel's Secretariat on 13 November 2008.¹⁰⁰ In 2009, the Panel received the majority of such cases and, during the month of April 2009 alone, more than 200 were registered.
158. The first opinion on the merits from the MMP complaints was adopted by the Panel on 8 December 2012, in the *S.C.* case.¹⁰¹ From the 248 MMP cases that the Panel declared admissible, it found violations of Article 2 of the ECHR in 233 of them (93 %).
159. For reasons about which the Panel may only speculate, except for five complaints, the complainants and the victims were Kosovo Serbs and not Kosovo Albanians. In two cases filed by Kosovo Albanians,¹⁰² the victims and/or complainants had either worked for, or were somehow otherwise associated with, the Serbian police or security forces, with members of the KLA being named as suspects. The Panel also observed the fact that many of the complaints concerned the deaths and disappearances of elderly relatives.
160. Most of the complainants informed the Panel about an incident, or a number of incidents (usually related), during or after which their relatives were abducted, disappeared and/or killed. In a substantial number of cases, no information on the specific circumstances of the victim's disappearance and/or death was presented.
161. The complainants raised their concerns regarding the conduct of investigations by UNMIK authorities, which in their view were totally ineffective. They also expressed their dissatisfaction at not being able to find out what had happened to their missing relatives and the lack of contacts with UNMIK authorities with regard to the investigations.
162. In determining UNMIK's responsibility in these cases, the Panel first had to provide legal qualification for the allegations put forward against UNMIK by the complainants. In doing this, the Panel relied on the jurisprudence of the European and Inter-American Courts of Human Rights, as well as the HRC.
163. As the jurisdictional limitations *ratione temporis* did not allow for the Panel to consider matters linked to the incidents that had taken place prior 23 April 2005, the Panel was unable to look into any substantive issue that could have been, or was, raised under the substantive limb of Article 2 of the ECHR, i.e. UNMIK's alleged failure to protect the lives of persons within its jurisdiction.

¹⁰⁰ See *Zdravković*, no. 46/08.

¹⁰¹ *S.C.*, no. 02/09, opinion of 12 December 2013.

¹⁰² See *Ibraj*, nos. 14/09 *et al.*; and *X.*, nos. 326/09 *et al.*

iii. Article 2 of the ECHR

The procedural obligation under Article 2

164. In the first MMP admissibility decision in the case *Zdravković*, adopted on 17 April 2009, the Panel considered that the complainants alleged in substance the lack of an adequate criminal investigation into the events leading to the loss of their relatives (disappearance, abduction and/or killing), thus relying on the procedural obligation under Article 2 of the ECHR.¹⁰³ The concept of the procedural obligations under Article 2 largely emerged from the situations of obvious loss of life in life-threatening situations, where the investigative material presented to the reviewing experts was so poor that there were simply insufficient grounds to assess whether the death was in violation of the substantive obligation to protect life. It became a very effective tool to ensure that the authorities would not be able to avoid responsibility under Article 2 through conduct of poor investigation.

165. Because Article 2 of the ECHR, which safeguards the right to life, ranks as one of the most fundamental provisions in the ECHR and enshrines one of the basic values of democratic societies, the Panel, decided to follow the approach of the ECtHR and subject allegations of breach of this provision to the most careful scrutiny. The Panel also noted that the European Court has found a continuing violation of Article 2 of the ECHR when there has been a failure of the authorities to conduct an effective investigation into the whereabouts and fate of missing persons who have disappeared in life-threatening circumstances; delaying crucial steps of the investigation or not taking necessary investigative steps may subsequently constitute a breach of Article 2 of the ECHR. Finally, the Panel stressed that the procedural obligation under Article 2 is not confined to cases where it has been established that the killing was caused by an “agent of the State” and extended it to cover cases of disappearance.

166. The Panel thoroughly reviewed each complaint in order to ensure that UNMIK authorities were indeed informed of a particular incident. Where it was not the case, the Panel considered complaints under this article inadmissible. For example, in the *Barać* case, the Panel stated that “nothing in the information submitted by the complainant demonstrates that he ever filed any complaint with the relevant UNMIK authorities with regard to his suspicions about the circumstances surrounding the death of his brother. Therefore, the Panel considers that under the circumstances of the present case UNMIK did not have an obligation to carry out an effective investigation into Mr Tomislav Barać’s death under Article 2 of the ECHR ... It follows that this part of the complaint is manifestly ill-founded ... and therefore inadmissible.”¹⁰⁴

Applicability of Article 2 to UNMIK

167. As regards the applicability of Article 2 to UNMIK, the Panel recalled that with the adoption of the UNMIK Regulation No. 1999/1 on 25 July 1999 UNMIK undertook

¹⁰³ See *Zdravković*, no. 46/08, decision of 17 April 2009, § 28.

¹⁰⁴ See *Barać*, no. 149/09, decision of 1 October 2012, §§ 15-16.

an obligation to observe internationally recognised human rights standards in exercising its functions. This undertaking was detailed in UNMIK Regulation No. 1999/24 of 12 December 1999, by which UNMIK assumed obligations under the listed international human rights instruments, including the ECHR. In this respect, the Panel noted time and again that while UNMIK's interim character and related difficulties must be duly taken into account, under no circumstances could these elements be taken as a justification for diminishing standards of respect for human rights, which were duly incorporated into UNMIK's mandate.

168. Concerning the applicability of Article 2 of the ECHR to situations of conflict or generalised violence, the Panel recalled that the ECtHR and HRC established that the procedural obligation to guard life and, subsequently, investigate any loss of life continues to apply in post-conflict situations, including in difficult security conditions. It is likewise understood that obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed. Nonetheless, the right to life, including its procedural guarantees, shall be considered as the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation.

169. The Panel gave due consideration to the difficulties encountered by UNMIK during the first phase of its deployment. It noted that the appropriate importance attached to the issue of missing persons in Kosovo meant that UNMIK had to take into account both the humanitarian and criminal dimensions of the situation. The Panel also considered that “the importance attached to the criminal investigations and the difficulties in Kosovo that limited the abilities of investigating authorities to conduct such investigations ... made it crucial that UNMIK establish from the outset an environment conducive to the performance of meaningful investigations. This would involve putting in place a system that would include such elements as the allocation of overall responsibility for the supervision and monitoring of progress in investigations, provision for the regular review of the status of investigations, and a process for the proper handover of cases between different officers or units of UNMIK Police. Such a system should also take account of the protection needs of victims and witnesses ... as well as to consider the special vulnerability of displaced persons in post-conflict situations ... While understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel deems that this process was completed in 2003 when the police and justice system in Kosovo was described as being “well-functioning” and “sustainable” by the UN Secretary-General.”¹⁰⁵

170. The Panel stated that it would not “review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application to the particular circumstances of a situation subject of a complaint before it”, and that it would apply the necessary nature and degree of scrutiny “to determine

¹⁰⁵ See *Stojković*, no. 87/09, opinion of 14 December 2013, § 128.

whether the effectiveness of the investigation satisfies the minimum threshold”. Thus, the Panel’s aim was to “establish with regard to each case if all reasonable steps were taken to conduct an effective investigation as prescribed by Article 2, having regard to the realities of the investigative work in Kosovo.”¹⁰⁶

171. The Panel took into account the sensitivity of information related to the investigations carried out by UNMIK and other authorities into the MMP cases. Therefore, it was extremely careful not to reveal in its opinions any information, where disclosure could be potentially harmful to the complainants or third parties, or otherwise was not appropriate for general public knowledge. Thus, the Panel removed from the decisions and opinions all addresses and other contact details of the complainants; names and addresses of witnesses; information that would allow perpetrators to assess the evidence in authorities’ possession; information marked “confidential” under internal UN rules; and other information the Panel deemed sensitive.

172. In considering this aspect of the MMP complaints, the Panel concentrated on the assessment of the adequacy and sufficiency of investigative and other actions undertaken by UNMIK authorities in every specific case, comparing against the standards of an effective investigation set forth by the ECtHR under the procedural limb of Article 2 of the ECHR.

Issues in the investigative process leading to finding violation of procedural obligation under Article 2

173. In cases when a killing/abduction/disappearance had taken place prior to the Panel’s jurisdiction *ratione temporis*, even in some instances before the establishment of UNMIK, but there was evidence of UNMIK authorities having been informed about them, the Panel stated that the continuous obligation to investigate such criminal matters in accordance with Article 2 of the ECHR was assumed by UNMIK.¹⁰⁷

174. Below are highlighted the most important issues affecting, to different degrees, the adequacy of the investigation. We can group them in three main categories.

175. *Investigative process issues*

- There were significant delays in the registration of the MMP reports by UNMIK Police, or, in some cases, failure to register them at all. At times, the delays were for months and years, with no explanation provided. It is likely that UNMIK Police often failed to inform prosecutors about criminal reports related to MMP cases.
- Important delays in, or even the complete absence of, initial investigative actions, such as crime scene investigation, “canvassing” of surrounding areas, collection

¹⁰⁶ See *Zdravković*, no. 46/08, opinion of 25 February 2013, §§ 107-115.

¹⁰⁷ See *Five Complainants*, nos. 43/09 *et al*, opinion of 31 July 2013, § 100; *Antić*, no. 100/09, opinion of 12 September 2013, §§ 61 and 64; *Anđelković*, no. 277/09, opinion of 23 January 2014, §§ 70 and 73.

and preservation of physical evidence, recording of witnesses' statements undermined the evidentiary basis of investigations from the very beginning.

- Attempts to locate witnesses in many instances did not seem to be thorough or diligent;¹⁰⁸ police often assumed that a witness was not impartial before talking to him or her.¹⁰⁹
- UNMIK failed to reach out to complainants and witnesses who had left Kosovo for security reasons. The special vulnerability of IDPs in post-conflict situations was also to be taken into account.¹¹⁰
- Delays in attempts to locate and interview witnesses appeared to be widespread. Because of such delays, witnesses died, others relocated and became untraceable.¹¹¹
- Lack of protection of witnesses in Kosovo from threats or intimidation has been, and remains, one of the greatest challenges for justice authorities.¹¹²
- There was a serious lack of proper sharing of information between relevant UNMIK Police units, which prevented “a properly coordinated system that is able to carry out an adequate and effective investigation.”¹¹³
- There were instances when the mortal remains of victims were “lost” by UNMIK authorities and no explanation was provided to the families for years.¹¹⁴
- In an overwhelming majority of cases the Panel found that the families of missing or murdered victims were either provided with no information about the state and progress of investigation, or the amount of this information was insufficient to safeguard their legitimate interests.¹¹⁵
- Police investigations were discontinued after an internal review, without informing the responsible prosecutors and the injured parties. In a number of cases the investigations were “dropped” without any formal decision and without any visible reason, despite leads that still needed to be followed. Moreover, on many occasions leads and recommendations identified by the reviewing investigators/prosecutors were not followed.

¹⁰⁸ See *Čungurović*, no. 131/09, opinion of 6 August 2014, § 34; *Lazić*, no. 261/09, opinion of 27 February 2015, § 35; *Ristić*, nos. 224/09 et al., opinion of 11 September 2015, § 45.

¹⁰⁹ See *Ristić*, *ibid.*, § 109.

¹¹⁰ See *Buljević*, no. 146/09, opinion of 13 December 2013, § 100.

¹¹¹ See *Kuzmanović*, no. 262/09, opinion of 21 January 2015, §§ 25 and 99.

¹¹² See *Mirić and Others*, nos. 68/09 et al, opinion of 10 September 2015, § 197; *Mladenović*, no. 99/09, opinion of 26 June 2014, § 200; *Nikolić and Others*, nos. 72/09 et al, opinion of 14 December 2014, §§ 201-202.

¹¹³ See *Stojković*, no. 87/09, opinion of 14 December 2013, § 164. For examples of failures to link obvious information, causing investigations to remain separate, see also *Vitošević*, nos. 90/09 and 103/09, opinion of 27 November 2013, §§ 97, 98 and 102; *Mišljen and Others*, nos. 58/09 et al, opinion of 13 November 2015, §§ 142, 165 and 175; *Bucalo and Others*, no. 148/09 et al, opinion of 4 February 2016, §§ 58 and 149.

¹¹⁴ See *Milenković*, no. 255/09, opinion of 26 June 2015, §§ 81-82.

¹¹⁵ See *Lazić*, no. 261/09, opinion of 27 February 2015, § 125.

176. Structural issues

- A number of files reflected situations when victims were abducted in front of KFOR units,¹¹⁶ or information on abductions was passed to a KFOR unit.¹¹⁷ No investigative action was pursued by UNMIK Police.
- In a large number of cases there were no indications of any prosecutorial overview control or any kind of involvement by public prosecutors. Even in cases where complainants submitted criminal reports to international public prosecutors, those reports seemed to have been only translated, without any proper action followed.¹¹⁸ It seems likely that international prosecutors took no meaningful action in investigating the reported incidents themselves, nor that they exercised their supervisory function with regard to the investigations conducted by UNMIK Police.
- Serbian state authorities sent to UNMIK substantive information providing details of various incidents, including the locations, dates and names of victims, suspects and witnesses. However, in most of these cases, there was no proper cooperation between UNMIK and the Serbian authorities.¹¹⁹
- Lack of coordination between UNMIK, ICTY and KFOR caused problems for the investigators. In some cases, UNMIK Police did not investigate because the ICTY had taken over the investigations, but without providing any documentation.¹²⁰ Accordingly, the Panel found no fault in the actions of UNMIK organs, while it could not assess the actions of the ICTY because of its jurisdictional limitations *ratione personae*.¹²¹ Nevertheless, the Panel expressed its position in this respect, saying that there should have been a trail of paperwork between UNMIK and the ICTY, indicating the handover of proceedings, but that it was lacking.

177. Policy issues

- Some investigations had been suspended after receiving only the initial information. The inaction of UNMIK Police was justified by the argument that such investigations “were not considered a priority.”¹²²
- An internal memorandum of UNMIK Police and DOJ (2003) stated that, in order to preserve its limited investigative resources, UNMIK Police was to concentrate

¹¹⁶ See *Tomanović and Others*, nos. 248 *et al*, opinion of 25 April 2013, §§ 23.

¹¹⁷ See *ibid.*, §§ 25 and 72; *Pejčinović*, no. 89/09, opinion of 13 March 2014, §§ 31, 40, 47 and 52; *Vitošević and Majmarević*, nos. 139/09 *et al*, opinion of 23 January 2014, §§ 32, 39, 40 and 119; *Mirić and Others*, nos. 68/09 *et al*, opinion of 10 September 2015, § 64.

¹¹⁸ See e.g. *Lazić*, no. 261/09, opinion of 27 February 2015, §§ 37, 115, 120 and 155; *Kostić and Others*, nos. 111/09 *et al*, opinion of 23 October 2015, §§ 115 and 265; *Mišljen and Others*, nos. 58/09 *et al*, opinion of 13 November 2015, §§ 65, 66, 164, 166 and 181.

¹¹⁹ See *Kostić and Others*, *ibid.*, §§ 96-98; *Bucalo and Others*, cases nos. 148/09 *et al*, opinion of 4 February 2016, § 41.

¹²⁰ See *Vitošević and Majmarević*, cases nos. 139/09 *et al*, opinion of 23 January 2014, §§ 72, 88, 98 and 127-132.

¹²¹ See e.g. *Remištar*, no. 245/09, opinion of 14 October 2014, §§ 104-118; *Mitrović and Others*, nos. 144/09 *et al*, opinion of 13 November 2014, §§ 193-203.

¹²² See *B.A.*, no. 52/09, opinion of 1 February 2013, §§ 26 and 46-49.

only on investigation of crimes “with a strong likelihood of suspect identification.”¹²³

- The Panel also found that no substantive effort was made by UNMIK investigative authorities to investigate in a systematic and coordinated manner the disappearance and killing of a large number of Kosovo Serbs where there was an obvious line of enquiry leading to KLA suspected perpetrators.¹²⁴

iv. Article 3 of the ECHR

The substantive obligation under Article 3

178. The Panel considered that complainants also alleged that the lack of an adequate criminal investigation into the incidents leading to the loss of their relatives and the lack of information from UNMIK authorities in relation to the investigations caused them mental pain and suffering, in violation of the substantive part of Article 3 of the ECHR.

179. In considering this aspect of MMP complaints, the Panel examined the situation of each particular complainant in order to establish whether by its behaviour UNMIK contributed to the complainant’s distress and mental suffering, in violation of the substantive obligation of Article 3 of the ECHR.

180. The consideration of Article 3 issues was always made in connection with the Panel’s findings in relation to Article 2. In particular, the Panel looked into the periods of complete (or almost complete) inaction of the authorities, especially in the situations when the minimum necessary information to pursue investigation from the outset was available.

181. The first opinion where Article 3 issues were considered alongside Article 2 was adopted by the Panel on 23 April 2013, in the *Jocić* case.¹²⁵

182. From out of the total of 248 MMP cases declared admissible, in 178 cases the Panel considered that the allegations also included issues under Article 3 of the ECHR. Out of those 178 cases, in 163 the Panel found that UNMIK had not acted in conformity with the substantive requirement of Article 3.

Applicability of Article 3 to UNMIK

183. Discussing the complaints against UNMIK before it, the Panel applied the same approach which it developed to the issues under Article 2 of the ECHR. The Panel stressed that it would not “review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application

¹²³ See *Stevanović*, no. 289/09, opinion of 14 December 2014, § 42.

