



## *The Human Rights Advisory Panel*

*UNMIK Administrative HQ, Container D, 10000 Pristina, Kosovo*

### **ANNUAL REPORT**

**2008**

## FOREWORD

This is the first annual report of the Human Rights Advisory Panel (the Panel). Consistent with the mandate of the Panel, this report is made available to the general public.

The Report covers the activities of the Panel from its inaugural session in November 2007 until 31 December 2008. Information on events that preceded the inaugural session are also referenced, including the adoption of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel, and the appointment of the first members of the Panel by the Special Representative of the Secretary-General, (SRSG) on 12 January 2007.

At the end of the Kosovo conflict, the United Nations assumed the administration of Kosovo under UN Security Council Resolution 1244 (the Resolution) of 10 June 1999. The newly formed United Nations Mission in Kosovo (UNMIK) faced a unique and challenging task. Under the Resolution, an international civil presence was established with defined primary responsibilities including the responsibility for the protection and promotion of human rights. The Resolution itself, however, did not specify any clear mechanisms to ensure implementation of the human rights mandate.

The creation of the Panel evolved from discussions and written commentaries that sought to determine how to best ensure the observance of human rights standards and how to effectively redress human rights grievances. In the early stages of UNMIK, interested members of the local and international human rights community began to identify gaps in this area. In 2000, the Ombudsperson Institution in Kosovo was established for the purpose of enhancing and protecting human rights but the scope of the Ombudsperson's authority was insufficient to implement the full range of internationally recognized human rights remedial measures.

In September 2004, the European Commission for Democracy through Law (the Venice Commission) noted the lack of “an adequate and consistent mechanism for the examination of alleged human rights breaches by the two “institutional” sources of potential human rights violations in Kosovo”<sup>1</sup> – UNMIK and KFOR<sup>2</sup>. The Venice Commission proposed that UNMIK establish an independent human rights court. As an interim solution, the Venice Commission recommended the formation of a Human Rights Advisory Panel.

The Parliamentary Assembly of the Council of Europe expressed similar concerns regarding the human rights mechanisms then available in Kosovo in January 2005. The Assembly recommended that UNMIK and KFOR/NATO commence work, in

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<sup>1</sup> European Commission for Democracy through Law (Venice Commission), Opinion on Human Rights in Kosovo: Possible Establishment of Review Mechanisms, CDL-AD (2004)033, adopted at the Commission’s 60<sup>th</sup> Plenary Session (Venice, 8-9 October 2004), available at [http://www.venice.coe.int/docs/2004/CDL-AD\(2004\)033-e.asp](http://www.venice.coe.int/docs/2004/CDL-AD(2004)033-e.asp), § 74.

<sup>2</sup> In June 1999, a multi-national NATO force, KFOR (Kosovo Force), was established under a UN mandate to deter hostilities, maintain peace and cooperate with the international civil presence.

cooperation with the Council of Europe, towards establishing a Human Rights Court for Kosovo.<sup>3</sup>

UNMIK took steps to transform the Ombudsperson Institution in Kosovo into an entirely local body which would not have jurisdiction over the international civil presence towards the end of 2005. The establishment of the Panel thereafter was intended to fill the gaps in human rights accountability resulting from this process and to address the concerns raised by the Venice Commission, the Council of Europe and other concerned parties.

In the final analysis, the Panel was destined to play a role which was different from the one originally proposed by the Venice Commission. The new concept was based on the assumption that the Panel, as a quasi-judicial body, would be an independent instrument for review of complaints of alleged human rights violations committed by UNMIK. In cases where the Panel actually determines that a human rights violation occurred, it will make public recommendations to the SRSG on the remedial measures to be taken.

The Panel finally became operational in November 2007. Since that time, it has become apparent that the Panel has an important role to play in relation to the continuing international civil presence in Kosovo. The establishment of the Panel was a significant step towards ensuring an adequate level of human rights protection and accountability in Kosovo. This conclusion is evidenced by the types of complaints and the rapidly increasing number of cases filed with the Panel. The matters under review by the Panel are illustrative of important human rights issues raised in the Kosovo context since 1999.