¹²⁴ See e.g. *Nikolić and Others*, nos. 72/09 *et al*, opinion of 14 December 2014, § 203; *Mirić and Others*, nos. 68/09 *et al*, opinion of 10 September 2015, § 204; *Kostić and Others*, nos. 111/09 *et al*, opinion of 23 October 2015, § 261.

¹²⁵ See *Jocić*, no. 34/09, opinion of 23 April 2013.

to the complaint before it, considering the particular circumstances of the case.”¹²⁶ For these reasons, the Panel considered that it had to establish with regard to each case “whether the attitude and reactions of UNMIK authorities to the disappearance itself and to the complainants’ quest for information with regard to the fate of their relatives and the criminal investigation, would amount to a violation of the obligation under Article 3, having regard to the realities in Kosovo at the relevant time.”¹²⁷

184. The analysis of the authorities’ reaction is “not confined to any specific manifestation of the authorities’ attitudes, isolated incidents or procedural acts” but there should be a “global and continuous assessment of the way in which the authorities of the respondent State responded to the applicants’ enquiries.”¹²⁸

185. Violations of Article 3 of the ECHR could be found in relation to disappearances in which the state itself was found to be responsible for the abduction. However, since in no way was UNMIK implicated in the actual disappearance, UNMIK could not be held responsible for the applicant’s mental distress caused by the commission of the crime itself.

186. The Panel recalled “that the authorities’ conduct, albeit negligent to the extent that it has breached Article 2 in its procedural aspect, could have in itself caused the applicant mental distress in excess of the minimum level of severity, which is necessary in order to consider treatment as falling within the scope of Article 3.”¹²⁹

Issues leading to the finding of a violation or no violation of Article 3

187. In assessing whether the substantive provisions of Article 3 had been violated, the Panel considered the proximity of family ties between the victim(s) and the complainant(s), whether the complainant witnessed the disappearance, whether he/she was in contact with UNMIK investigative authorities in this respect, the period of time which passed between the disappearance, location of mortal remains, their identification, and their final return to the family, and in case of an unreasonable delay – whether any explanation for that was presented by UNMIK. In a very small number of cases, the Panel found violations of Article 2 with regard to all complainants, but of Article 3 only with regard to some of them.¹³⁰ In situations when the Panel did not see any evidence showing that UNMIK authorities were informed or were otherwise made aware of the alleged disappearance, the Panel found no violation of Article 3 as it was not persuaded that by their conduct the UNMIK authorities caused or in any way contributed to the mental distress of the complainants.¹³¹

¹²⁶ *Ibid.* §§ 81.

¹²⁷ *Ibid.* §§ 114-117.

¹²⁸ *Ibid.*, § 108.

¹²⁹ *Ibid.*, § 111.

¹³⁰ See *Spasić and Others*, nos. 221/09 *et al*, opinion of 31 July 2013, §§ 141-142; see also *Vitošević and Majmarević*, nos. 139/09 *et al*, opinion of 23 January 2014, §§ 178-179.

¹³¹ See *Jovičić*, no. 233/09, opinion of 24 June 2015, §§ 79-88.

188. The following particular issues were highlighted by the Panel:

- The Panel thoroughly considered whether the complainants were kept regularly apprised of the process of investigation, or at all contacted by UNMIK authorities. For example, in many cases the complainants were left without any information, and some of them had even undertaken their own investigations.¹³²
- Likewise, the Panel verified if the complainant was interviewed by the police, as an injured party or a witness. It appeared that in some cases they were contacted by phone and what they said was then more or less accurately reflected in police reports, but in most cases their statements were never officially recorded.¹³³

D. Discrimination

189. Inter-ethnic tensions and discrimination have been pervasive in Kosovo in the aftermath of the conflict. Nonetheless, the Panel received a very limited number of complaints directly about discrimination, mostly from members of Kosovo non-majority communities in the context of restructuring and/or privatization of socially-owned enterprises (SOEs). However, the Panel has always been aware of covert direct and indirect discrimination.

190. It emerged from the complaints related to privatisation of SOEs that UNMIK had established an apparently neutral legal framework to regulate the distribution of 20% of privatization proceeds which, however, inevitably created inequalities among employees on the ground of ethnicity, due to the post-conflict environment. The Panel noted that certain rules – primarily the requirement that an employee must have been working with an SOE at the time of the privatization in order to benefit from its sale or, alternatively, the requirement to prove in court that his or her disadvantaged position was not due to discrimination – as well as their practical interpretation by the privatisation bodies, failed to take into account the specific needs and vulnerable situation of those employees belonging to non-majority communities who, due to security concerns, had had to leave their workplace and live in displacement with limited or no access to court. In these cases, the Panel found that the strict evidentiary requirements required of the complainants as IDPs, as well as the inconsistent evaluation of evidence by the KTA and the Special Chamber resulted in their unfair exclusion from the privatization proceeds and amounted to instances of indirect or *de facto* discrimination with respect to the complainants' rights to property and access to court.¹³⁴

191. Another point which emerged from the complaints to the Panel was that UNMIK had not made sufficient efforts to ensure the implementation of the anti-discrimination

¹³² See, e.g., *Jocić, ibid.*, § 120; *Lazić*, no. 261/09, opinion of 27 February 2015, § 125.

¹³³ See *Jocić, ibid.*, § 122.

¹³⁴ See *Guga*, no. 47/08, opinion of 24 January 2014; *Ristić*, no. 319/09, opinion of 30 May 2014; and the earlier case of *Parlić*, no. 01/07, opinion of 18 June 2010, §§ 55-57, in which the Panel first elaborated on the concept of indirect discrimination, but did not consider necessary to examine the complaint under Article 14 of the ECHR in addition to Article 6 of the ECHR.

legislation, adopted as of 2004 to comply with European and international standards. The Kosovo Anti-Discrimination Law (ADL)¹³⁵ envisaged, among other provisions, the application of the reversal of the burden of proof in all discrimination claims. According to this Law – also applied by the Panel in its examination of the complaints about discrimination – when a complainant establishes facts from which it may be presumed *prima facie* that there has been direct or indirect discrimination, the burden shall be on the respondent to disprove discrimination.¹³⁶ Notwithstanding the legal interpretation given by the SRSG that the ADL would supersede all previous legislation, the Panel noted that in a number of instances the KTA and the Special Chamber had not correctly applied the rule on the burden of proof. It had disregarded without an adequate explanation the *prima facie* evidence provided by the complainants and failed to shift the burden of proof to the respondent, which resulted in another layer of discrimination against the complainants.¹³⁷ In the *Guga* case, the Panel also noted that a further layer of discrimination against the complainant, a former employee of Egyptian ethnicity, had resulted from the profound and long-standing inconsistencies in the case-law of the Special Chamber, which in other privatisation cases involving former employees from other minority groups in a situation similar to the complainant, had eventually recognised their right to a share of the proceeds.¹³⁸

192. The case of *N.M. and Others*¹³⁹ brought to the attention of the Panel the issue of the historical marginalisation, including by residential segregation, of the Roma in Europe, along with the issue of multiple or intersectional discrimination suffered by the complainants as IDPs, as members of the Roma, Ashkali and Egyptian (RAE) community in Kosovo and, for the female complainants, as women placed in lead contaminated IDP camps in Northern Mitrovicë/Mitrovica. The Panel appreciated the establishment of RAE IDP camps by UNMIK immediately after the destruction of the Roma Mahalla in June 1999 in order to accommodate the flow of thousands of RAE IDPs. However, it noted that such a solution, intended to be temporary due to the hazardous proximity of the camps to sources of lead contamination, lasted for more than ten years and that during this time the complainants were left without medical assistance.

193. The Panel found that UNMIK's response to the situation of the complainants was tainted by racial prejudice, as also transpired from the argument put forward by UNMIK and contradicted by scientific evidence, that the health crises in the camps were generated by the "unhealthy" life-style of the RAE IDPs, or the argument that UNMIK could not move them to an alternative, safe, location that was "acceptable" to

¹³⁵ Law No. 2004/03 adopted by the Kosovo Assembly on 19 February 2004 and promulgated by the SRSG on 20 August 2004 (UNMIK Regulation No. 2004/32 "On the Promulgation of the Anti-Discrimination Law Adopted by the Assembly of Kosovo").

¹³⁶ Article 8(1) of the ADL.

¹³⁷ See *Guga*, no. 47/08, opinion of 24 January 2014, §§ 68-81; *Ristić*, no. 319/09, opinion of 30 May 2014, §§ 53 and 73-78.

¹³⁸ See *Guga*, *ibid.*, §§ 68-81 and 86-87.

¹³⁹ See *N.M. and Others*, no. 26/08, opinion of 26 February 2016. The Panel's findings on this case are summarised in detail below, E. Access to Justice.

all stakeholders. The Panel pointed out that UNMIK had, in addition to the obligation not to discriminate, also the obligation to avoid the perpetuation of discriminatory practices against the RAE community by local authorities in Kosovo. UNMIK also had the obligation to afford special protection to the complainants as IDPs and as members of the RAE community, in a particularly vulnerable situation. The Panel also highlighted UNMIK's failure to apply a gender perspective to the situation. It did not take into account how the lead contamination was affecting differently and disproportionately the health and well-being of RAE women in the camps, nor did it take the required remedial actions, for example by providing access to regular screening and adequate health care for pregnant women. These omissions resulted in additional direct and indirect discrimination against the RAE women, in violation of Article 12 of the CEDAW and of the CEDAW Committee General Recommendation No. 24.

E. Access to Justice

194. Another significant category of complaints submitted to the Panel involved issues related to access to justice, under Article 6 of the ECHR (i.e. right to a fair trial, right to an independent and impartial tribunal, etc.). In most of these cases, the complainants stated that they had some sort of property rights, until June 1999 when they were forced to leave Kosovo and became internally displaced.
195. After the arrival of UNMIK in Kosovo, the Housing and Property Directorate (HPD) and the Housing and Property Claims Commission (HPCC) were established by UNMIK.¹⁴⁰ The HPD's mandate was to regularize housing and residential property rights in Kosovo. The HPCC was an independent organ of the HPD responsible for settling disputes concerning residential property referred to it by the HPD until the SRSG determined that the local courts were able to carry out those functions.
196. The issue as to whether Article 6 of the ECHR applied to the HPCC was examined by the Panel not long after its inception. In the *Vučković* case, the Panel concluded that although the HPCC was not a classic court, it was a mass claims processing body, which following an adversarial process issued binding and enforceable decisions. On this basis, it decided that the HPCC was judicial in function such that Article 6 of the ECHR applied to proceedings before it.¹⁴¹
197. In some cases, the Panel had also to determine whether the KPA had denied the complainant the right to enforcement of the HPCC's final decision, in violation of Article 6 of the ECHR. In the *Vulić* case, the complainant's immovable property in Klinë/Klina Municipality was usurped after the hostilities broke out. On 16 November 2006, the HPCC adopted a decision in favour of his repossession. It was more than two years and seven months before the decision was successfully enforced and the complainant took possession of his property. The complainant had, to a certain degree,

¹⁴⁰ UNMIK Regulation No. 1999/23 "On the Establishment of the Housing and Property Directorate and the Housing and Property Claims Commission", 15 November 1999.

¹⁴¹ See *Vučković*, no. 03/07, opinion of 13 March 2010, § 34.

contributed to the delay by not picking up the keys to the property and by not following the KPA's standard operating procedures. In this way, the complainant passed the obligation on to the police to conduct any eviction. However, the police indicated that it was the KPA who had to act upon the request for eviction. As a result, the complainant had essentially put himself in a situation where neither the KPA nor the police appeared to be responsible for conducting the eviction.¹⁴²

198. In the *Kušić* case, the Panel had also to determine whether the unimplemented execution of a HPCC decision more than nine years on had violated the right to the execution of a decision within a reasonable time, contrary to Article 6 of the ECHR. UNMIK did not put forward any convincing arguments as to why this delay had occurred. The complainant was therefore faced with the uncertainty of an indeterminate wait.¹⁴³

F. Economic and Social Rights

199. As the ICESCR was included in the international instruments constituting the Panel's applicable law, the Panel examined complaints from pensioners, employees and returnees under it. It examined three cases of alleged violation of the right to be protected from social risks and contingencies such as old age, unemployment and return, even in time of resource constraints or restructuring of the economy.

200. In the case of *Krasniqi*¹⁴⁴, the Panel assessed the efforts made by UNMIK to resolve the situation of those pensioners who had contributed to and accrued pension rights within the pension scheme of the former Yugoslavia and had their pension discontinued by the Belgrade authorities as a consequence of the conflict. The Panel acknowledged that, by establishing a new pension system under the Kosovo legal system, UNMIK had complied with part of its obligations under the ICESCR. However, from the point of view of the adequacy of the Kosovo pensions the Panel considered, in line with the concerns expressed by the UN Committee on Economic, Social and Cultural Rights, and in consideration of special needs and vulnerability of elder persons, that the monthly pension of 45 euros provided to the complainant during the Panel's jurisdiction, was not sufficient to guarantee his access to basic essential services and goods (Article 9 of the ICESCR).

201. In the case of the employees of the Trepça/Trepča mining complex, Kišnica branch,¹⁴⁵ who had been made redundant by the closure of the mines after the arrival of UNMIK, the Panel re-affirmed the principle that state authorities have the obligation under the Covenant to regulate by law and oversee the provision of social security benefits. In the specific case before it, concerning a group of employees not in receipt of the redundancy stipends offered to other inactive employees of Trepça/Trepča, the Panel found that the failure by UNMIK to establish a clear legal basis for, and to monitor the

¹⁴² See *Vulić*, no. 05/07, opinion of 18 March 2011, § 59.

¹⁴³ See *Kušić*, no. 08/07, opinion of 15 May 2010, § 65.

¹⁴⁴ See *Krasniqi*, no. 08/10, opinion of 17 May 2016.

¹⁴⁵ See *Employees of the Kišnica and Novo Brdo Mines of Trepča Complex*, no. 81/10, opinion of 18 May 2016.

implementation of, the stipends system reflected, as also later stated by the Kosovo Office of the Auditor General, in the unfair exclusion of the complainants in violation of their right to social security. In both cases mentioned above, the Panel concluded that, as the complainants were left without adequate means to support themselves and their families, their right to an adequate standard of living (Article 11 of the ICESCR) was also violated.

202. In the case of *B.K.*, concerning the forced repatriation of the complainant to Kosovo in 2008, after he had lived and worked for 23 years in the United States of America, the Panel found that the failure by UNMIK to implement a readmission policy towards ensuring safe and dignified return of all returnees, especially the most vulnerable, and the lack of any assistance provided to the complainant, affected by a medical condition from birth, had placed him in a situation of extreme poverty and want. This was incompatible with human dignity, which amounted to a violation of UNMIK's minimum core obligations under Articles 9 and 11 of the ICESCR, as well as to a violation of Article 3 of the ECHR.¹⁴⁶

G. Violence Against Women

203. As the CEDAW was included in the international instruments constituting the Panel's applicable law, the Panel considered complaints under it.

204. Very few cases filed with the Panel suggested the occurrence of sexual violence and violence against women, nonetheless the Panel was aware of its frequent incidence during and in the aftermath of the conflict in Kosovo.

205. In two cases involving multiple complainants and victims, the Panel found that UNMIK did not exercise due diligence in the investigation of violence against women and indicated that its failure to conduct gender-sensitive investigations might have contributed to the general lack of documentation of conflict-related sexual violence in Kosovo and hampered access to justice by, and reparations for, victims. In the case of a KLA attack in July 1998 on Rahovec/Orahovac and surrounding villages, where civilian women were separated from men and illegally detained for several days, the Panel applied Article 5 (right to liberty) of the ECHR to encompass a procedural limb. It asserted an obligation of the relevant authorities – here UNMIK Police – to investigate detention by non-state actors in situations where there is a possibility that sexual violence might have occurred. In so doing, the Panel referred to the jurisprudence of the HRC that a positive obligation exists under Article 9 of the ICCPR *vis-à-vis* arbitrary detention of women during armed conflict, which makes them particularly exposed to sexual violence. It also drew upon the international instruments¹⁴⁷ qualifying arbitrary detention of women as a form of violence against

¹⁴⁶ See *B.K.*, no. 85/10, opinion of 13 November 2015, § 52.

¹⁴⁷ See CEDAW Committee General Recommendation No. 19 on Violence Against Women, A/47/38, 1992; UN GA Resolution 48/104, Declaration on Elimination of Violence Against Women, 20 December 1993.

women that states have the obligation to prevent, investigate and punish, whether committed by their agents or private persons.¹⁴⁸

206. In the case of *S.M.*, the Panel, in line with the jurisprudence of the ECtHR, the UN Committee against Torture and the CEDAW Committee, found that the rape and killing by the KLA in June 1999 of a young woman affected by disability, in the presence of her mother, amounted to an act of torture as well as of sexual and gender-based violence. Therefore, UNMIK had violated its international obligations to diligently investigate and prosecute it.¹⁴⁹

207. As well as conflict-related violence, in the case of *N.M. and Others* concerning RAE IDPs placed by UNMIK in lead contaminated camps, the Panel identified that creating conditions for self-abortion by female IDPs who feared they would deliver babies affected by abnormalities, was also a form of gender-based violence and a manifestation of gender-based discrimination,¹⁵⁰ which UNMIK had failed to protect women against.¹⁵¹

H. Lead Contamination in the IDP Camps

208. The opinion in the case of *N.M. and Others*, which the Panel adopted on 26 February 2016, was one of the most important opinions of the entire life of the Panel, and as such, warrants more analysis. The complainants were 138 members of the RAE community in Kosovo. During the 1999 conflict in Kosovo, many Roma who had formerly lived in the Roma Mahala settlement in south Mitrovicë/Mitrovica fled to north Mitrovicë/Mitrovica as a result of inter-ethnic violence and the destruction of their homes. Approximately 600 Roma were placed in IDP camps (Zhikoc/Žitkovac, Cesminluka/Česmin Lug, Kablare, Leposaviq/Leposavić, and Osterode) near the Trepça/Trepča smelter and its sites used to store the waste from mining. The Trepça/Trepča smelter, the largest producer of zinc and lead in the former Yugoslavia, with approximately 15,000 workers employed in 1999, extracted metals, including lead, from the products of nearby mines from the 1930s until 1999.