Marek Nowicki

Presiding Member  
Human Rights Advisory Panel

31 January 2009

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<sup>3</sup> Parliamentary Assembly of the Council of Europe, resolution 1417 (2005) on Protection of human rights in Kosovo, adopted on 25 January 2005, available at <http://assembly.coe.int/Mainf.asp?link=/Documents/AdoptedText/ta05/ERES1417.htm>.

## 1. INTRODUCTION

1. The Human Rights Advisory Panel (the Panel) was established pursuant to UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel (the Regulation)<sup>4</sup> with the mandate to examine complaints by individuals or groups of individuals claiming to be a victim of a human rights violation by UNMIK.

The Panel was established in response to calls for the establishment of a mechanism to consider UNMIK's compliance with international human rights standards in its role as the interim transitional administration of Kosovo. It is fully independent and its organisation and mandate are such that it can best be qualified as a quasi-judicial body.

The Panel is the first human rights complaint mechanism of its kind in United Nations (UN) peace keeping missions which exercise transitional administration powers. As such, it is confronted with certain unique issues, including the definition of the scope of the acts or omissions which are attributable to UNMIK, assessing a complainant's exhaustion of available remedies in the context of general UN immunity from legal proceedings, and characterising continuing and non-continuing violations within the context of the Panel's limited temporal jurisdiction.

2. Although the Panel was established by the March 2006 Regulation, it took considerable time before it became operational. The first members were appointed by the SRSG on 12 January 2007 and they were convened for the inaugural meeting in October 2007. However, this was postponed for administrative reasons and the Panel finally commenced its operations in November 2007.

The Panel, with the support of UNMIK, established its premises and recruited staff during its first full year of operation. It conducted a public information campaign and established a website, both of which were considered essential for the proper functioning of the Panel as a body competent to receive complaints from the public. It set up an electronic case management system and established both library and electronic research facilities. The Panel promulgated its Rules of Procedures, and prioritized cases for assessment of admissibility and consequent communications to the SRSG.

3. The Panel conducted twelve (12) sessions, received eighty four (84) complaints, ruled on thirty (30) complaints, found fourteen (14) complaints admissible, found seventeen (17) complaints inadmissible, and adopted an opinion on the merits in one (1) case from the inaugural session in November, 2007 until December 2008.

Complaints submitted to the Panel have concerned a wide range of alleged human rights violations, including the right to life, the prohibition of ill-treatment, the right to a fair trial, the right to respect for private and family life, the right to an effective remedy and the right to the enjoyment of property.

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The Regulation is appended to the present report (annex 1).

## 2. COMPOSITION OF THE PANEL

### 2.1 Panel members

The three part-time Panel members, nominated by the President of the European Court of Human Rights and appointed by the SRSG in accordance with the Regulation on 12 January 2007 were as follows:

Mr. Paul Lemmens (Belgium), Judge in the Belgian Council of State and professor of human rights law at the University of Leuven;

Mr. Marek Nowicki (Poland), President of the Helsinki Foundation for Human Rights, Warsaw, and former Ombudsperson in Kosovo;

Ms. Michèle Picard (France), Vice-President of the Paris First Instance Court and former President of the Human Rights Chamber for Bosnia and Herzegovina.

The Panel elected Mr. Marek Nowicki as its Presiding Member in January 2008.

Ms. Picard resigned from the Panel on 3 March 2008 in order to take up an appointment as a judge *ad litem* with the International Criminal Tribunal for the former Yugoslavia in the Hague.

Ms Snezhana Botusharova (Bulgaria), a former Judge in the European Court of Human Rights, Strasbourg was nominated by the President of the European Court of Human Rights and appointed to the Panel by the SRSG to replace Ms. Picard on 6 May 2008.

It is a fundamental requirement that the Panel members be of high moral character, impartiality and integrity with demonstrated expertise in human rights. Biographical information is provided hereunder on the members of the Panel:

**4. Marek A. Nowicki** (January 2007-present), is a Polish citizen and a human rights lawyer. Mr. Nowicki 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 and he was the Polish member of the European Union Network of Independent Experts on Fundamental Rights from March 2003 to September 2006.