209. Approximately half of the complainants were children. About 75 complainants were women and girls. At least 13 of them delivered babies in the camps and have also submitted the complaint on behalf of their children. All complainants claimed to have suffered lead poisoning and subsequent health problems on account of the soil contamination in the camp sites due to their proximity to the Trepça/Trepča smelter and mining complex and on account of the generally poor hygiene and living conditions in the camps. Four complainants claimed that their family members died in the camps as a result of lead poisoning.

210. The complainants claimed that UNMIK violated their human rights by placing them in IDP camps on land known to be highly contaminated, by not providing them with

¹⁴⁸ See *Kostić and Others*, nos. 111/09 *et al*, opinion of 23 October 2015, §§ 322-334.

¹⁴⁹ See *S.M.*, no. 342/09, opinion of 18 March 2016, §§ 134-141 and 148-149.

¹⁵⁰ See CEDAW Committee General Recommendation No. 19 on Violence Against Women, A/47/38, 1992.

¹⁵¹ See *N.M. and Others*, no. 26/08, opinion of 26 February 2016, § 327.

timely information about the health risks or the required medical treatment, as well as by failing to relocate them to a safe location.

Right to life

211. The Panel emphasised the positive obligation on the state to take appropriate steps to safeguard the lives of those within their jurisdiction, with special attention to indigenous persons who, or because of their specific situations such as extreme poverty or exclusion, find themselves among the most vulnerable in the society.
212. The Panel considered that the record showed that the heavy exposure to contamination, coupled with poor living conditions in the camps, which lasted for more than ten years, three of which were within the Panel's jurisdiction, had posed a real and immediate threat to the complainants' life and physical integrity. In the regulatory and institutional vacuum within Kosovo in the aftermath of the conflict, the findings and recommendations of World Health Organisation experts, as well as other specialised bodies, should have informed UNMIK's response to the health crisis in the camps.
213. The ECtHR has established that positive obligations under Article 2 of the ECHR, in the context of dangerous activities and environmental matters, include the obligation on the competent authorities to provide access to essential information enabling individuals to assess risks to their health and lives. From the documentation in its possession, the Panel deemed that UNMIK did not provide adequate information to the complainants on the risks to their health and lives deriving from their long term presence in the camps.

Prohibition of torture and inhuman or degrading treatment

214. The Panel did not underestimate the burden that UNMIK had to face immediately following its arrival in Kosovo and appreciated its efforts at reconstruction. However, the Panel did not exclude UNMIK's responsibility towards the complainants, especially when considering that the situation complained of had lasted for more than ten years.
215. The Panel rejected the argument that the Roma have historically lived in substandard living conditions, an argument that suggests that the social and economic marginalisation of Roma people is based on race and on their own actions and, as such, may be perpetuated without responsibility. The marginalisation of the Roma and the traumatic experiences which led to their IDP status in Kosovo made the complainants especially vulnerable to inhuman and degrading treatment and UNMIK was responsible for their well-being.

Right to respect for private and family life

216. The lack of access to relevant information adversely affected the reproductive rights of women in the camps, in particular the pregnant women such as those who

reportedly incurred self-abortion or miscarriage as a consequence of lead poisoning. Other interests, such as political and security issues or economic constraints, had been put forward by UNMIK to justify its failure to take certain actions in order to protect the complainants from the environmental hazards they were exposed to.

217. Concerning the location of the complainants, the Panel acknowledged UNMIK's efforts to accommodate them, but considered that no sufficient evidence had been presented to prove that the relocation to a safe area was impeded by other pressing difficulties which made it a disproportionate burden. Therefore, the Panel considered that UNMIK did not succeed in striking a fair balance between the interests of the community and the complainants' enjoyment of their rights to respect for private and family life.

Right to health and adequate standard of living

218. UNMIK failed to provide systematic monitoring of the lead contamination in the camps, through regular blood testing, and it only provided appropriate therapy for a limited time and to some people. After October 2007, IDPs were left without the health treatment that counters the effects of lead poisoning. UNMIK did not take all appropriate steps towards the progressive realisation of the complainants' right to health in the period within the Panel's jurisdiction.

219. The Panel was concerned that UNMIK's inadequate response to the crisis might have been driven by discriminatory stereotypes rather than scientific evidence, as the latter would have shown that proximity to the Trepça/Trepča smelter and its tailing dams was the main source of lead contamination. Taking note of the findings, the Panel considered shameful that such a record was attributable to the action and/or inaction of an entity of the United Nations – UNMIK – at the core of whose mandate was the protection of displaced persons from the conflict.

Additional discrimination against female complainants

220. The Panel took account of the reports and other material which provide evidence that Roma women are historically likely to experience multiple discriminations. In this case, it considered that there was little room for doubt that *de facto* the female complainants were additionally and disproportionately affected by the extremely unhealthy situation in the camps. Since its early days, UNMIK was aware of the high health risks posed by lead poisoning to pregnant women and children.

221. In these circumstances, UNMIK had the obligation under the CEDAW to adopt positive measures to adequately respond to the situation of particular disadvantage of female complainants. These included the obligation to ensure that the pregnant women could carry out their pregnancy in a safe environment, providing easy access to regular screening and adequate health care, access to adequate hygiene and nutrition, collection of data on still-births and miscarriages for the purpose of monitoring,

provision of psychological and support services to those women who had incurred miscarriage, abortion or still-birth.

Children's rights

222. Finally, as the CRC was also included in the international instruments constituting the Panel's applicable law, the Panel considered the situation under it.
223. The Panel considered insufficient and inadequate the actions taken by UNMIK to fulfil its obligation under the CRC. The lives and health of children should have been the overriding consideration guiding UNMIK's response to the situation. However, UNMIK did not explain how the best interest of the children in the camps was considered, assessed or determined when deciding and enacting measures in response to the situation in the camps.
224. Consequently, the Panel found that, through its actions and omissions, UNMIK was responsible for compromising irreversibly the life, health and development potential of children who were born and grew up in the camps.

I. The *Balaj and Others* Case

225. The Panel had only one other occasion to evaluate whether UNMIK had violated both the substantive and procedural limbs of Article 2 of the ECHR concerning the right to life. In the case of *Balaj and Others*, UNMIK Police used excessive force during a crowd control operation in Kosovo on 17 February 2007, resulting in the deaths of two victims and the serious bodily injury of two other persons. In accordance with the Administrative Direction, the Panel declared the case inadmissible.
226. However, the Panel left the door open when it noted in the inadmissibility decision that "if the complainants are required to re-file a complaint after the conclusion of the UN Third Party Claims Process, they would invariably run afoul of the 31 March 2010 deadline for the submission of new complaints. The requirement of going through the UN Third Party Claims Process would in that case in effect extinguish the complaint without the possibility of the complainants resubmitting it to the Panel, despite the fact that ... the complaint was admissible under the regulatory framework applicable when it was filed. Such a result would offend basic notions of justice". In 2012, when the Third Party Claims Process had concluded, the Panel decided, over the objection of UNMIK, that the complainants could request the Panel to reopen the proceedings without the cut-off deadline of 31 March 2010 being an obstacle to a continued examination of their complaint.¹⁵² The complainants did avail themselves of this opportunity, which other complainants with collateral complaints lodged with the UN Third Party Claims Process would also use, and would become known as the *Balaj exception*.

¹⁵² See *Balaj and Others*, no. 04/07, decision of 11 May 2012, § 53.

227. The Panel found, first, that in the circumstances of this case the force used to disperse the demonstrators, which caused the deaths of Mr Mon Balaj and Mr Arben Xheladini and injuries to two others, was not absolutely necessary within the meaning of Article 2(2) of the ECHR. Therefore, it concluded that there was a violation of the substantive limb of Article 2 of the ECHR. In addition, the Panel found that, although the investigation into the circumstances leading to those tragic consequences was prompt, it did not display sufficient guarantees of independence and impartiality and did not satisfy the requirement of thoroughness. Therefore, the Panel concluded that UNMIK failed to carry out an effective investigation into the matter, in violation of the procedural limb of Article 2 of the ECHR.

228. Finally, the Panel found that the forceful intervention of the police officers was disproportionate and not necessary in a democratic society for the prevention of disorder in violation of Article 11(2) of the ECHR.¹⁵³

VIII. Evaluation of the HRAP's Experience

229. It is important first to understand the context in which the Panel found itself with regards to UNMIK. The Panel recognized that the situation regarding UNMIK was, in UNMIK's own words, "*sui generis*", that is one of a kind. As a UN mission acting on the basis of a UNSC mandate, UNMIK was not exactly a state, even if it was exercising governmental functions over territory of undetermined status. Further, when UNMIK entered Kosovo and began exercising its authority, violence was endemic and state structures – legal and judicial system, law enforcement bodies, security – had all broken down. The ensuing vacuum needed to be filled and institutions rebuilt. As such, the Panel had to find the appropriate way of taking the difficulties and challenges facing UNMIK into account, without allowing the dilution of human rights standards.

230. The Panel's perspective about how UNMIK conducted itself in different contexts, for example, regarding the investigations undertaken by UNMIK Police and international prosecutors in the MMP cases, evolved over time, as the Panel had the opportunity to assess more of the investigatory materials. Specifically, it was only through examining the investigative files in dozens of similar MMP cases that the Panel started to understand the general systemic failures within UNMIK and in the law enforcement bodies at that time. As the Panel became more familiar with the material, its approach to UNMIK's failures became more precise, which can be traced through the evolution of the Panel's MMP opinions.

231. The Panel adopted 335 opinions on the merits where it found violations of human rights attributable to UNMIK and considered that recommendations and some form of reparation was necessary.

¹⁵³ See *ibid.*, opinion of 27 February 2015, §§ 188-190, 202-221 and 248-268.

232. The Panel found it problematic to determine what recommendations it should make in a situation where UNMIK was no longer able to have a direct impact on decisions and policies being made in Kosovo. As noted previously, UNMIK can no longer amend legislation as necessary (or in any case, even if it amended the relevant legislation, it could no longer ensure enforcement), nor can it direct the Kosovo authorities or EULEX to remedy other deficiencies identified by the Panel. The Panel had to be cognisant of such limitations when making recommendations that would have a beneficial impact on the human rights situation of the affected complainants.
233. Below is a brief survey of what recommendations the Panel made to UNMIK in the particular categories of cases where the Panel found that UNMIK had committed most of its human rights violations, specifically in the “14k” cases, the MMP cases and a few other significant cases.

A. Panel’s Recommendations

Property cases

234. In the “14k” cases where violations were found, the Panel recommended that UNMIK endeavour, with all the diplomatic means available to it *vis-à-vis* the Kosovo authorities, to obtain assurances that the cases filed by the complainants would be duly processed. UNMIK agreed in every case, essentially by sending EULEX a *pro forma* letter asking it to monitor the cases. This illustrates the ineffectiveness of the Panel flowing from its late establishment.
235. The Panel also recommended that UNMIK award adequate compensation to each of the complainants for non-pecuniary damage suffered as a result of the prolonged stay of the proceedings instituted by them, but this recommendation UNMIK could not implement. Indeed, UNMIK responded time and again that it was unable to pay such compensation pursuant to UN GA Resolution.

Missing and Murdered Persons Cases

236. In 233 of the MMP cases the Panel found that UNMIK had committed a violation of Article 2 of the ECHR, specifically by failing to carry out an adequate and effective investigation into the disappearance or abduction and/or killing of the complainants’ close relatives. The Panel took a wider view of reparations and recommended that UNMIK obtain assurances from EULEX that the investigations would be continued in compliance with the requirements of Article 2, procedural limb, that the circumstances surrounding the disappearance and killing of the victims be established and perpetrators brought to justice. In addition, the complainant and/or other next-of-kin should be informed of such proceedings and relevant documents disclosed to them, as necessary. The Panel recommended that UNMIK publicly acknowledge, within a reasonable time, responsibility with respect to its failure to adequately investigate the disappearance and killing of the victims and make a public apology to the complainants and their families in this regard. Moreover, the Panel recommended that

UNMIK pay adequate compensation to the complainant for the non-pecuniary damage suffered due to UNMIK's failure to conduct an effective investigation.

237. Additionally, the Panel made recommendations with respect to future UN conduct. It recommended that UNMIK take appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and NGOs, for the realisation of a full and comprehensive reparation programme, including restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict.

238. Finally, the Panel recommended that UNMIK take appropriate steps before competent bodies of the UN, including the UN Secretary-General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the UN, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring. Thus, the Panel made recommendations that urged UNMIK to seek systemic responses to the human rights violations.

Other Important Cases

239. In *Balaj and Others*, the Panel recommended that UNMIK take appropriate steps towards payment of adequate compensation to the complainants for the non-pecuniary damage suffered due to UNMIK's violation of Articles 2 and 11 of the ECHR. Additionally, the Panel recommended that, in case the investigation into this matter is reopened, UNMIK should ensure that all necessary assistance is provided to any body with the authority to investigate this matter, in line with UN GA Resolution 66/93 on the "Criminal Accountability of the United Nations Officials and Experts on Mission" adopted on 9 December 2011.

240. In *N.M. and Others*, the Panel recommended UNMIK to make a public apology, including through media, to the complainants and their families, for its failure to comply with applicable human rights standards in response to the adverse health condition caused by lead contamination in the IDP camps and the consequent harms suffered by the complainants. Furthermore, the Panel recommended that UNMIK take appropriate steps towards payment of adequate compensation for pecuniary and non-pecuniary damage in relation to the finding of the violations of the human rights provisions listed in the opinion. Another recommendation by the Panel was that UNMIK take appropriate steps to ensure that UN bodies working with refugees and IDPs promote and ensure respect for international human rights standards and that the findings and recommendations of the Panel in this case are shared with such bodies, as a guarantee of non-repetition. The Panel also recommended that UNMIK take appropriate steps towards UN bodies to ensure effective distribution of information relevant to the health and well-being of people under their authority and control. In addition, the Panel recommended that UNMIK urge UN bodies and

relevant authorities in Kosovo to protect and promote the human rights of Roma people, especially women and children.

B. UNMIK's Action

241. By far, the biggest failure of the entire HRAP experience was the fact that UNMIK did not follow the Panel's recommendations. Despite the lengthy process of the Panel collecting information from the complainants and UNMIK, then subsequently issuing admissibility decisions, opinions and recommendations, essentially nothing tangible came from all of this activity, as UNMIK failed to take meaningful action in relation to the Panel's recommendations.

No Continued Investigations

242. In his response to one of the Panel's first issued MMP opinions, *Pavić*¹⁵⁴, the SRSG explained his approach to the human rights violations. First, he stated that he would continue to urge EULEX and other competent authorities to take all steps to ensure that the criminal investigations into the disappearance and killing of the complainant's family member would be continued and the perpetrators brought to justice. The Panel understands that the SRSG sent a letter to EULEX regarding this case, and in all of the other MMP cases, urging them to continue the investigations.

243. Initially, the Panel was hopeful that, after being so prompted by the SRSG, EULEX would re-open these MMP investigations. This appeared to be exactly what was happening: in 2013, EULEX created a Task Force, led by an international prosecutor, who was charged with examining these unfinished MMP investigations in order to make recommendations to EULEX prosecutors and police about how to proceed. However, after hearing no results from this Task Force for more than two years, in 2015 the Executive Officer liaised with representatives from EULEX, who explained that as part of its own shrinking jurisdiction, EULEX would not be re-opening any of the MMP cases, but would instead be passing them on to the local authorities. As of the publication of this Final Report, the Panel remained unaware of any further investigative activities that were undertaken by either EULEX or the local authorities concerning these MMP cases.

244. Passing on jurisdiction of these matters to the local authorities is problematic for any number of reasons, including that most of these cases involved Kosovo Serb victims, who were justifiably concerned about their safety when they had intentionally brought these complaints first to UNMIK and later to an international Panel. Many of the complainants had requested anonymity.

245. The continued lack of investigation of the MMP cases reflects the fact that the establishment of the Panel came too late to be able to influence UNMIK's action with respect to law enforcement.

¹⁵⁴ See *Pavić*, no. 98/09, opinion of 26 April 2013, as well as the SRSG's decision dated 24 July 2013.