From 1982 onwards, during the period of martial law in Poland, Mr. Nowicki was a columnist for the underground press, a dissident with the Polish “Solidarity” movement. At the same time, he was co-founder, activist of the Helsinki Committee in Poland and co-author of all of its reports on the human rights situation in Poland.

He was a founding member of the Helsinki Foundation for Human Rights in Warsaw and its president from November 2003 until February 2008. He is a member of the Advisory Council of the International Centre for the Legal Protection of Human Rights in London (INTERIGHTS). Mr. Nowicki is the author of dozens of books and hundreds of articles on human rights published in Poland and abroad. He also lectures on human rights at the “Collegium Civitas” university in Warsaw.

5. **Paul Lemmens** (January 2007-present), a Belgian citizen, is a member of the Brussels bar and has been a judge in the Council of State of Belgium since 1994. He was a member of the Council of State's section that examines the compatibility of draft legislation and draft regulations with higher norms of international and national law for over ten years. He currently serves in the supreme administrative court which is the contentious section of the Council.

Mr. Lemmens has also been a part-time professor at the University of Leuven since 1986 where he has lectured 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. He is the Belgian director of the European Masters Programme in Human Rights and Democratisation, a European inter-university programme based in Venice, (Italy).

Mr. Lemmens was a member of the Belgian Data Protection Commission from 1987 until 1997 and he has also served as a member of the National Commission for the Rights of the Child since 2007. He was an expert for the Council of Europe on the study of the compatibility of certain national systems (Central and Eastern European States) with the European Convention on Human Rights during the 1990's. He is currently the senior expert for Belgium in the legal expert group of the European Union Fundamental Rights Agency (FRALEX).

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 Committee of Ministers of the Council of Europe as a member of the Human Rights 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 General Assembly as a judge *ad litem* in the International Criminal Tribunal for the former Yugoslavia on 24 August 2005, a function which she assumed on 3 March 2008. Ms. Picard also worked in the human rights sector with the Council of Europe in Albania, in FYROM and in Bosnia and Herzegovina

7. **Snezhana Botusharova** (May 2008-present), a Bulgarian citizen, was a Judge in the European Court of Human Rights from 1 November 1998 until 30 April 2008, and also Vice-President of the Fifth Section of the Court. She is currently an international judge in the Court of Bosnia and Herzegovina. She also served as the Republic of Bulgaria Ambassador Extraordinary and Plenipotentiary to the United States of America from 1994 to 1998.

Ms. Botuscharova was a Member of the Bulgarian Grand National Assembly on behalf of the Union of Democratic Forces and she was one of the authors of the new Bulgarian Constitution. She was re-elected to the 36th National Assembly and was its Deputy Chairperson and 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 European Commission for Democracy through Law of the Council of Europe from 1991 to 1994 and, in this capacity, prepared legal opinions on the draft Constitutions of Ukraine, the Russian Federation and Moldova.

Ms. Botuscharova obtained the degree of Doctor of Law from the Lomonosov University of Moscow. She worked as an attorney-at-law at the Sofia Bar, before becoming 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 is the author of books and articles on constitutional law, in particular the new Bulgarian Constitution, and on human rights issues.

## **2.2 Secretariat of the Panel**

8. The Secretariat of the Panel consists of an Executive Officer, a legal officer and two administrative officers. A human rights officer and an additional legal officer are in the process of recruitment. Biographical information is provided hereunder on the Secretariat:

**John J. Ryan**, an Irish citizen, was formerly employed as a Solicitor with Stephen MacKenzie and Co. Solicitors, Dublin, Ireland. He was appointed as the Executive Officer of the Secretariat of the Panel by the SRSG in September, 2007. Prior to assuming his current responsibilities he was employed as the Head of the International Judicial Support Division, Department of Justice, UNMIK and thereafter as Senior Legal Officer, OSRSG, UNMIK. Mr. Ryan is a graduate of the University of Limerick, Ireland 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.

**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 Department of Justice 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. She was reassigned to the United Nations Mission in Liberia in September, 2008.

**Martin Clutterbuck**, an Australian citizen, was a legal officer with the Panel from September to December 2008 whereupon he accepted the post of Head of Office of the Kosovo Property Claims Commission. He previously worked for UNMIK in various capacities such as the International Legal Aid Coordinator with the Department of Justice 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. Mr. Clutterbuck qualified as a lawyer in Australia in 1995.

**Bernadette Foley**, an American citizen, is a legal officer who came to the Panel in December of 2008. She was previously employed as a Senior Inspector with the UNMIK Office of Disciplinary Council which investigated allegations of ethical misconduct by judges and prosecutors. From 2005 to 2006 she managed, designed and delivered a training program for investigators of judicial and prosecutorial misconduct in a joint UNDP/UNMIK project. From 2002-2004 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 United States in the area of criminal and mental health law.

**Snezana Martinović**, a Serbian national, has been an administrative assistant with the Panel since December, 2007. She commenced employment with UNMIK in 2000 where she worked as an Administrative Assistant with the Department of Justice.

**Ruzvelt Frrokaj**, Kosovo Albanian, 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, OSRSG.

**Mimoza Arifi-Hoxha**, Kosovo Albanian, has been an administrative assistant with the Panel since November 2008. She commenced employment with UNMIK in December 1999 as an administrative assistant with the Division of Public Information/Press Office.

9. **Magda Mierzewska**, a Polish citizen was seconded by the European Court of Human Rights, Strasbourg to the Panel for a two-month period from May to July 2008. Ms. Mierzewska is a lawyer in the Court's Registry who made an important contribution to the Panel in terms of research, analysis and drafting during her secondment.

### **3. LEGISLATIVE AND PROCEDURAL FRAMEWORK**

#### **3.1. Legislative framework**

10. Pursuant to the Regulation, the Panel may consider complaints under a range of human rights instruments, in particular the Universal Declaration of Human Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights, 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.

In practice, complainants base their complaints primarily upon the Articles of the European Convention on Human Rights (ECHR) and its Protocols.

#### **3.2. Procedural framework**

11. A number of the procedural aspects to be followed by the Panel and the parties are determined by the Regulation. They provide for an adversarial procedure in two stages: firstly, the examination of the admissibility of the complaint, then, if the complaint is declared admissible, an examination of the merits of the complaint. The procedure may lead to an opinion, which is sent to the SRSG and which may contain recommendations.

Pursuant to the Regulation, the Panel adopted its Rules of Procedure, on 5 February 2008. These rules, which are based on the Rules of the European Court of Human Rights, contain detailed provisions on the handling of complaints and the deliberative processes of the Panel.<sup>5</sup>

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The Rules of Procedure are appended to the present report (annex 2).

Based on the practice followed by the Panel during the period under review, a brief description of the main steps in the procedure is provided hereunder:

12. With regard to the filing of complaints, it is recommended that complainants use the standard format available from the Secretariat of the Panel, or from its website, in Albanian, Serbian, (Latinic and Cyrillic) or English. Complainants who have not used the standard form will be duly requested by the Secretariat to complete the application form.

There is no charge for the submission of a complaint to the Panel and no requirement for legal representation, although many complainants are legally represented. In the completion of the application form, complainants must set forth all relevant facts on which the alleged violation of human rights is based. Documentary evidence and supporting material may be attached to the complaint. The Panel, in fact encourages complainants to submit a copy of the entire file together with the complaint.

The Panel may request further information from the complainant or the SRSG, and may request, from the SRSG, the appearance of any person or the production of any document that is relevant to the complaint. As provided by the Regulation, the SRSG shall cooperate with the Panel and provide it with the necessary assistance in the exercise of its powers and authorities, including, in particular, through the release of documents and information relevant to the complaint. The SRSG recently invited the Panel to seek information and documentation directly from the concerned agencies. The Panel has now adopted this practice as standard procedure.

13. Upon receipt of a complaint, the Panel must first determine if it is competent to deal with the complaint and whether the complaint is admissible. The Panel is empowered to deal only with complaints about acts or omissions for which UNMIK is responsible and only in relation to alleged violations of human rights that have occurred not earlier than 23 April 2005 or arising from facts which occurred prior to that date, where these facts give rise to a continuing violation of human rights.