No Public Apologies

246. The SRSG sent a form letter to each of the complainants, stating: “I deeply regret that there was a lack of an effective investigation into the abduction and death of your [loved one] which has caused you additional distress and mental suffering.” The Panel found this letter, without further action, to be unacceptable. In its 2013 Annual Report, it stated that “if the SRSG’s letter included significant statements to take remedial action to try to ameliorate the suffering of the complainant, then this could constitute a meaningful apology.”¹⁵⁵
247. In its 2014 Annual Report, the Panel noted that “[c]oncerning the public nature of the apology, the Panel finds that this single letter to the complainant does not constitute a public apology, and it does not become a public apology just by placing it on the Panel’s website in a format that is not easily discoverable to persons unfamiliar with the specific case”. For this reason, starting in October 2014, in the MMP cases where the Panel found human rights violations attributable to UNMIK, the Panel’s recommendations included that the SRSG should “publically acknowledge, including through media, UNMIK’s failure to conduct an effective investigation.”¹⁵⁶
248. Additionally, many of the complainants found this apology to be inadequate. In the Serbian newspaper *Vesti*, in a story concerning public reaction to the Panel’s opinion in the *S.C.* case, the Coordinator of the Association of Families of Kidnapped and Missing in Kosovo and Metohija stated, “[a]ll members of the families of the kidnapped and missing persons are convinced that UNMIK has done absolutely nothing to find our loved ones. If UNMIK apologizes, as humans we would appreciate it, but our tragedy cannot be wiped out by an apology. The only apology is to investigate crimes against our loved ones.”¹⁵⁷

No Compensation Paid

249. In relation to the Panel’s repeated recommendation that UNMIK take appropriate steps toward the realisation of a full and comprehensive reparation programme, including restitution, compensation, rehabilitation and satisfaction, the SRSG issued a decision stating that: “In this regard, I wish to recall that the acts in question relate to activities carried out by the institutions established under the interim administration of Kosovo. As such, had UNMIK continued to have control over these institutions today, UNMIK would have been in a position to refer the Panel’s recommendation to those institutions for appropriate action. I am prepared to discuss the possibility of setting up a mechanism to deal with such matters with the relevant authorities at the appropriate juncture.” The last never happened. The SRSG’s words constituted the formula through which he informed the complainants that there would be no compensation paid by UNMIK for its human rights violations.

¹⁵⁵ See HRAP, *Annual Report 2013*, §§ 97-104.

¹⁵⁶ See HRAP, *Annual Report 2014*, §§ 73-74.

¹⁵⁷ “UNMIK Turned a Blind Eye While the KLA was Killing”, *Vesti*, 7 March 2013.

250. In September 2013, AI released a report entitled “Kosovo’s UNMIK Legacy: The Failure to Deliver Justice and Reparations to the Relatives of the Abducted”, which documented the facts in approximately twenty of the Panel’s first MMP opinions.¹⁵⁸ The report concurred with the Panel’s findings: “Amnesty International considers that between June 1999 and December 2008 UNMIK international police and prosecutors, who were charged with the investigation of crimes under international law, failed to initiate prompt, effective, independent, impartial and thorough investigations into many, or perhaps even the majority of reports of enforced disappearances and abductions.” The report also highlighted UNMIK’s arguments explaining why it has not paid compensation to the complainants whose human rights had been violated, in contravention of the Panel’s recommendations to UNMIK.

251. AI’s Report considered the SRSG’s approach unacceptable. “It was unquestionably UNMIK police, rather than the Kosovo authorities, that were invested with the responsibility for the investigation of cases of missing persons. The obligation to ensure reparation for the failure to do this must therefore fall on UNMIK itself.”¹⁵⁹ The Report stated that when AI queried UNMIK on this point, urging UNMIK to pay reparations, the SRSG said: “it is an irrefutable fact that UNMIK’s capacity to pay immaterial damages has ceased to exist and [it] now falls upon local Kosovo authorities having assumed exclusive control over public administration in Kosovo”. AI responded: “Amnesty International considers this response ... to constitute an extraordinary attempt by UNMIK to deny its liability for violations of the very human rights standards that it was created to uphold and respect.”

252. In the Panel’s Annual Report of 2013, it noted that it was not clear why UNMIK’s capacity to pay immaterial (non-pecuniary) damages has any connection to the local authorities having assumed exclusive control over public administration in Kosovo.¹⁶⁰ As the human rights violations were committed by UN personnel, it should be the UN’s responsibility to pay compensation for these breaches. The PACE Committee similarly admonished UNMIK noting that: “[a]s of November 2013, UNMIK has not provided compensation to the victims of human rights violations as recommended by the Panel ...”.¹⁶¹

253. In respect of non-pecuniary damage, the SRSG made an additional justification for non-payment: “[i]n relation to the Panel’s recommendation to award adequate compensation to the Complainants, the Panel is aware that current United Nations General Assembly instructions on compensations do not permit the United Nations Organization and its missions to pay compensation other than for material damage or physical harm. Consequently, UNMIK is not in a position to pay any compensation for human rights violations that may have occurred in these matters. UNMIK will continue to draw the attention of the United Nations General Assembly to the need for

¹⁵⁸ AI, *Kosovo’s UNMIK Legacy: The Failure to Deliver Justice and Reparations to the Relatives of the Abducted*, 2013.

¹⁵⁹ *Ibid.*

¹⁶⁰ HRAP, *Annual Report 2013*, §§ 36 and 100.

¹⁶¹ See PACE Committee on Legal Affairs and Human Rights (Rapporteur: Mr José María Beneyto), Report on “Accountability of International Organisations for Human Rights Violations”, Doc. 13370, 17 December 2013, § 59.

a review of the current compensation rules, which exclude payment of compensation for non-pecuniary damage.¹⁶²

254. In May 2015, the SRSRSG alerted the UNSC of the situation in his quarterly Report. The Report noted: “[t]he Panel has consistently recommended compensation for moral damages. However, the relevant General Assembly resolutions prohibit compensation by the United Nations for non-economic loss resulting from peacekeeping operations. Nonetheless, in my discussions with our local and international interlocutors, I have been advocating establishment of a suitable mechanism to compensate for moral damages, as well as for further investigation by appropriate judicial authorities of inconclusive cases.”¹⁶³ The SRSRSG repeated this same point nearly a year later that “no progress has been made with regard to the Panel’s recommendations relating to the payment of adequate compensation for moral damages suffered as a result of those violations”.¹⁶⁴

255. At the conclusion of the Panel’s mandate, UNMIK remains as unaccountable for the human rights violations that it committed as it was in 2004 when the Venice Commission proposed a mechanism be established to bring some oversight to UNMIK’s compliance with human rights. Due to UNMIK’s failure to follow the Panel’s recommendations, the HRAP process has obtained no compensation for the complainants. As such, they have been victimized twice by UNMIK: by the original human rights violations committed against them and by not receiving compensation through this process. For many years, the Panel has carried out detailed analysis of the complaints brought before it and exhorted UNMIK and the United Nations to undertake some beneficial activity on behalf of the complainants before the HRAP’s mandate concluded; but this has not occurred. Nor has the Human Rights Court envisaged by the Venice Commission been established.

C. Other Constraints

256. The Panel is aware that its experience was constrained by a number of factors, most of which have been mentioned previously, relating to the way the Panel was set up and by the restrictions imposed by UNMIK upon its jurisdiction from the early beginning. The Panel’s operations were exacerbated by the Administrative Direction, specifically the requirement that the Panel had to take decisions on all admissibility issues before considering merits, the arbitrary jurisdictional end date of 31 March 2010 and the new requirement that complainants had to complete the UN Third Party Claims Process before submitting their complaint to the Panel. These limitations meant that either the Panel never received complaints on some topics or that it had to find complaints to be

¹⁶² The SRSRSG was referring to UN GA Resolution 52/247 on “Third-Party Liability: Temporal and Financial Compensation” of 17 July 1998.

¹⁶³ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 30 July 2015, S/2015/579.

¹⁶⁴ UNSC, Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo of 1 February 2016, S/2016/99.

inadmissible so could not explore the substance of the claims, even when it felt there was a human rights issue at stake.

The Establishment of the Panel

257. The relationship between the Panel and UNMIK – and more broadly the United Nations Organization in general – was crucially flawed from the outset. The Panel was founded far too late. Even starting the conception of the Panel from the activities at the end of 2004 that eventually led to UNMIK Regulation No. 2006/12, this was more than five years after UNMIK was mandated to act as the executive authority in Kosovo pursuant to UNSC Resolution 1244. Moreover, after the Panel was established and commencing its work, UNMIK, from June 2008, began to down-size its operation, which proved counterproductive for getting the Panel fully operational.¹⁶⁵ It seems likely that there was little appreciation within UNMIK of what setting up the Panel entailed or required.
258. Additionally, the Panel was only established upon the insistence of outside bodies, the CoE, the OSCE, the international Ombudsperson Institution in Kosovo, etc. The early history of the HRAP makes very clear that it was unwanted by many inside the UN and was initiated only under international pressure.¹⁶⁶
259. There were other problems relating to the Panel's establishment. The Panel did not in fact become operable until almost two years after Regulation No. 2006/12 was adopted. Furthermore, when the Panel began, there was little effort put into public information by UNMIK.
260. The lack of an adequate public information campaign coupled with the "six-month rule" in Section 3.1 of the Regulation, which required that "all other available avenues for review of the alleged violations have been pursued, and within a period of six months from the date on which the final decision was taken" meant that many people were not able to access the Panel. By the time they learned about the existence of the Panel, the six months had already passed. This particular rule seemed especially harsh and was unnecessary in the Kosovo context. The origin of the rule probably comes from Article 35 of the ECHR, which gives a similar six-month deadline. However, the ECHR, unlike the Panel after the AD, has no end date for accepting complaints. Having both a six-month rule and an end date of 31 March 2010 was needlessly restrictive.
261. The six-month rule made even less sense when combined with the fiction stemming from the Panel's start date for receipt of complaints, which, according to the Regulation was 23 April 2006, but in fact was November 2007. If a strict six-month rule was going to apply to limit complainants' access to the Panel, UNMIK should

¹⁶⁵ At that time UN Secretary-General Mr Ban Ki Moon "instructed [his] Special Representative to move forward with the reconfiguration of UNMIK as set out in [his] special report, in order to adapt UNMIK to a changed reality and address current and emerging operational requirements in Kosovo." (see UNSC, Report of the Secretary-General on the United Nations Interim Administration in Kosovo of 15 July 2008, S/2008/458, § 3).

¹⁶⁶ See above, III. Early History of the Panel.

have fulfilled its obligations by ensuring it was ready to receive complaints on the Panel's inception date.

262. This issue came to a head in the *Demirović* case. Pursuant to the six-month rule, the complaint became time-barred in May 2007, as the final decision of the relevant body had been issued six months previously. However, as the Panel only held its inaugural session in Prishtinë/Priština in November 2007, the complainant argued that he and hundreds of others similarly situated persons lacked the possibility to submit a complaint to the Panel, as, at the end of 2007, the Panel was mostly unknown. Although the Panel found relevant the complainants' concerns, the case had to be declared inadmissible as there was no special circumstance.¹⁶⁷ But in its decision, the Panel suggested that the complainant request that the SRSG amend the governing Regulation to allow the Panel to hear such cases, but this never occurred.

Jurisdiction Ratione Temporis and Ratione Personae

263. An extremely important constraint on the Panel was its limited jurisdiction. As a result of this, the opinions adopted by the Panel necessarily show only a partial picture of the legacy of UNMIK *vis-à-vis* its accountability for human rights violations in Kosovo. This meant that many important questions indicated and discussed in the reports of different international NGOs and institutions about the status of human rights in Kosovo never made their way on to the Panel's docket.

264. According to the governing Regulation, the Panel did not have temporal jurisdiction over any human rights violations that were committed before 23 April 2005. This excluded violations committed when UNMIK was first deployed and the violence in post-conflict disorder was at its zenith. Deaths and disappearances that occurred at that time were outside of the Panel's jurisdiction, except with respect to ongoing failure to investigate. So the Panel was not able to consider the obligation of UNMIK to protect the population. This also excluded the events related to the March riots in Kosovo in 2004. Thus, a good many of these human rights issues were excluded from the Panel's scrutiny.

265. The same is true of the end date of the Panel's jurisdiction, which was not easy to determine as UNMIK resigned from executive competencies throughout 2008. The Panel used two dates regarding different types of cases. The first date, 15 June 2008, was that of the entry into force of the Kosovo Constitution after which UNMIK was no longer able to perform effectively the vast majority of its tasks as an interim administration and the SRSG was unable to enforce the executive authority that is still formally vested upon him under UNSC Resolution 1244. The second date, 9 December 2008, was that of the end of UNMIK's responsibility with regard to police and justice in Kosovo, EULEX assuming full operational control in the area of the rule of law.

¹⁶⁷ See *Demirović*, case no. 57/08, decision of 17 April 2009, § 20.

266. In addition, the Panel's jurisdiction was totally foreclosed by the AD, as the Panel was not able to consider any complaint submitted after 31 March 2010.

267. From the outset, the Panel was also excluded from considering any complaints regarding violations of human rights by KFOR, even though UNSC Resolution 1244 provided for a two-pronged mission involving both KFOR and UNMIK. During the early days of UNMIK, KFOR played a policing role and KFOR military police initially conducted many investigations in MMP cases. The complainants in these cases often told stories of KFOR personnel being active at a crime scene, but since KFOR was not under the Panel's mandate, there was no way for the Panel to compel them to provide information regarding these matters.

268. For reasons already described in this and other parts of the Report, as well as a result of the political developments in Kosovo in the meantime (specifically, the period after the Unilateral Declaration of Independence in February 2008), the Panel had the opportunity to review only some important issues and problems regarding human rights standards.

Access to the Panel

269. Access to a quasi-judicial body, such as the Panel, required certain conditions which were not always present. For instance, the Panel was physically isolated from the population of Kosovo. Indeed, the HRAP was located within UNMIK premises, which could not be easily accessed by potential complainants. The UNMIK buildings, even when they were located in the centre of Prishtinë/Priština, were gated and protected by guards and it had the feeling of a military base. Situating the HRAP within UNMIK may have had the effect of making Kosovans think that the HRAP was part of UNMIK, thus influencing their perception of its independence. The Panel sought to move to another location, fearing its presence in UNMIK would undermine its independence, but UNMIK did not allow it.

270. Another limitation was the relative lack of lawyers involved in the process. The complainants, many of whom were IDPs, often had no or inadequate legal representation. Where legal assistance had been afforded through donor-funded projects, complainants were left without such assistance when the projects concluded before the cases. Constructing a human rights compliant post-conflict society is a long-term project that cannot be resolved by short-term specific projects.

271. Finally, displaced persons were in an especially disadvantageous position, "cut-off" from the social structures, marginalized through fear of further violence, mistrust of authorities and lacking adequate access to institutions.

272. Finally, the Panel noted that its competence was formally expanded beyond the individual complaint by Regulation 10.3 which stated: "In the absence of the submission of a complaint by [a complainant], the Advisory Panel may appoint a suitable person as an ex officio representative to submit a complaint and act on behalf

of a suspected victim or victims in the procedure set forth in the present Chapter, if the Advisory Panel has reliable information that a violation of human rights has occurred.” Such provision could have been a precious complement to the individual complaint procedure if accompanied by appropriate resources and time.

Relationship with UNMIK

273. The whole history of the Panel’s establishment and especially the early years of operation indicate the difficulty of the relationship between UNMIK and the Panel.

274. There were subsequently problems related to the Panel’s access to the investigation files in the MMP cases. In order to determine whether there had been an effective investigation pursuant to the procedural safeguards enshrined in Article 2 of the ECHR’s right to life, the Panel needed to review the investigatory files and determine what activities the UNMIK Police and prosecutors had undertaken. But, these files proved difficult to obtain, thereby prolonging the Panel’s work significantly. Although the Panel could request UNMIK to handover the files, it could not compel it to do so.¹⁶⁸

275. In particular, the method of handover of files from UNMIK to EULEX and then back to UNMIK for scrutiny by the Panel made its work harder and time-consuming. In 2013, the Secretariat requested and received access to a number of investigative files that were not in EULEX’s possession and had instead been moved to the UN HQ archive.

276. UNMIK failed to include in its quarterly reports to the UNSC important issues and developments that were happening within the Panel, key findings and cases, for example. Thus, rather than casting light on the HRAP’s work, this prevented debate in the UNSC on these issues.

IX. Conclusions

277. The Panel was established in the very particular circumstances of UNMIK’s situation in Kosovo. UNMIK was mandated following the UNSC unauthorised NATO military action in 1999 against the FRY, an action justified by its supporters in the name of human rights. The civil mission – UNMIK – thus also had to be there as promoting and protection human rights. Further, it was situated in the heart of Europe; where the ECHR was central to human rights protection, but the ECtHR had no jurisdiction in Kosovo. When it was evident that UNMIK was indirectly responsible of human rights violations in Kosovo, the demand of accountability became such that UNMIK had to respond. The result was the Panel. What remains uncertain is whether there will be any such future mechanism.

278. It is not only in the context of territorial administration that UN accountability for human rights is relevant. In any situation where the UN has authority and control over

¹⁶⁸ Although the UNMIK-EULEX Agreement on the Handover of Files allowed for UNMIK to ask and receive files back from EULEX.

individuals, it must be exercised in a human rights compliant way, for instance in refugee camps or with respect to peace operations. In such circumstances an accountability mechanism would be appropriate.

279. The importance of the HRAP was the very fact of its existence as a quasi-judicial body composed of independent legal experts who were mandated to evaluate UNMIK's actions against international human rights laws. It seemed clear to the international human rights communities that the UN's legitimacy and credibility is undermined where there is no legal accountability. Further, the human rights system as a whole is weakened when it can be observed that the UN, one of the main guardian of the world's human rights system, is itself failing to live up to the obligations it has promoted. So, the Panel was created mainly to be a contributing component to UN accountability – the first of its kind; it was also hoped that the Panel would be able to provide some gains in ensuring the protection of human rights in Kosovo.