Complaints can be admitted only if all other available remedies or avenues for review of the alleged violation have been pursued and provided that the complaint is lodged within six months from the date on which the final decision was taken. Complaints that are incompatible with human rights standards, i.e. complaints that invoke a violation of a right not guaranteed by any of the human rights instruments within the jurisdiction of the Panel, are inadmissible. Finally, the Regulation allows the Panel to reject a complaint, at the admissibility stage, on the ground that it is manifestly ill-founded.

14. The Panel can declare a complaint inadmissible at once, upon an analysis of the complaint itself. If the Panel is not able at this stage to reach such a conclusion on the basis of the complaint itself, it communicates the complaint to the SRSG to obtain his comments on the complaint. If a complaint is so communicated, the Panel routinely invites the SRSG to comment on both the admissibility and the merits of the complaint. The Panel may provide the responses from the SRSG to the complainant for his or her comment.

Although the Panel can immediately adopt an opinion on the merits of a complaint, including its decision on admissibility, it has, heretofore, adopted a separate decision on the admissibility of the complaint. All Panel decisions on admissibility are published on the Panel's website.

15. Once the complaint has been declared admissible, the procedure enters into the examination stage of the merits of the complaint. In the case of *Canhasi*, the SRSG raised an admissibility issue i.e. the non-exhaustion of remedies, after the Panel's decision to declare the complaint admissible. The Panel stated that parties would normally be estopped from the late presentation of admissibility objections. It considered however that it was not necessary to take a position on the admissibility of the respondent's objection in this case as the objection was, in any event, not founded (*Canhasi*, 04/08).

Parties may be requested to provide further information and they are also provided with the opportunity to comment on the merits. Public hearings may be held if the interests of justice require. The practice of the Panel has been, thus far, to organise public hearings only when their added value is clear and no such hearings have been held to date.

In reaching an opinion on the merits of a complaint, the Panel examines it in the light of the human rights provisions invoked by the complainant or relevant to the issues in the case. It will determine whether or not there has been a breach of human rights by UNMIK. In the case of a finding of a violation, the Panel may make recommendations to UNMIK for measures to be taken. The Panel's opinions are also published on its website.

It is the prerogative of the SRSG to respond to the opinion of the Panel and the SRSG's response to the recommendations is also published on the Panel's website.

#### **4. PUBLIC INFORMATION INITIATIVES**

16. The Panel conducted a 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 non governmental organizations, (NGOs) and international organizations, in particular with those involved in the promotion and protection of human rights in Kosovo.

The Panel and the Secretariat also 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. The Panel and the Secretariat provided a short oral presentation to the participants on that occasion which was followed by a question and answer session.

The Panel further engaged in media appearances including radio and TV interviews in various minority areas, to highlight the work of the Panel. The broadcast of a public service announcement on the Panel's operations was aired on Kosovo and Serbian TV on 2 June 2008.

The Secretariat of the Panel also conducted a public information campaign in the region. It designed and produced information brochures in the Albanian, Serbian and English languages, which were widely disseminated in court houses, municipal and government buildings, and through non-governmental organizations (NGOs) as well as legal aid offices and court liaison offices.

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 in Serbia. This programme is funded and implemented by the Danish Refugee Council.

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 Kidnapped and Murdered Persons in Prokuplje and with Mr. Gianfranco D'Eramo, Team Leader of the EU-funded (and DRC-implemented) Legal Aid Project in Belgrade on 26 November. The Secretariat also met with representatives of the Ministry for Kosovo and Metohija, UNHCR, the Danish Refugee Council, the International Organization for Migration, PRAXIS, the Initiative for Development and Cooperation and the Balkan Centre for Migration and Humanitarian Activities and concluded the campaign with a meeting with Ms. Kruna Petković, Assistant Minister, Ministry for Kosovo and Metohija on 27 November.

## **5. CASELOAD OF THE PANEL**

17. A total of eighty four (84) complaints were filed with the Panel during the reporting period, including the fifteen (15) complaints that were filed in 2006 and 2007, prior to the inaugural session of the Panel in November 2007. In fact, the first fifteen (15) complaints were filed following the promulgation of the Regulation on 23 March 2006.