Looking to the Future

280. If we consider any future UN accountability mechanism and the optimum form such a mechanism should take, it has to be designed in a holistic way and crafted to the factual situation of the people on the ground and the political context of the mission. In particular, three main elements should be taken into account: (i) how it could operate effectively from the outset to take account of the human rights concerns of a vulnerable population in a post-conflict situation; (ii) how to ensure appropriate recommendations from the Panel with respect to complainants; and (iii) how to ensure an appropriate response from UN mission in question. In the case of the HRAP none of this was done from the outset and the position was worsened by the changes made by the Administrative Direction.

281. The following are what we regard, from HRAP experience, as some of the minimum factors to take into account in any future institution set up for same or similar purpose.

- A Human Rights Panel with authority to deliver binding opinions, not an “advisory” Panel.
- Set up by UN HQ, not by the mission; it means a UN body, not an UNMIK body.
- Included in the mandate of the mission and established immediately after the mandating of the mission.
- Applicable to the whole UN mandated operation, civil and security, as in Kosovo KFOR and UNMIK.
- Composed of independent high-level experts, including system of replacing a Panel member speedily and having provision for *ad hoc* member.
- Proper professional international and local staffing, as well as auxiliary services (e.g. translation) and adequate budget planning.

- Existence together and in harmony with other human rights mechanisms such as the ombudsperson, not established as an alternative to them.
- Jurisdiction over all human rights alleged violations using as applicable law the UDHR and all UN human rights treaties as well as the relevant regional treaties. They should be spelled out in the mandate.
- Procedures based on principles of fair, transparent adversarial processes, and the Panel having competence to access all relevant and necessary documentation.
- All relevant public institutions and structures obliged to cooperate with the Panel.
- Guarantees of adequate access to the Panel for complainants and proper awareness and educative campaign, especially before and during the first period of existence.
- Obligation of the UN to consider how to comply with such a Panel's recommendations, in order to make it effective and so to ensure that no false expectations are raised. This should include an adequate follow-up procedure.
- Opinions and recommendations of the Panel should be regularly included in the report of a mission to the UNSC.

282. Appropriate legal and policy planning would address ways to ensure independence from the UN mission but also its co-operation; that admissibility requirements are commensurate with the realities on the ground and not unnecessarily restrictive; ensuring mechanisms and political will for the implementation of the Panel's recommendations; and in ways to ensure not just compliance with recommendations in individual cases but more generally so that there are changes in practice and operations of the relevant mission to ensure human rights compatibility. What is at stake for UN is only to keep its promise to "promote and protect human rights".

X. Annexes

A. Profiles of Members of the HRAP

i. Final Composition of the Panel

1. The three Panel Members, nominated by the President of the ECtHR and (re-)appointed by the SRSG in accordance with UNMIK Regulation No. 2006/12 as of 1 January 2014 were Mr Marek Nowicki (Poland), Ms Christine Chinkin (United Kingdom/Australia) and Ms Françoise Tulkens (Belgium)¹. The Panel elected Mr Marek Nowicki as its Presiding Member in January 2008 and re-elected him as its Presiding Member in 2009, 2010, 2011, 2012, 2013, 2014, 2015 and 2016².
2. Biographical information is provided hereunder on the members of the Panel.
3. **Marek A. Nowicki** (January 2007-June 2016) is a Polish citizen, a human rights lawyer, and a member of the Warsaw Bar Chamber since 1987. He was the UN-appointed International Ombudsperson in Kosovo from July 2000 to December 2005. He was a member of the European Commission of Human Rights in Strasbourg from March 1993 until 31 October 1999. He served as a human rights expert for the Venice Commission, the CoE Directorate General of Human Rights and the OSCE. Mr Nowicki is the author of dozens of books and hundreds of articles on human rights published in Poland and abroad. He is a member of the Selection Committee of the Václav Havel Human Rights Prize of the PACE.
4. **Christine Chinkin** (February 2010-June 2016), a dual British/Australian citizen, Fellow of the British Academy, is Emerita Professor of International Law at the London School of Economics and Director of the newly created Centre on Women, Peace and Security at the LSE. She is also a William C. Cook Global Law Professor at the University of Michigan Law School. She is a member of the Bar of England and Wales and an academic member of Matrix Chambers. She has degrees in law from the Universities of London, Yale and Sydney and has previously held full-time academic posts at the Universities of Oxford, London, Sydney and Southampton, New York Law School and the National University of Singapore. Ms Chinkin is the author of books and articles on international law and human rights, notably the human rights of women.
5. **Françoise Tulkens** (September 2012-June 2016), a Belgian citizen, has a Doctorate in Law, a Master's degree in Criminology and a Higher education teaching certificate (*agrégation de l'enseignement supérieur*) in Law. She was a Professor at the University of Louvain and has taught in Belgium as well as abroad in the fields of criminal law, comparative and European criminal law, juvenile justice and human rights protection systems. From November 1998 to September 2012, she was a Judge in the ECtHR, serving as Section President from January 2007 and as Vice-President of the Court from February 2011. She has been an Associate Member of the Belgian Royal Academy since 2011. In 2013 she has been appointed as a member of the Scientific Committee of the EU Fundamental Rights' Agency (FRA), of which she is currently the Vice-Chair. She is the author of many publications in the areas of human rights and criminal law and also co-author of reference books. Ms Tulkens holds honorary doctorates from the Universities of Geneva, Limoges, Ottawa, Ghent, Liège and Brighton.

ii. Former Panel Members

6. **Michèle Picard** (January 2007-March 2008), a French citizen, was appointed as a Judge in 1982. She later became the Vice-President of the Tribunal de Grande Instance of Paris. In March 1996 she was appointed by the CoE Committee of Ministers as a member of the Human Rights

¹ Ms Tulkens's appointment and re-appointment by the SRSG covers the same time-period but was effective from 14 September 2012 until 13 September 2013, 14 September 2013 until 13 September 2014 and 14 September 2014 until 13 September 2015.

² See HRAP Rules of Procedure (below, Annex E.), Rule 6.

Chamber for Bosnia and Herzegovina. She was the President of the Chamber from November 1997 until December 2003. Ms. Picard was an alternate member of the UN Sub-Commission on the Promotion and Protection of Human Rights until 2006 and was appointed by the President of the UN Commission of Human Rights for two years in July 2005 as an independent expert on the situation of human rights in Uzbekistan. She was elected by the UN GA as a Judge *ad litem* in the ICTY on 24 August 2005, a function which she assumed on 3 March 2008.

7. **Snezhana Botusharova** (May 2008-June 2009) obtained her Doctor of Law degree from the Lomonosov University of Moscow. She was a Professor of Constitutional Law at the Kliment Ohridski Sofia University, the New Bulgarian University in Sofia and the Neofit Rilski University in Blagoevgrad. She was a member of the Bulgarian Grand National Assembly and one of the authors of the new Bulgarian Constitution (acting Chairperson from September to November 1992). As a Member of Parliament she took part in various legislative activities preparing the legal basis for Bulgaria's transition to democracy and rule of law. She was also a member of the Venice Commission (1991-1994). From 1994 to 1998, she served as the Republic of Bulgaria's Ambassador Extraordinary and Plenipotentiary to the USA. Ms Botusharova is the author of books and articles on constitutional law and on human rights issues. She currently serves as an International Judge in the Constitutional Court of Kosovo.
8. **Paul Lemmens** (January 2007-September 2012) is a Belgian citizen. He was a Judge in the Council of State of Belgium from 1994 until September 2012. He has served both in the Council of State's section that examines the compatibility of draft legislation and draft regulations with higher norms of international and national law and in the Council of State's contentious section, which constitutes the Supreme Administrative Court of Belgium. Since 1986, he has been a Professor at the University of Leuven where he lectures in International Human Rights Law. He has also taught Constitutional Law, Civil Procedure and Administrative Procedure. He is the author of a number of books and articles on European human rights law. Mr Lemmens took up a mandate of Judge in the ECtHR in September 2012.

B. Profiles of Members of the Staff of the HRAP Secretariat

i. Final Secretariat Staff

9. The Secretariat Staff consists of an Executive Officer, three legal officers and two administrative assistants.
10. **Andrey Antonov**, a Russian citizen, joined the Secretariat in June 2011 as Executive Officer. Previously, he worked for the UN (since 2000), serving with UNMIK Police, as a legal officer at UNMIK DOJ, as a legal advisor at the UN Integrated Office in Sierra Leone, as a conduct and discipline officer at the UN Mission in Sudan and as an investigator with the Investigation Division of the Office of Internal Oversight Services at the UN HQ. Mr Antonov holds a PhD in Law. He has authored around 50 publications in different periodicals related to various aspects of criminal law and investigation, international humanitarian law, human rights and peacekeeping.
11. **Anna Maria Cesano**, an Italian citizen, joined the Secretariat as a legal officer in May 2011. Previously, she worked as a rule of law officer at the Access to Justice Programme of the UNDP in Sierra Leone, as a liaison officer at the UN High Commissioner for Refugees in Tanzania and as a human rights officer at the UN Integrated Office in Sierra Leone. Before joining the UN, she worked at the University of Siena, as a researcher on the European system for the protection of human rights. Ms Cesano holds a Masters Degree in Human Rights and Conflict Management from Sant' Anna School of Advanced Studies of Pisa and a Master of Laws degree from the Catholic University of Milan.
12. **Brandon Gardner**, an American citizen and former member of the Pennsylvania Bar, joined the Secretariat as a legal officer in October 2011. Previously, he served as a legal officer in the External Relations Section of UNMIK DOJ and in UNMIK's Rule of Law Liaison Office, and as a legal advisor to the Elections Complaints and Appeals Commission on behalf of the OSCE Mission in Kosovo. He holds a Juris Doctorate from the University of Pittsburgh School of Law, and a Bachelor of Arts in Political Science and International Relations from the University of Pittsburgh.
13. **R. Dule Vicovac**, a Canadian citizen and member of the Manitoba Bar (Canada) and Minnesota Bar (USA), joined the Secretariat as a legal officer in August 2014. Previously, he worked as an attorney in criminal and refugee cases in Canada, as a legal expert in an EU-funded legal aid project assisting displaced persons from Kosovo and as a team leader/legal expert in an EU-funded project with the Ministry for Human and Minority Rights of Serbia. Prior to that, he served as a legal officer with UNMIK and the Housing and Property Directorate, UN-Habitat. Mr Vicovac holds a Juris Doctorate from Hamline School of Law in Minnesota and also attended the University of Manitoba and Oxford University.
14. **Adlije Muzaqi**, a local staff member and team assistant, has been working with the Secretariat since September 2010. She commenced employment with the UN in October 1999 as an administrative assistant with the UNMIK Municipal Administration in Vushtrri/Vučitrn Municipality, Mitrovicë/Mitrovica Region.
15. **Larisa Barišić**, a local staff member and a legal assistant, has been working with the Secretariat since November 2015. Before joining UNMIK, she had been serving the OMiK for several years. Ms Barišić holds a Bachelor of Arts in Political Science and International Relations from the Faculty of Political Sciences, University of Belgrade, and pursues her Master studies in International Law and Humanitarian Law at the University of Belgrade Faculty of Law.

ii. Former Secretariat Staff

16. **John J. Ryan**, an Irish citizen, was the Executive Officer of the Secretariat from September 2007 to June 2009. Formerly a solicitor with Stephen MacKenzie and Co. Solicitors in Dublin, he also was employed as the Head of the UNMIK DOJ International Judicial Support Division and thereafter as senior legal officer, Office of the SRSG, UNMIK. He is a graduate of the University of Limerick, with a Bachelor of Laws (Hons.) in Law and European Studies and a graduate of the Law School of the Incorporated Law Society of Ireland.
17. **Ruzvelt Frrokaj**, a national staff member, was an administrative assistant with the Panel from November 2007 until the completion of his assignment with UNMIK in June 2008. He joined UNMIK in March 2000 and was employed as a security officer and administrative assistant with UNMIK Administration and also as an administrative assistant in the Office of Publicly Owned Enterprises, Office of the SRSG.
18. **Snežana Martinović**, a Serbian citizen, joined the Secretariat in December 2007 as an administrative assistant. Prior to this, she served as an administrative clerk within UNMIK Police Department and administrative assistant within UNMIK DOJ. In November 2013 she was promoted to legal assistant of the Secretariat. Ms Martinović holds a Teaching Degree from the Pedagogic Academy, University of Belgrade, and BTEC Advance Diploma in Paralegal Work (Criminal Law).
19. **Leanne Ho**, an Australian citizen, was appointed as a legal officer with the Panel in December 2007. She commenced her UN employment as a legal officer with the UNMIK DOJ in 2003, where she was employed, *inter alia*, as operations manager in the Judicial Integration Section, international legal adviser to the Kosovo Judicial Council and as legal officer in the International Judicial Support Division.
20. **Magda Mierzewska**, a Polish citizen, was seconded by the ECtHR to the Panel for a two-month period from May to July 2008. She is a lawyer in the ECtHR's Registry who made an important contribution to the Panel in terms of research, analysis and drafting during her secondment.
21. **Martin Clutterbuck**, an Australian citizen, was a legal officer with the Panel from September to December 2008. He previously worked for UNMIK in various capacities such as the international legal aid coordinator with the DOJ and president of the Registration Appeals Commission. He worked with UNTAET/UNMISSET in East Timor as a legal officer for the Deputy Special Prosecutor for Serious Crimes from 2001 to 2003. Prior to that, he worked in Australia as principal solicitor/coordinator in a number of community legal centres, as well as being a consultant with the International Development Law Organisation. He qualified as a lawyer in Australia in 1995.
22. **Mimoza Arifi-Hoxha**, a national staff member, was an administrative assistant with the Secretariat from November 2008 through September 2010. She commenced employment with the UN in December 1999 as an administrative assistant with the UNMIK DPI/Press Office.
23. **Elina Castren**, a Finnish citizen, served as a human rights officer with the Secretariat from December 2008 through June 2009 on secondment from the Government of Finland..
24. **Bernadette Foley**, an American citizen, served as a legal officer with the Secretariat from December 2008 through June 2009. She was previously employed as a senior judicial inspector with the UNMIK Office of the Disciplinary Council. From 2005 to 2006 she managed, designed and delivered a training programme for investigators of judicial and prosecutorial misconduct in a joint UNDP/UNMIK project. From 2002 to 2004 she was a visiting faculty fellow teaching law at a Russian university under the auspices of the Open Society Institute's Civic Education Project. From 1986 until 2001, she was a trial and appeal lawyer in the USA in the area of criminal and mental health law.

25. **Jerina Dampier**, an American citizen and member of the New York Bar, served as a legal officer with the Secretariat from February 2009 through May 2009. Previously, she served as a legal officer with the UNMIK Department of Civil Administration, UNMIK DOJ's Criminal Division and the Special Chamber of the Supreme Court of Kosovo for KTA-Related Matters.
26. **Butera Mpira**, a Rwandan citizen, served as a legal officer with the Secretariat from March 2009 through June 2009. Previously, he served as a legal officer with the UNMIK DOJ's International Judicial Support Division and with the non-governmental organisation Non-Violent Peaceforce in Sri Lanka.
27. **Chiara Rojek**, a French citizen, served as a legal officer with the Secretariat from March 2009 through June 2009. Previously, she served as a legal officer with the UNMIK DOJ's International Judicial Support Division and as a legal officer with the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.
28. **Ravi K. Reddy**, an American citizen and member of the New York Bar, joined the Secretariat as a legal officer in May 2009. Previously, he served as a legal officer in the Office of the Director of the UNMIK DOJ and as a law clerk (legal officer) at the US Advocacy Program of HRW. He holds a Master of Laws in Human Rights Law from the University of Nottingham, a Jurist Doctorate from the University of Pittsburgh and a Bachelor of Arts in History from the University of Delaware. In June 2011, he joined the UN Mission in Timor-Leste, where he was employed as a legal officer in the OLA.
29. **Nedim Osmanagić**, a Bosnian citizen, served as a legal officer from June 2009 until September 2010 and was the Officer-in-Charge of the Secretariat and its Acting Executive Officer from June 2009 until February 2010. He brought to the Secretariat his experience as Deputy Ombudsperson for Bosnia and Herzegovina, human rights officer in the OHCHR in Prishtinë/Priština, senior judicial inspector with UNMIK, legal officer for the Venice Commission, UNMIK and UN Mission in Bosnia and Herzegovina, and human rights adviser for the OSCE Mission in Bosnia and Herzegovina and UNDP Somalia.
30. **Rajesh Talwar**, an Indian citizen, worked for the UN in various capacities in Kosovo, Somalia, Liberia and Afghanistan before returning to Kosovo to take up the position of Executive Officer of the Secretariat in February 2010. Prior to working for the UN, he practised law in the Supreme Court of India and courts subordinate thereto. As a lawyer, he was closely associated with several human rights cases including landmark petitions dealing with issues arising out of HIV/AIDS. In 1996 he went to the UK on a British Chevening scholarship, from where he did his LLM in Human Rights Law at the University of Nottingham.
31. **Anila Premti**, an Albanian citizen, joined the Secretariat as a legal officer in October 2010, on temporary assignment from her regular post with UNCTAD in Geneva. Previously, she also worked as a legal officer at UNMIK DOJ, Special Chamber of the Supreme Court of Kosovo on KTA-Related Matters, and at the UN OLA in New York. Prior to joining the UN, she worked at the Ministry of Foreign Affairs in Albania. She holds a Master of Laws degree from Tulane University and a Law degree from the University of Tirana.
32. **Sarah Enright**, an Irish citizen, served as a UNV with the Secretariat from March through June 2012, on a part-time basis. She was concurrently serving as a UNV Legal Officer within the UNMIK Rule of Law Liaison Office, from October 2011 through September 2012. Previously, she worked as a barrister in her native Ireland and for the Court of Justice of the European Union in Luxembourg.
33. **Daniel Trup**, a British/French citizen, joined the Secretariat in June 2012 as a legal officer. Qualifying as a solicitor in 2000, he has worked in the field of criminal law both in the UK and abroad. Prior to joining the Secretariat, he had worked for EULEX as senior legal officer in the

Special Prosecutor's Office and as legal officer in the Prosecutor's Office in the State Court of Bosnia and Herzegovina. Mr Trup holds an LLM in International Law from the University of Kent, and a Bachelor of Arts in Politics and History from the University of London.

C. UNMIK Regulation No. 2006/12

**UNITED
NATIONS**
United Nations
Interim
Administration
Mission in
Kosovo



UNMIK

NATIONS UNIES
Mission d'Administration
Intérimaire des Nations
Unies au
Kosovo

UNMIK/REG/2006/12
23 March 2006

REGULATION NO. 2006/12

ON THE ESTABLISHMENT OF THE HUMAN RIGHTS ADVISORY PANEL

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under United Nations Security Council resolution 1244 (1999) of 10 June 1999,

Taking into account United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 1999/1 of 25 July 1999, as amended, on the Authority of the Interim Administration in Kosovo,

For the purpose of establishing a Human Rights Advisory Panel as a provisional body during the term of the mandate of UNMIK to examine alleged violations of human rights by UNMIK,

Hereby promulgates the following Regulation:

CHAPTER 1: The Establishment and Jurisdiction of the Human Rights Advisory Panel

Section 1

Establishment of the Human Rights Advisory Panel

1.1 The Human Rights Advisory Panel (Advisory Panel) is hereby established.

1.2 The Advisory Panel shall examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of the human rights, as set forth in one or more of the following instruments:

(a) The Universal Declaration of Human Rights of 10 December 1948;

(b) The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 and the Protocols thereto;

(c) The International Covenant on Civil and Political Rights of 16 December 1966 and the Protocols thereto;

(d) The International Covenant on Economic Social and Cultural Rights of 16 December 1966;

(e) The Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965;

(f) The Convention on the Elimination of All Forms of Discrimination Against Women of 17 December 1979;

(g) The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment of 17 December 1984; and

(h) The Convention on the Rights of the Child of 20 December 1989.

1.3 Upon completion of an examination of a complaint, the Advisory Panel shall submit its findings to the Special Representative of the Secretary-General. The findings of the Advisory Panel, which may include recommendations, shall be of an advisory nature.

Section 2 Temporal and Territorial Jurisdiction

The Advisory Panel shall have jurisdiction over the whole territory of Kosovo and over complaints relating to alleged violations of human rights that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights.

Section 3 Admissibility Criteria

3.1 The Advisory Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued, and within a period of six months from the date on which the final decision was taken.

3.2 The Advisory Panel shall not deal with any complaint that

(a) Is anonymous; or

(b) Is substantially the same as a matter that has already been examined by the Advisory Panel and contains no relevant new information.

3.3 The Advisory Panel shall declare inadmissible any complaint which it considers incompatible with the human rights set forth in one or more of the instruments referred to in section 1.2 above, manifestly ill-founded or an abuse of the right of complaint.

CHAPTER 2: The Composition and Status of the Human Rights Advisory Panel

Section 4 Seat and Composition

4.1 The Advisory Panel shall have its seat in Pristina.

4.2 The Advisory Panel shall consist of three members, of whom one shall be designated as the presiding member. At least one member of the Advisory Panel shall be a woman.

4.3 The members of the Advisory Panel shall be international jurists of high moral character, impartiality and integrity with a demonstrated expertise in human rights, particularly the European system.

Section 5
Appointment of the Members

5.1 The Special Representative of the Secretary-General shall appoint the members of the Advisory Panel, upon the proposal of the President of the European Court of Human Rights.

5.2 The members shall be appointed for a term of two years¹. The appointment may be renewed for further terms of two years.

Section 6
Oath or Solemn Declaration

Upon appointment, each member of Advisory Panel shall subscribe to the following declaration before the Special Representative of the Secretary-General or his or her designate:

"I do hereby solemnly declare that:

“In carrying out the functions of my office, I shall uphold the law at all times and act in accordance with the highest standards of professionalism and the utmost respect for the dignity of my office and the duties with which I have been entrusted.

In carrying out the functions of my office, I shall uphold at all times the highest level of internationally recognized human rights standards, including those embodied in the principles of the Universal Declaration of Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols, the International Covenant on Civil and Political Rights and its Protocols, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination, The Convention on the Elimination of All Forms of Discrimination Against Women, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the Convention on the Rights of the Child.”

Section 7
Immunity and Inviolability

7.1 The premises used by the Advisory Panel shall be inviolable. The archives, files, documents, communications, property, funds and assets of the Advisory Panel, wherever located and by whomsoever held, shall be inviolable and immune from search, seizure, requisition, confiscation, expropriation or any other form of interference, where by executive, administrative, judicial or legislative action.

7.2 Members of the Advisory Panel shall have the same immunities as UNMIK personnel under sections 3.3 and 3.4 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR, UNMIK and their Personnel in Kosovo.

7.3 The Secretary-General shall have the right and duty to waive the immunity of a member of the Advisory Panel in any case where in his opinion the immunity would impede the course of justice and can be waived without prejudice to the interests of UNMIK.

¹ The term in office for Panel Members was reduced to one year, renewable, by UNMIK Regulation No. 2007/3 of 12 January 2007.

Section 8
Financial and Human Resources

Appropriate arrangements shall be made to ensure the effective functioning of the Advisory Panel through the provision of requisite financial and human resources.

Section 9
Secretariat

A full-time secretariat shall service the Advisory Panel.

CHAPTER 3: Procedure before the Human Rights Advisory Panel

Section 10
Submission of complaints and *Ex Officio* Representatives

10.1 A complaint shall be submitted in writing to the Advisory Panel.

10.2 The complainant may submit the complaint or a family-member, a non-governmental organization or a trade union may submit the complaint on behalf of the complainant.

10.3 In the absence of the submission of a complaint under section 10.2, the Advisory Panel may appoint a suitable person as an *ex officio* representative to submit a complaint and act on behalf of a suspected victim or victims in the procedure set forth in the present Chapter, if the Advisory Panel has reliable information that a violation of human rights has occurred.

10.4 On the application of the *ex officio* representative, the Advisory Panel may terminate a procedure under section 10.3 if the suspected victim or victims do not wish the procedure to continue or if the continuation of the procedure is not in the public interest for some other reason.

10.5 There shall be no charge for the submission of a complaint.

Section 11
Written Submissions

11.1 A complaint shall set forth all relevant facts upon which the alleged violation of human rights is based. Documentary evidence may be attached to the complaint.

11.2 On receiving the complaint the Advisory Panel shall determine whether the complaint is admissible. If the information provided with the complaint does not allow such determination to be made, the Advisory Panel shall request additional information from the complainant. If the Advisory Panel determines that the complaint is inadmissible, it shall render a determination by which the complaint is dismissed.

11.3 When the Advisory Panel determines that a complaint is admissible, it shall refer the complaint to the Special Representative of the Secretary-General with a view to obtaining a response on behalf of UNMIK to the complaint. Such response shall be submitted to the Advisory Panel within twenty (20) days of the receipt of the complaint by the Special Representative of the Secretary-General.

11.4 The Panel may request the complainant and UNMIK to make further written submissions within periods of time that it shall specify if such submissions are in the interests of justice.

Section 12
Confidentiality of Communications

12.1 The communications between the Advisory Panel and the complainant or the person acting on his or her behalf shall be confidential.

12.2 The confidentiality of communications as set forth in section 12.1 shall apply fully when the complainant or the person acting on his or her behalf is in detention.

Section 13
The Participation of an *Amicus Curiae* and the Ombudsperson

13.1 The Advisory Panel may, where it is in the interests of justice, invite

(a) An *amicus curiae* to submit written observations; and

(b) The Ombudsperson to submit written observations if the Ombudsperson has already been seized of the matter.

13.2 The submission of written observations by the Ombudsperson shall be without prejudice to the powers, responsibilities and obligations of the Ombudsperson under the applicable law.

Section 14
Oral hearings

Where it is in the interests of justice, the Advisory Panel shall hold oral hearings.

Section 15
Requests for the appearance of persons or the submission of documents

15.1 The Advisory Panel may request the appearance of any person, including UNMIK personnel, or the submission of any documents, including files and documents in the possession of UNMIK, which may be relevant to the complaint.

15.2 The Special Representative of the Secretary-General shall cooperate with the Advisory Panel and provide it with the necessary assistance in the exercise of its powers and authorities, including, in particular, in the release of documents and information relevant to the complaint.

15.3 Requests for the appearance of UNMIK personnel or for the submission of United Nations documents shall be submitted to the Special Representative of the Secretary-General. In deciding whether to comply with such requests, the Special Representative of the Secretary-General shall take into account the interests of justice, the promotion of human rights and the interests of UNMIK and the United Nations as a whole.

Section 16
Public hearings and access to documents deposited with the Advisory Panel

16.1 Hearings of the Advisory Panel shall be in public unless the Advisory Panel in exceptional circumstances decides otherwise.

16.2 Upon the approval of the Advisory Panel, documents deposited with the Human Rights Advisory Panel may be made available to a person having a legitimate interest in the matter in response to a request in writing.

Section 17
Findings and Recommendations of the Advisory Panel

17.1 The Advisory Panel shall issue findings as to whether there has been a breach of human rights and, where necessary, make recommendations. Such findings and any recommendations of the Advisory Panel shall be submitted to the Special Representative of the Secretary-General.

17.2 The findings and recommendations of the Advisory Panel shall be published promptly in English, Albanian and Serbian in a manner that ensures broad dissemination and accessibility.

17.3 The Special Representative of the Secretary-General shall have exclusive authority and discretion to decide whether to act on the findings of the Advisory Panel.

17.4 The decisions of the Special Representative of the Secretary-General shall be published promptly in English, Albanian and Serbian in a manner that ensures broad dissemination and accessibility.

Section 18
Rules of Procedure

18.1 The Advisory Panel shall adopt rules of procedure for its proceedings. The rules of procedure may assign powers and responsibilities to the secretariat of the Advisory Panel.

18.2 Upon adoption by the Advisory Panel, the rules of procedure shall be published promptly in English, Albanian and Serbian in a manner that ensures broad dissemination and accessibility.

CHAPTER 4: Final Provisions

Section 19
Implementation

The Special Representative of the Secretary-General may issue any necessary Administrative Directions for the implementation of the present Regulation.

Section 20
Applicable Law

The present Regulation shall supersede any provision in the applicable law that is inconsistent with it.

Section 21
Entry into force

The present Regulation shall enter into force on 23 March 2006, except for section 10 which will become effective on 23 April 2006.

Søren Jessen-Petersen
Special Representative of the Secretary-General

D. UNMIK Administrative Direction No. 2009/1

UNITED NATIONS
United Nations Interim
Administration Mission in
Kosovo



UNMIK

NATIONS UNIES
Mission d'Administration
Intérimaire des Nations
Unies au
Kosovo

UNMIK/DIR/2009/1
17 October 2009

ADMINISTRATIVE DIRECTION NO. 2009/1

IMPLEMENTING UNMIK REGULATION NO. 2006/12 ON THE ESTABLISHMENT OF THE HUMAN RIGHTS ADVISORY PANEL

The Special Representative of the Secretary-General,

Pursuant to the authority given to him under section 19 of United Nations Interim Administration Mission in Kosovo (UNMIK) Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel, as amended by UNMIK Regulation 2007/3 of 12 January 2007 (the Regulation),

Taking into account the Rules of Procedure adopted on 5 February 2008 by the Human Rights Advisory Panel pursuant to section 18 of the Regulation,

For the purpose of clarifying the character and setting of proceedings at public hearings of, the consideration of the admissibility of complaints by, and providing a deadline for the submission of any complaints to, the Human Rights Advisory Panel in view of UNMIK's diminished ability to effectively exercise executive authority in all areas from which the subject matter of human rights complaints has emanated,

Hereby promulgates the following Administrative Direction:

Section 1 Public Hearings

1.1 Public hearings of the Human Rights Advisory Panel (the Advisory Panel) shall be conducted in such manner and settings that allow a clear sense of non-adversarial proceedings to be conveyed to all participants and to the public at large, including to any media presence in case such presence is permitted by the Advisory Panel.

1.2 During Public hearings, complainants or their representative shall be permitted to make a statement summarizing the alleged human rights violation, as contained in the written submissions to the Advisory Panel. During public hearings, the Advisory Panel shall ask such questions of the parties, or their representatives, which clarify the factual basis of the complaint and are necessary for the Advisory Panel to fully assess the human rights allegations before it.

1.3 The venue and seating arrangements for public hearings conducted by the Advisory Panel shall be consistent with the non-adversarial nature of the proceedings.

Section 2
Issues of Admissibility

2.1 At any stage of the proceedings of a human rights complaint before it, the Advisory Panel shall examine all issues of admissibility of the complaint before examining the merits.

2.2 Any complaint that is, or may become in the future the subject of the UN Third Party Claims Process or proceedings under section 7 of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and their Personnel in Kosovo of 18 August 2000, as amended, shall be deemed inadmissible for reasons that the UN Third Party Claims Process and the procedure under section 7 of Regulation No. 2000/47 are available avenues pursuant to Section 3.1 of the Regulation.

2.3 Comments on the merits of an alleged human rights violation shall only be submitted after the Advisory Panel has completed its deliberation on and determined the admissibility of such complaint. If issues of admissibility of a complaint are addressed at any time after the Advisory Panel has made a determination on admissibility of a complaint and commenced its considerations of the merits, the Advisory Panel shall suspend its deliberations on the merits until such time as the admissibility of the complaint is fully re-assessed and determined anew.

2.4 Following any new admissibility determination, the Advisory Panel shall refer such new determination to the Special Representative of the Secretary-General for the purpose of obtaining further comments on the complaint.

Section 3
Appointment and Resignation of Panel Members

3.1 The President of the European Court of Human Rights shall propose in compliance with the applicable UN procurement rules a sufficient number of suitable candidates for appointment under section 5 of UNMIK/REG/2006/12, as amended, upon receiving a request from the Special Representative of the Secretary-General. If no proposals or an insufficient number of proposals are received by UNMIK within a period of one calendar month of such request, the Special Representative of the Secretary-General may make the necessary appointment without the requested proposal and following consultation with relevant international Human Rights bodies.

3.2 In case one or more members of the Advisory Panel resign from their position, the Panel shall make no determinations until new appointments have been made allowing the Panel to reach its statutory number of members.

Section 4
Publications of the Advisory Panel

All publications, announcements and press releases of the Advisory Panel shall be made through the UNMIK Office of the Spokesperson and Public Information, which shall assist the Advisory Panel in its official announcements on all matters.

Section 5
Cut-off Date for Submission of Complaints

Notwithstanding section 3.1 of UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, no complaint to the Advisory Panel shall be admissible if received by the Secretariat of the Advisory Panel later than 31 March 2010.

Section 6
Entry into Force

The present Administrative Direction shall enter into force on 17 October 2009 and shall be applicable for all complaints submitted to the Advisory Panel including such that are currently pending before the Advisory Panel.

Lamberto Zannier
Special Representative of the Secretary-General

E. HRAP Rules of Procedure

(adopted by the Panel on 5 February 2008; amended on 11 September 2009, 21 November 2009 and 12 February 2010)

Chapter 1. General provisions

Rule 1. Aim of the present Rules

The present rules aim at setting the rules to be followed by the Human Rights Advisory Panel and those appearing before it, in procedures covered by UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel.

Rule 2. Definitions¹

For the purposes of the present rules, unless the context otherwise requires:

a. the term “Regulation No. 2006/12” means UNMIK Regulation No. 2006/12 of 23 March 2006 on the establishment of the Human Rights Advisory Panel;

a *bis*. the term “Administrative Direction No. 2009/1” means Administrative Direction No 2009/1 implementing UNMIK Regulation No. 2006/12 on the establishment of the Human Rights Advisory Panel;

b. the term “Panel” means the Human Rights Advisory Panel;

c. the term “complainant” means any person or group of individuals who has submitted a complaint or on whose behalf a complaint has been submitted;

d. the term “applicant” means the complainant who has submitted a complaint himself or herself, or the family member, the non-governmental organisation or the trade union that has submitted a complaint on behalf of a complainant;

e. the term “representative” means the person who represents a party in the proceedings before the Panel, according to Rule 17.

Chapter 2. Organisation of the Panel

Rule 3. Members of the Panel

Members of the Panel shall serve only in their personal capacity.

Rule 4. Order of precedence²

1. Members of the Panel shall take precedence after the Presiding Member according to the length of time they have been in office.

2. Members having the same length of time in office shall take precedence according to age.

3. Re-appointed members shall take precedence having regard to the duration of their previous terms of office.

Rule 5. Resignation³

Resignation of a member shall be notified to the Presiding Member of the Panel who shall transmit it to the Special Representative of the Secretary-General.

¹ Point a *bis* inserted on 12 February 2010.