The Panel adopted thirty (30) decisions in 2008 commencing with its first decision on the admissibility of a complaint on 6 February 2008. Seventeen (17) of these decisions declared complaints entirely inadmissible, two (2) complaints were declared partly inadmissible. The Panel adjourned the further examination of these two (2) complaints and the other ten (10) complaints were declared fully admissible.

On 12 November 2008 the Panel adopted its first opinion, in which it found a violation of the procedural aspect of the right to life because of the lack of an effective investigation into the killing of the wife of the complainant, *Shaip Canhasi*. This opinion was communicated to the SRSG on 21 November, 2008 and he therefore did not have adequate time to respond to recommendations of the Panel before the end of the reporting period.

There were sixty nine (69) cases pending before the Panel on 31 December 2008. Of these cases, fifty four (54) were still at the admissibility stage, while fourteen (14) cases were at the merits stage.

18. Certain trends have emerged in the complaints raised before the Panel. As has already been indicated, most of the complaints invoke a violation of the European Convention on Human Rights, (ECHR) or its Protocols. The ECHR provisions which gave rise to the largest number of violations during the reporting period were:

Article 1 of Protocol No. 1 to the ECHR, concerning the right to protection of property;

Article 6, ECHR in relation to the right to a fair trial within a reasonable time; and

Article 13, ECHR concerning the right to an effective remedy.

The subject matter of complaints to the Panel included the following:

- Allegations of a violation of the right to life (Article 2 ECHR), in relation to an allegedly inadequate investigation into the fate of a missing person.
- Allegations of violations of the right to life (Article 2 ECHR), in relation to an allegedly inadequate murder investigation.
- Allegations of a violation of the right to a fair trial within a reasonable time (Article 6 § 1 ECHR) and the right to an effective remedy (Article 13 ECHR), in relation to property compensation claims pending in the municipal courts of Kosovo since 2004.
- Allegations of a violation of the right to a fair trial (Article 6 § 1 ECHR), right to respect for private and family life (Article 8 § 1 ECHR) and the right to protection of property (Article 1 of Protocol No. 1) as well as the right to an effective remedy (Article 13 ECHR, in relation to decisions made by the Housing and Property Directorate and its Housing and Property Claims Commission, and the Kosovo Property Agency and its Property Claims Commission, concerning ownership and occupancy).
- Allegations of a violation of the right to a fair trial (Article 6 § 1 ECHR), right to respect for private and family life (Article 8 § 1 ECHR) and the right to protection of property (Article 1 of Protocol No. 1) as well as the right to an effective remedy (Article 13 ECHR, in relation to unsuccessful evictions of unlawful occupiers of property).
- Allegations of a violation of the right to a fair trial (Article 6 § 1 ECHR), right to respect for private and family life (Article 8 § 1 ECHR) and the right to protection of property (Article 1 of Protocol No. 1) as well as the right to an effective remedy (Article 13 ECHR, in relation to conflicting decisions on property cases between the Housing and Property Directorate or the Kosovo Property Agency and municipal and district courts).
- Allegations of a violation of the right to a fair trial (Article 6 § 1 ECHR) and the right to protection of property (Article 1 of Protocol No. 1), in relation to decisions made by the Special Chamber of the Supreme Court of Kosovo in relation to Kosovo Trust Agency Matters concerning employee benefits payable through the privatization of Socially Owned Enterprises.
- Allegations of a violation of the right to protection of property (Article 1 of Protocol No. 1), in relation to the confiscation of property by law-enforcement authorities.

Two complaints, in particular, have garnered considerable public attention:

- The first case concerns a complaint in relation to the alleged lead poisoning and other violations of rights of a large number of members of the Roma community living in camps for internally displaced persons in northern

Kosovo (*Mehmeti et al.*, 26/08).

- The other complaint is in relation to the allegedly unauthorized and disproportionate use of force by UNMIK police in the dispersal of a street demonstration in February 2006, which led to the deaths of two individuals and injuries to other complainants (*Balaj et al.*, 04/07).