² The word “President” in § 1 replaced by “Presiding Member” on 12 February 2010.

³ The word “President” replaced by “Presiding Member” on 12 February 2010.

Rule 6. Election of the Presiding Member⁴

The Panel shall elect its Presiding Member, for a term of office of one year. He or she may be re-elected.

Rule 7. Functions of the Presiding Member⁵

The Presiding Member shall direct the work of the Panel.

Rule 8. Replacement of the Presiding Member⁶

If the Presiding Member is unable to carry out his or her duties, or if his or her office is vacant, the duties of Presiding Member shall be carried out by another member according to the order of precedence laid down in Rule 4.

Rule 9. Secretariat⁷

1. The Secretariat shall consist of the Executive Officer and other professional and administrative staff.

2. The Executive Officer shall, under the direction of the Presiding Member, be responsible for the work of the Secretariat and, in particular:

- a. shall assist the Panel and its members in the fulfilment of their duties;
- b. shall be the channel for all communications concerning the Panel;
- c. shall have custody of the archives of the Panel.

Chapter 3. Functioning of the Panel

Rule 10. Seat of the Panel

1. In accordance with Section 4.1 of Regulation No. 2006/12, the seat of the Panel shall be in Pristina.

2. The Panel may decide to perform its functions elsewhere if it thinks fit.

3. The Panel may decide, at any stage of the examination of a complaint, that it is necessary that an investigation or any other function be carried out elsewhere by it or one or more of its members.

Rule 11. Sessions of the Panel⁸

1. The Panel shall determine the dates of its sessions.

2. Members who are prevented by illness or other serious reason from attending all or part of any session of the Panel or from fulfilling any other duty shall, as soon as possible, give notice thereof to the Presiding Member.

Rule 12. Withdrawal

1. A member of the Panel may not take part in the consideration of any case if:

- a. he or she has a personal interest in the case;
- b. he or she has expressed opinions publicly, through the media, in writing, through his or her public actions or otherwise, that are objectively capable of adversely affecting his or her impartiality;
- c. for any other reason, his or her independence or impartiality may legitimately be called into doubt.

⁴ The word "President" in the heading and the text replaced by "Presiding Member" on 12 February 2010.

⁵ The word "President" in the heading and the text replaced by "Presiding Member" on 12 February 2010.

⁶ The word "President" in the heading and the text replaced by "Presiding Member" on 12 February 2010.

⁷ The word "President" in § 2 replaced by "Presiding Member" on 12 February 2010.

⁸ The word "President" in § 2 replaced by "Presiding Member" on 12 February 2010.

2. In the event of any doubt as to the existence of one of the grounds referred to in paragraph 1, that issue shall be decided by the Panel, without the member concerned being present.

*Rule 13. Deliberations*⁹

1. The Panel shall deliberate in private. Its deliberations shall remain secret. Only the Executive Officer, members of the Secretariat, interpreters, and persons providing technical or secretarial assistance to the Panel may be present at its meetings, unless the Panel decides otherwise.

2. Where it is necessary for the Panel to decide a point or procedure or any other question other than at a scheduled meeting of the Panel, the Presiding Member may direct that the deliberation may take place through electronic means.

*Rule 14. Quorum*¹⁰

1. The Panel can decide only if all members are present or, in the case of Rule 13 § 2, if all members take part in the deliberation by electronic means.

2. In the case of the withdrawal of a member or his or her absence in the sense of Rule 11 § 2, the Panel can decide with the other two members being present or taking part in the deliberation by electronic means.

*Rule 15. Voting*¹¹

The decisions of the Panel shall be taken by a majority of the members taking part in the vote. Abstentions shall not be allowed in final votes on the admissibility and merits of cases. In the event of a tie, the Presiding Member shall have the casting vote.

Chapter 4. Procedure

A. General rules

Rule 16. Languages

1. The official languages of the Panel shall be Albanian, Serbian and English.

2. The authentic version of the decisions on admissibility and the opinions on the merits shall be the English one. The English version shall be translated in Albanian and Serbian.

Rule 17. Representation of the parties

1. Complainants and persons acting on their behalf can be represented before the Panel by attorneys or other representatives of their choice.

2. UNMIK shall be represented before the Panel by the Special Representative of the Secretary General or by an agent appointed by him.

Rule 18. Participation of an Amicus Curiae and the Ombudsperson

1. The Panel may, in accordance with Section 13 of Regulation No. 2006/12, invite an amicus curiae or the Ombudsman to submit written observations.

2. Such invitation may be extended by the Panel acting on its own initiative, or upon a written request by a person or an institution willing to participate as amicus curiae, or by the Ombudsperson.

⁹ The word "President" in § 2 replaced by "Presiding Member" on 12 February 2010.

¹⁰ The words "the resignation or" in § 2 omitted, and the words "the other" inserted between the words "with" and "two members" in § 2 on 12 February 2010.

¹¹ The word "President" replaced by "Presiding Member" on 12 February 2010.

Rule 19. Action in specific cases

1. The Panel may, of its own motion or at the request of a party, take any action which it considers expedient or necessary for the proper performance of its duties under Regulation No. 2006/12.

2. The Panel may delegate one or more of its members to take any such action in its name, and in particular to hear witnesses or experts, to examine documents or to visit any locality. Such member or members shall duly report to the Panel.

Rule 20. Joinder of complaints

The Panel may, if it considers in the interest of the proper conduct of the proceedings, order the joinder of two or more complaints.

Rule 21. Order of processing of complaints

1. The Panel shall deal with complaints in the order in which they become ready for examination.

2. The Panel may, however, decide to give precedence to a particular complaint.

Rule 22. Provisional measures¹²

1. The Panel or, where appropriate, its Presiding Member may, at the request of a party or of any other person concerned, or of its own motion, indicate to the parties any interim measure which it considers should be adopted in the interests of the parties or of the proper conduct of the proceedings before it.

2. The Panel may request information from the parties on any matter connected with the implementation of any interim measure it has indicated.

Rule 23. Time-limits

In accordance with Section 11.3 of Regulation No. 2006/12, and unless extended by the Panel, the time-limit for UNMIK for a response on the merits of a complaint declared admissible shall be twenty days of the receipt of the complaint by the Special Representative of the Secretary-General. All other time-limits shall be fixed by the Panel, for any information, observations or comments requested from the parties.

Rule 24. Costs

In accordance with Section 10.5 of Regulation No. 2006/12, there shall be no charge for the submission of a complaint.

B. Complaints

Rule 25. Signature of complaints

1. Any complaint submitted under Section 10.2 or 10.3 of Regulation No. 2006/12 shall be submitted in writing and shall be signed by the applicant or by the applicant's representative.

2. Where a complaint is submitted by a legal person or by a group of individuals, it shall be signed by those persons competent to represent such legal person or group. The Panel shall determine any question as to whether the persons who have signed a complaint are competent to do so.

3. Where an applicant is represented in accordance with Rule 17 § 1, a power of attorney or written authority shall be supplied by his or her representative.

¹² The word "President" in § 1 replaced by "Presiding Member" on 12 February 2010.

Rule 26. Content of complaints

1. A complaint shall set out:
 - a. the identity of the applicant and of the complainant, if different from the applicant, including, where appropriate, the name, date of birth, occupation and address of the person concerned;
 - b. the name, occupation and address of the representative, if any;
 - c. a statement of all relevant facts;
 - d. a succinct statement of compliance with the admissibility criteria laid down in Section 3 of Regulation No. 2006/12;
 - e. a succinct statement of the alleged violations of the instruments mentioned in Section 1.2 of Regulation No. 2006/12;
 - f. the reparation sought from UNMIK.
2. The applicant may attach any documentary evidence to the complaint. The applicant shall in any event submit copies of decisions, whether judicial or not, relating to the object of the complaint or showing that the admissibility criteria have been satisfied.
3. The applicant can make use of a standard form provided by the Secretariat.

Rule 27. Registration of complaints

The Executive Officer shall keep a register of the complaints, in which shall be entered the date of registration and the date of termination of the proceedings.

C. Examination of admissibility

*Rule 28. Designation of a rapporteur*¹³

1. The Presiding Member shall designate a member as rapporteur, who shall examine the complaint.
2. In their examination of complaints rapporteurs
 - a. may request the parties to submit, within a specified time, any factual information, documents or other material which they consider to be relevant;
 - b. shall submit such reports, drafts and other documents as may assist the Panel in carrying out its functions.

Rule 29. Inadmissibility decision without communication of the complaint to UNMIK

The Panel may at once declare that the complaint is inadmissible or strike it out.

Rule 29bis. Admissibility decision without communication of the complaint to UNMIK

The Panel may also at once declare that the complaint is admissible, where the complaint raises questions which are substantially the same as those that have been raised in other complaints, which have already been declared admissible by the Panel, and where no new admissibility issue arises.¹⁴

*Rule 30. Communication of the complaint to UNMIK and written proceedings*¹⁵

1. Alternatively, the Panel may decide to
 - a. request the parties to submit any factual information, documents or other material considered by the Panel to be relevant;

¹³ The word "President" in § 1 replaced by "Presiding Member" on 12 February 2010.

¹⁴ Rule 29bis inserted on 11 September 2009.

¹⁵ The words "give notice of" in § 1 replaced by "communicate", the words "on the complaint" in § 1 replaced by "on the admissibility of the complaint, including on the question whether the complaint is manifestly ill-founded.", and the second sentence of § 2 omitted on 12 February 2010.

b. communicate the complaint to the Special Representative of the Secretary-General and invite UNMIK to submit written observations on the admissibility of the complaint, including on the question whether the complaint is manifestly ill-founded, and, upon receipt thereof, invite the complainant to submit observations in reply;

c. invite the parties to submit further observations in writing.

2. Before taking its decision on the admissibility, the Panel may decide, either at the request of a party or of its own motion, to hold a hearing if it considers that the discharge of its functions under Regulation No. 2006/12 so requires.

*Rule 31. Plea of inadmissibility*¹⁶

Any plea of inadmissibility should in principle be raised by UNMIK in its written observations on the admissibility of the complaint submitted as provided in Rule 30 § 1 b.

*Rule 31bis. Admissibility issue linked to the merits*¹⁷

Where the Panel determines that an admissibility issue is closely linked to the merits of the complaint, it may join the issue to the merits. In that case, provided that there is no other obstacle to the admissibility, it shall declare the complaint admissible.

Rule 32. Decision on admissibility

1. The decision of the Panel shall contain a brief description of the facts, as well as the reasons in points of law. It shall state whether it was taken unanimously or by a majority.

2. Any member who has taken part in the consideration of the case shall be entitled to annex to the decision of the Panel either a separate opinion, concurring with or dissenting from that decision, or a bare statement of dissent.

*Rule 33. Admissibility issue raised or arising after the complaint has been declared admissible*¹⁸

1. In the event that a new admissibility issue is raised or arises after the complaint has been declared admissible, the Panel shall, in accordance with Section 2.3 of Administrative Direction No. 2009/1, suspend its deliberation on the merits and determine the admissibility issue by a separate decision.

2. However, where it is clear that the Special Representative of the Secretary-General has already fully discussed the merits of the complaint, the Panel may at once adopt its opinion on the merits, in which it then includes its determination of the admissibility issue.

D. Examination of the merits

*Rule 34. Proceedings after the admission of a complaint*¹⁹

1. Once a complaint has been declared admissible, or following a confirmation of the admissibility of the complaint upon the examination of a new admissibility issue under Rule 33 § 1, the Panel shall invite the Special Representative of the Secretary-General to comment or to further comment on the merits. It may invite the complainant to submit further evidence and written observations, including observations on the comments made by the Special Representative of the Secretary-General.

2. The Panel may decide, either at the request of a party or of its own motion, to hold a hearing on the merits if it considers that the discharge of its functions under Regulation No. 2006/12 so requires.

¹⁶ The words “must, in so far as its character and the circumstances permit,” replaced by “should in principle”, the words “or oral” omitted, and the words “Rule 30” replaced by “Rule 30 § 1 b” on 12 February 2010.

¹⁷ Rule 31bis inserted on 12 February 2010.

¹⁸ Rule 33 replaced on 12 February 2010.

¹⁹ § 1 replaced on 12 February 2010.

3. The Panel shall, where appropriate, fix the written and oral procedure.

Rule 35. Opinion on the merits

1. In accordance with Section 17.1 of Regulation No. 2006/12, the Panel shall adopt an opinion containing its findings as to whether there has been a breach of the human rights of the complainant.

2. In accordance with Section 17.1 of Regulation No. 2006/12, the Panel may, when it considers necessary, make recommendations based on its findings. These recommendations may relate, in particular, to the reparation measures that are to be taken following the finding of a violation of the human rights of the complainant.

Rule 36. Form of the opinion

1. The opinion shall contain:

a. the name of the members of the Panel who have participated in the adoption of the opinion, and the name of the Executive Officer of the Secretariat;

b. the date on which it was adopted;

c. a description of the parties and their representatives;

d. an account of the procedure followed;

e. the facts of the case;

f. a summary of the submissions of the parties;

g. the reasons in points of law;

h. the operative provisions;

i. the number of members constituting the majority.

2. Any member who has taken part in the consideration of the case shall be entitled to annex to the opinion of the Panel either a separate opinion, concurring with or dissenting from that opinion, or a bare statement of dissent.

E. Evidence

Rule 37. Evidence upon which the decisions and opinions are based

The Panel shall base its decisions and opinions on any evidence which it considers relevant to the complaint, including evidence collected on its own initiative.

Rule 38. Submission of additional evidence by the parties

The parties may submit additional evidence at any point during the proceedings, until the Panel has finished the consideration of the case. The Panel may, however, when necessary for the proper performance of its duties under Regulation No. 2006/12, set a time-limit for the submission of such evidence.

Rule 39. Investigative measures

1. The Panel may, at the request of a party or of its own motion, adopt any investigative measure which it considers capable of clarifying the facts of the case.

2. The Panel may, *inter alia*, in accordance with Section 15.1 of Regulation No. 2006/12, request the appearance of any person, including UNMIK personnel, as a witness or an expert or in any other capacity, or the submission of any documents, including files and documents in the possession of UNMIK, which may be relevant to the complaint. Requests for the appearance of UNMIK personnel or for the submission of United Nations documents shall be submitted to the Special Representative of the Secretary-General and acted upon by him in accordance with Section 15.3 of Regulation No. 2006/12.

*Rule 39bis. Requests for restrictions on disclosure of evidence*²⁰

1. Any of the parties may request the Panel not to disclose to the other party in the proceedings evidence submitted by it, in order to safeguard an important public interest or to preserve the fundamental rights of the complainant or of any other person concerned. Any such request shall include reasons and specify whether it is requested that the disclosure of all or part of the information submitted is restricted. The Panel shall decide on the request on an *ex parte* basis.

2. If the Panel grants the request, it shall inform the other party of its decision, and act accordingly. To the extent that it will not jeopardise the confidential character of the information received, the Panel shall indicate the nature of the evidence received in confidence. It will be possible for the Panel to base its determinations on evidence received in confidence.

3. If the Panel does not grant the request, or if it grants it only partially, it shall inform the requesting party of its decision, and give it an opportunity to reconsider the issue of submission of the evidence to the Panel.

*Rule 39ter. Confidentiality of evidence collected by the Panel on its own initiative*²¹

If the Panel receives evidence from a third party on the condition of confidentiality, it shall not disclose that evidence to any of the parties. It will be possible for the Panel to base its determinations on evidence received in confidence.

F. Hearings

Rule 40. Public character of the hearings

In accordance with Section 16.1 of Regulation No. 2006/12, hearings shall be in public, unless the Panel in exceptional circumstances decides otherwise.

*Rule 41. Conduct of hearings*²²

1. The Presiding Member shall organise and direct the hearings.
2. Any member of the Panel may put questions to any person appearing before the Panel.

G. Signature, delivery, notification and publication of decisions and opinions

*Rule 42. Delivery of decisions and opinions*²³

Decisions and opinions shall be delivered in writing.

*Rule 43. Signature of decisions and opinions*²⁴

Decisions and opinions shall be signed by the Presiding Member and the Executive Officer of the Secretariat.

Rule 44. Notification of decisions and opinions

Decisions and opinions shall be notified to the parties.

²⁰ Rule 39bis inserted on 21 November 2009.

²¹ Rule 39ter inserted on 21 November 2009.

²² § 1 replaced on 12 February 2010.

²³ Original Rule 43 renumbered on 12 February 2010.

²⁴ The word “President” in the original Rule 42 replaced by “Presiding Member”, and original Rule 42 renumbered on 12 February 2010.

Rule 45. Publication of decisions and opinions

Decisions and, in accordance with Section 17.2 of Regulation No. 2006/12, opinions shall be published promptly in English, Albanian and Serbian.

H. Revision and rectification of errors

Rule 46. Requests for revision of a decision or an opinion

1. A party may, in the event of the discovery of a fact which might by its nature have a decisive influence and which, when the decision or the opinion was delivered, was unknown to the Panel and could not reasonably have been known to that party, request the Panel, within a period of one month after that party acquired knowledge of the fact, to revise that decision or opinion.

2. The request shall mention the decision or the opinion of which revision is requested and shall contain the information necessary to show that the conditions laid down in paragraph 1 have been complied with. It shall be accompanied by a copy of all supporting documents.

3. The Panel may refuse the request on the ground that there is no reason to warrant considering it.

4. If the Panel does not refuse the request, it shall communicate it to the other party or parties and shall invite them to submit any written comments within a time-limit laid down by the Panel. The Panel shall also fix the date of the hearing should the Panel decide to hold one.