The largest number of human rights complaints received by the Panel concern property issues. In this regard, the Panel received complaints related to the following agencies of UNMIK in descending order:

Kosovo Property Agency (KPA);  
Housing and Property Directorate (HPD);  
Housing and Property Claims Commission (HPCC)  
Municipal Courts of various municipalities;  
Special Chamber of the Supreme Court of Kosovo on Kosovo Trust Agency Related Matters;  
UNMIK and the SRSG generally; and  
UNMIK police.

## **6. JURISPRUDENCE OF THE PANEL**

19. The Panel commenced the development of its jurisprudence in the course of its processing of the individual complaints of alleged human rights violations placed before it. Given the fact that the Panel commenced its operations relatively recently, the focus of its jurisprudence at the end of 2008 was mainly on admissibility and other threshold issues, including the basic parameters of its jurisdiction. The jurisprudence of the Panel has not been limited to admissibility issues as it has also ruled on a number of substantive issues. A short overview of the Panel's main rulings is provided hereunder.

### **6.1. Admissibility issues**

20. The Panel considered quite a number of admissibility issues during the reporting period and some of these are outlined below:

#### *6.1.1 Admissibility *ratione temporis**

21. In the case of *Behrami* the Panel found the complaint inadmissible *ratione temporis* as the events complained of, leading to the death of one child aged 12 and serious injuries to another child aged 10, through the accidental discharge of unexploded ordinance in the Mitrovicë/Mitrovica region, occurred in 2000 and was outside of the Panel's temporal jurisdiction. It should be noted that the complaint was filed with the Panel after an application relating to the same facts and lodged by the same complainant had been declared inadmissible by the European Court of Human Rights on 2 May 2007. The European Court declared inadmissible the application, as the complaints were incompatible *ratione personae* with the provisions of the ECHR, meaning that the acts and omissions complained of were not attributable to any party to the Convention.

A significant proportion of cases before the Panel concern complaints in relation to the destruction of property, primarily in the context of the armed conflict in Kosovo in 1999, and subsequent claims for compensation filed with municipal courts in relation

to property damage. In the *Lajović* admissibility decision, the Panel pointed out that its temporal jurisdiction is limited to alleged violations that have 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. Insofar as the complaint related to damage to property inflicted prior to 23 April 2005, the Panel found that it had no jurisdiction. However, the Panel affirmed its jurisdiction over the alleged ongoing usurpation of property which could constitute a continuing violation (*Lajović* 09/08.)

#### *6.1.2 Admissibility ratione personae*

22. A number of complaints were lodged concerning acts committed by agencies which were not attributable to UNMIK, such as KFOR (Sahiti 03/08) and OSCE (Jovanović 39/08.), or against private individuals (Nikolić 37/08), and were thus outside the jurisdiction of the Panel.

23. Complaints were declared inadmissible in other cases as the complainants could not themselves be considered victims of the alleged violations (*Teki Bokshi and Others* 06/08).

#### *6.1.3 Exhaustion of all available avenues for review*

24. In its opinion in the *Canhasi* case in which it examined a late objection to the admissibility of the complaint (Para 15 ante), the Panel set out a number of basic principles:

The Panel noted that the rationale for the non-exhaustion rule is to afford the competent authorities, primarily the courts, the opportunity to prevent or put right the alleged violations of the relevant international instruments. The rule is based on the assumption, reflected in Article 13 of the ECHR and similar treaty provisions, that the domestic legal order will provide an effective remedy for violations of a complainant's rights.

The Panel made it clear that complainants are only required to exhaust domestic remedies that are available and effective. "The only remedies required to be exhausted are those that relate to the breaches alleged. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness (...). Discretionary or extraordinary remedies need not be exhausted (...). In determining whether any particular remedy meets the criteria of availability and effectiveness, regard must be had to the particular circumstances of the individual case (...)."

The Panel also explained that the burden of proof in cases in which the respondent invokes the non-exhaustion of remedies lies on the respondent to establish that the remedy was an effective one, which was available in theory and practice at the relevant time. The respondent must demonstrate that the remedy was accessible, capable of providing redress in respect of the individual's complaints and offered reasonable prospects of success.