Rule 47. Rectification of errors and editorial revision

1. Without prejudice to Rule 46, the Panel may, of its own motion or at the request of a party made within one month of the delivery of a decision or an opinion, rectify clerical errors, errors in calculation or obvious mistakes.

2. Decisions and opinions are subject to editorial revision.

I. Derogation

Rule 48. Derogation in individual cases

The provisions of this chapter shall not prevent the Panel from derogating from them for the consideration of a particular case, where necessary for the proper performance of its duties under Regulation No. 2006/12.

Chapter 5. Final provisions

Rule 49. Questions not governed by the Rules of Procedure

Questions not governed by the present Rules of Procedure shall be settled by the Panel, which shall base its ruling on the provisions of Regulation No. 2006/12 and, as much as possible, on the Rules of Court of the European Court of Human Rights.

Rule 50. Language versions of the Rules of Procedure

The present Rules of Procedure are adopted in English, which text shall constitute the authentic version. The text shall be translated in Albanian and Serbian.

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G. Statistical Table

HRAP Caseload, Communications & Determinations (final, as of 30 May 2016)												
Caseload	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Received	3	12	69	353	90 ¹	n/a	n/a	n/a	n/a	n/a	n/a	527
Closed	0	0	18	11	35 ²	98	95	85	97	79	9	527
Pending	3	15	66	408	463	365	270	185	88	9	0	0
Determinations by Type	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Total	0	0	34	23	79	213	270	91	103	79	10	902
Admissibility Decisions	0	0	30	19	51	164	238	10	3	-	-	515
Partial Admissibility Decisions	0	0	2	0	1	0	0	-	-	-	-	3
Strike off the List	0	0	0	3	5	2	6	-	-	-	-	16
Opinions on the Merits	0	0	1	0	22	46	23	79	96	79	9	355
Partial Opinions on the Merits	0	0	0	1	0	0	0	-	-	-	-	1
Requests for Revision/Reopening	0	0	1	0	0	1	3	2	4	-	1	12
Determinations by Finding	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	Total
Decisions	Admissible	0	0	11	2	16	63	112	2	-	-	206
	Partially Admissible	0	0	2	9	25	51	60	2	2	-	151 ³
	Inadmissible	0	0	17	8	10	50	66	6	1	-	158
Opinions: Violation	0	0	1	0	21	45	21	76	88	74	9	335
Opinions: No Violation	0	0	0	1	1	1	2	3	8	5	-	21 ⁴
Requests for Revision	Refused	0	0	1	0	0	1	1	2	4	-	10
	Granted	0	0	0	0	0	0	2	-	-	-	2

¹ Following the Panel's review, case no. 25/10 was split in two cases (new case no. 90/10)

² Two cases (no. 04/07 and 26/08) declared inadmissible in 2010, have been re-opened by the Panel in 2012.

³ Three of them are "partial admissibility" decisions.

⁴ One of them is a partial opinion on the merits.

H. Decisions and Opinions of the HRAP Referred to in this Report (by alphabetical order)

1. *Anđelković*, no. 277/09, opinion of 23 January 2014
2. *Antić*, no. 100/09, opinion of 12 September 2013
3. *B.A.*, no. 52/09, opinion of 1 February 2013
4. *Balaj and Others*, no. 04/07, decision of 11 May 2012
5. *Balaj and Others*, no. 04/07, opinion of 27 February 2015
6. *Barać*, no. 149/09, decision of 1 October 2012
7. *B.K.*, no. 85/10, opinion of 13 November 2015
8. *Bucalo and Others*, nos. 148/09 *et al*, opinion of 4 February 2016
9. *Buljević*, no. 146/09, opinion of 13 December 2013
10. *Čungurović*, no. 131/09, opinion of 6 August 2014
11. *Demirović*, no. 57/08, decision of 17 April 2009
12. *Employees of the Kišnica and Novo Brdo Mines of Trepča Complex*, no. 81/10, opinion of 18 May 2016
13. *Five Complainants*, nos. 43/09 *et al*, opinion of 31 July 2013
14. *Guga*, no. 47/08, opinion of 24 January 2014
15. *Ibraj*, nos. 14/09 *et al*, opinion of 6 August 2014
16. *Jocić*, no. 34/09, opinion of 23 April 2013
17. *Jovičić*, no. 233/09, opinion of 24 June 2015
18. *Kostić and Others*, nos. 111/09 *et al*, opinion of 23 October 2015.
19. *Krasniqi*, no. 08/10, opinion of 17 May 2016
20. *Kušić*, no. 08/07, opinion of 15 May 2010
21. *Kuzmanović*, no. 262/09, opinion of 21 January 2015
22. *Lazić*, no. 261/09, opinion of 27 February 2015
23. *Milenković*, no. 255/09, opinion of 26 June 2015
24. *Milogorić and Others*, nos. 38/08 *et al*, opinion of 24 March 2010
25. *Mirić and Others*, nos. 68/09 *et al*, opinion of 10 September 2015
26. *Mišljen and Others*, nos. 58/09 *et al*, opinion of 13 November 2015
27. *Mitrović and Others*, nos. 144/09 *et al*, opinion of 13 November 2014
28. *Mladenović*, no. 99/09, opinion of 26 June 2014
29. *N.M. and Others*, no. 26/08, opinion of 26 February 2016
30. *Nikolić and Others*, nos. 72/09 *et al*, opinion of 14 December 2014
31. *Parlić*, no. 01/07, opinion of 18 June 2010
32. *Pavić*, no. 98/09, opinion of 26 April 2013
33. *Pejčinović*, no. 89/09, opinion of 13 March 2014
34. *Remištar*, no. 245/09, opinion of 14 October 2014
35. *Ristić*, nos. 224/09 *et al*, opinion of 11 September 2015
36. *Ristić*, no. 319/09, opinion of 30 May 2014
37. *S.C.*, no. 02/09, opinion of 12 December 2013
38. *S.M.*, no. 342/09, opinion of 18 March 2016
39. *Spahiu*, no. 02/08, partial opinion of 20 March 2009
40. *Spasić and Others*, nos. 221/09 *et al*, opinion of 31 July 2013
41. *Stevanović*, no. 289/09, opinion of 14 December 2014

42. *Stojković*, no. 87/09, opinion of 14 December 2013
43. *Tomanović and Others*, nos. 248/09 *et al*, opinion of 25 April 2013
44. *Vitošević*, nos. 90/09 and 103/09, opinion of 27 November 2013
45. *Vitošević and Majmarević*, nos. 139/09 *et al*, opinion of 23 January 2014
46. *Vučković*, no. 03/07, opinion of 13 March 2010
47. *Vulić*, no. 05/07, opinion of 18 March 2011
48. *X.*, nos. 326/09 *et al*, opinion of 6 June 2013
49. *Zdravković*, no. 46/08, decision of 17 April 2009
50. *Zdravković*, no. 46/08, opinion of 25 February 2013

I. Reports or Opinions in which HRAP is Discussed

- Amnesty International, *Kosovo: UNMIK's Legacy. The Failure to Deliver Justice and Reparation to the Relatives of the Abducted* [PDF], London, 2013, pp. 9-21.
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- European Commission for Democracy Through Law ("Venice Commission"), *Opinion on the Existing Mechanisms to Review the Compatibility with Human Rights Standards of Acts by UNMIK and Eulex in Kosovo*, Opinion No. 545 / 2009, CDL-AD(2010)051, Strasbourg, 21 December 2010, §§ 18-47.
- Human Rights Watch, *Kosovo: Poisoned by Lead – A Health and Human Rights Crisis in Mitrovica's Roma Camps* [PDF], June 2009, pp. 16-17, 33-34, 68 and 70.
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J. HRAP Mentions in Secretary-General's Reports to the UNSC

S/2006/45 of 25 January 2006

75. A regulation establishing a human rights advisory panel awaits approval from Headquarters.

S/2008/211 of 28 March 2008

24. The Human Rights Advisory Panel has held three working sessions since its inaugural session in November 2007. The Panel elected its Presiding Member, adopted its rules of procedure and continued with its examination of complaints, dealing with issues such as property rights and access to courts. It delivered its first decision in February.

S/2008/458 of 15 July 2008

23. The Human Rights Advisory Panel is now fully operational. The secondment of an expert from the European Court of Human Rights has boosted its technical capacity for human rights legal research, analysis and drafting. An electronic case management system has been set up, strengthening operational capacity. To promote public awareness of its mandate, it has embarked on an information campaign that includes meetings with non-governmental organizations and civil society groups, dissemination of information brochures, and running a public service announcement on local Kosovo and Serbian television. Of the 26 cases it has received so far, the Panel has now issued decisions on admissibility in 9 cases, with 6 being declared admissible and 3 inadmissible. The cases deal, inter alia, with property rights, right to life, freedom of expression and administration of justice. Certain cases still raise issues concerning the effectiveness of legal remedies available to the complainants under the legal system in Kosovo as it currently stands. The Assembly of Kosovo is in the process of selecting candidates for the position of Ombudsperson, but there are serious concerns that the selection process has become highly politicized.

S/2009/149 of 17 March 2009

30. The Human Rights Advisory Panel, created by UNMIK Regulation 2006/12 as a mechanism for handling complaints of alleged human rights violations arising from matters under UNMIK responsibility, became operational in November 2007 and issued its first opinion on 12 November 2008. UNMIK liaises with EULEX to ensure prompt and thorough police and judicial investigations in cases before the Advisory Panel, and is reviewing the possibility of dealing with payment of compensation where recommended by the Panel. The workload of the Advisory Panel stood at 108 cases on 31 January 2009. Of these, 20 cases have been finalized, the majority being dismissed owing to their inadmissibility and the failure of complainants to pursue their applications; 88 cases remain active and pending. The largest number of complaints concern housing and property matters.

S/2009/300 of 10 June 2009

26. My Special Representative undertook consultations with the High Commissioner for Human Rights to find ways of increasing the effectiveness of the Human Rights Advisory Panel as a credible mechanism for dealing with allegations of human rights violations under the mandate of UNMIK. Agreement has been reached on the need to reaffirm the non-adversarial character of the Panel's proceedings at public hearings and to address other procedural aspects of UNMIK Regulation 2006/12 on the establishment of the Panel. The total number of cases received by the Panel to date is 378, of which 23 cases are closed.

S/2010/5 of 6 January 2010

44. UNMIK issued administrative direction No. 2009/1, implementing UNMIK regulation No. 2006/12 on the establishment of the Human Rights Advisory Panel. The direction sets 31 March 2010 as a cut-off date for the submission of complaints to the Panel and clarifies

issues related to the admissibility of complaints, the appointment and resignation of Panel members and the conduct of public hearings. To date, the Panel has received a total of 482 cases, of which 452 are pending and 30 are closed.

S/2010/169 of 6 April 2010

36. During the reporting period, the vacancy for the third member of the Human Rights Advisory Panel was filled. To publicize the upcoming cut-off date of 31 March 2010 for submission of complaints to the Panel, notices were placed in the Pristina and Belgrade media having wide circulation. Following a review of its case figures, the panel reports that it has received a total of 439 cases to date, of which 30 have been closed.

S/2010/562 of 29 October 2010

53. In pursuance of its mandate, the Human Rights Advisory Panel has made recommendations to my Special Representative on 62 out of a total of 521 complaints.

S/2011/43 of 28 January 2011

43. The Human Rights Advisory Panel case processing output has increased threefold in 2010, with 32 cases closed as at the end of November, compared to 11 cases closed in 2009. However, the Panel still faces a significant backlog of 460 pending cases. This and other procedural and policy questions affecting the Panel were reviewed by the eighty-fifth session of the Venice Commission of the Council of Europe on 17 and 18 December. The Commission emphasized the need to secure additional resources and consider appropriate procedural options to enhance the Panel's efficiency.

S/2011/281 of 3 May 2011

51. As at 31 March 2011, the UNMIK Human Rights Advisory Panel had completed 92 of a total of 525 matters, including 26 complaints that were closed during the reporting period. Of the 92 completed matters, the Panel closed 41 through opinions on the merits and the remaining 51 through determinations finding the complaint inadmissible. Of the 41 matters closed through an opinion on the merits, the Panel opined that UNMIK had been responsible for a violation of human rights in 39 matters and made appropriate recommendations to the Special Representative in accordance with its mandate.

S/2012/72 of 31 January 2012

47. As at 31 December 2011, the UNMIK Human Rights Advisory Panel had completed 166 of a total of 525 cases. In the course of the year 2011, the Panel closed 100 cases, compared to 37 in 2010.

S/2012/603 of 3 August 2012

39. In June, a member of the UNMIK Human Rights Advisory Panel was appointed to serve on the European Court of Human Rights. My Special Representative has requested the President of the Court to provide recommendations for a suitable replacement to ensure continuity in the work of the Panel.

S/2015/303 of 27 April 2015

45. The Human Rights Advisory Panel, which was established in 2006 to investigate individual allegations of human rights violations committed by UNMIK, continued its activities and issued its annual report for 2014 in March. As at the end of March 2015, the Panel has closed 454 cases, while 73 cases remain outstanding.

Minutes of UNSC 7448th meeting (New York, 26 May 2015), S/PV.7448, pp. 3-4

With regard to UNMIK's human rights-related activity, let me take this opportunity to brief you on the Mission's Human Rights Advisory Panel, established in 2006 to investigate individual complaints of alleged human rights violations during the early years of UNMIK's deployment. The Panel received 527 complaints and closed 464 of them, while 63 cases remain outstanding. The Panel has consistently recommended compensation for moral damages. However, the relevant General Assembly resolutions prohibit compensation by the United Nations for non-economic loss resulting from peacekeeping operations. Nonetheless, in my discussions with our local and international interlocutors, I have been advocating establishment of a suitable mechanism to compensate for moral damages, as well as for further investigation by appropriate judicial authorities of inconclusive cases.

S/2015/579 of 30 July 2015

59. The UNMIK Human Rights Advisory Panel, which reviews complaints of human right violations allegedly committed by UNMIK from June 1999 to February 2008, delivered 16 opinions on 20 complaints. In 15 complaints, the Panel found that UNMIK failed to act in accordance with the procedural requirements of article 2 of the European Convention on Human Rights. In 12 complaints, the Panel also found that, by its failure, UNMIK contributed to the distress and mental suffering of the complainants and their families, in violation of article 3 of the European Convention on Human Rights. Since my last report, no progress has been made with regard to the Panel's recommendations relating to the payment of adequate compensation for moral damages suffered as a result of those violations. Furthermore, EULEX informed UNMIK that, owing to current legal constraints, it is unable to implement the Panel's recommendation on continuation of criminal investigations pertaining to cases before the Panel. By the end of June, the Panel had closed 474 cases, while 53 cases are outstanding.

S/2015/833 of 3 November 2015

42. The UNMIK Human Rights Advisory Panel, which reviews complaints of alleged human rights violations committed by UNMIK from 23 April 2005 to 31 March 2010, delivered six opinions on 13 complaints during the reporting period. The Panel found in all these cases that UNMIK had fallen short of satisfying the procedural requirements of article 2 (right to life) and, in 11 cases, of article 3 (prohibition of torture, inhumane or degrading treatment) of the European Convention on Human Rights. By the end of September, the Panel had closed 487 cases; 40 cases remain outstanding. The Panel plans to complete its substantive work on the complaints by the end of 2015.

S/2016/99 of 1 February 2016

42. During the reporting period, the UNMIK Human Rights Advisory Panel delivered nine opinions on 31 complaints. In eight of the nine opinions, the Panel found that UNMIK had failed to meet the procedural requirements stipulated in article 2 (right to life) of the European Convention on Human Rights, due to the lack of proper criminal investigation. Further, the Panel established that, in 22 of the 31 complaints, the procedural requirements had not been met as provided in article 3 of the Convention (prohibition of torture, inhumane or degrading treatment). In the ninth opinion, the Panel concluded that the Mission had violated article 3 of the Convention as well as articles 9 (right to social security) and 11 (right to an adequate standard of living) of the International Covenant on Economic, Social and Cultural Rights. Since my last report, no progress has been made with regard to the Panel's recommendations relating to the payment of adequate compensation for moral damages suffered as a result of those violations. By the end of 2015, the Panel had closed 518 cases, with nine remaining. The Panel plans to complete its substantive work by March 2016, followed by preparation and presentation of its final report.

S/2016/407 of 29 April 2016

48. During the reporting period, the UNMIK Human Rights Advisory Panel delivered four opinions on seven complaints, including one in a case relating to the exposure of Roma IDPs to hazardous health conditions, including lead contamination, during the early days of the interim administration. In two opinions, relating to five complaints, the Panel found that UNMIK had fallen short of satisfying the procedural requirements of article 2 (right to life) and article 3 (prohibition of torture, inhumane or degrading treatment) of the Convention for the Protection of Human Rights and Fundamental Freedoms. In another opinion, in addition to violations of articles 2 and 3 of the Convention, the Panel found a violation of the Convention on the Elimination of All Forms of Discrimination against Women. In the opinion arising from the case of the exposure of the Roma IDPs to lead contamination, the Panel identified numerous violations of not only those conventions but also the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child. Since my previous report, no progress has been made with regard to the Panel's recommendations concerning the payment of adequate compensation, including for moral damages arising from the alleged violations by UNMIK. As at the end of the reporting period, the Panel had closed 525 cases, with only 2 pending. The Panel is scheduled to complete its substantive work by the end of June 2016 and issue a final report thereafter.