With regard to the objection raised by the SRSG in the *Canhasi* case, in which the complainant argued that appropriate measures were not taken to properly investigate his wife's murder, the Panel noted that the SRSG objected that the complainant had not sought further information on the investigation from the UNMIK Police Commissioner or the Ministry of the Interior. The Panel concluded that a request for

further information on the progress of the investigation did not, in this case, constitute an “available avenue for review” of the alleged violation.

The “effective remedy” sought by the complainant was a “thorough and effective investigation capable of leading to the identification and punishment of those responsible for the deprivation of life”, not merely information which would have confirmed that the murder investigation had stalled, apparently for more than eight years (*Canhasi* 04/08).

25. Whilst the respondent’s objection on the basis of the non-exhaustion of remedies was not upheld in *Canhasi*, a number of other complaints before the Panel were found to be inadmissible as complainants either had pending applications for review in the courts or had not availed themselves of the right to appeal and thus had not yet exhausted all available remedies, or had pending prosecutorial proceedings.

26. The complaint of *Balaj et al* raises the specific issue of the availability of an effective avenue for redress in cases involving UNMIK on account of the UN’s general immunity from legal proceedings pursuant to the Convention on the Privileges and Immunities of the United Nations. In this case the Panel has joined the question of exhaustion of remedies to the consideration of the merits of the cases.

#### *6.1.4 Six-month rule*

27. In some cases, complaints had not been lodged within the relevant six month period, either from the date of violation or from the date on which a final decision was taken. The Panel therefore provided guidance on the operation of the six month rule. It ruled that, in the case of proceedings before the Housing and Property Claims Commission, where the complainant has filed a request for reconsideration of a complaint that has been declared admissible, the relevant date of final determination is the date of the binding and enforceable decision on such request, (*Zrnzević* 12/08, *V.P.* 05/08).

#### *6.1.5 Complaints manifestly ill-founded*

28. A number of complaints were declared inadmissible as being manifestly ill-founded. This was the position of the Panel where complaints did not disclose any appearance of a violation of human rights (*Begolli* 08/08, *Teki Bokshi and Zeqir Bujupi* 12/07, *Nikolić* 37/08).

On other occasions, the Panel noted that the complainant was, in fact, attempting to re-argue his or her case, after it had been examined by the competent court. The Panel has only limited jurisdiction. It cannot examine the case like a court with full jurisdiction over all the aspects of the case. When the complainant argues about a court’s establishment of the facts or interpretation of the law, the Panel limits itself to assessing whether the court has acted in an arbitrary or unreasonable manner. It is not the task of the Panel to act as a court of appeal or court of “fourth instance” from the decisions of the ordinary courts, (*Emini* 17/08, *Bota Sot* 02/06).

### **6.2. Substantive issues**

29. The Panel also addressed a number of substantive issues, the most important of which are outlined below:

#### *6.2.1 Right to life (Article 2 ECHR)*

30. As indicated above, the complaint of *Canhasi* concerned the investigation by UNMIK police into the murder of the complainant's wife, on 3 February 2000, in northern Mitrovicë/Mitrovica by unidentified persons who forcibly entered the apartment in which the complainant and his wife were living. The complainant alleged that the investigation by UNMIK was inadequate.

In its opinion, the Panel set out relevant principles concerning the procedural aspect of the right to life contained in Article 2 of the ECHR. It stated, referring to the case law of the European Court of Human Rights, that "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 must therefore subject allegations of breach of this provision "to the most careful scrutiny".

Further, the Panel held that "the obligation to protect the right to life under Article 2 of the EHCR, read in conjunction with a State's general duty under Article 1 of the ECHR to 'secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention', also requires by implication that there should be some form of effective official investigation when individuals have been killed as a result of the use of force (...)".

It was noted that the scope of the procedural obligation is not confined to cases of active State involvement in a killing, but has a broader autonomous scope. The Panel quoted the jurisprudence of the European Court of Human Rights: "[The] obligation requires that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances. The investigation must be capable of establishing the cause of the injuries and the identification of those responsible with a view to their punishment. Where death results, as in the present case, the investigation assumes even greater importance, having regard to the fact that the essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life."

The Panel affirmed that certain investigative measures must be taken to ensure an adequate and effective investigation. "Critically the authorities must have taken the reasonable steps available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony (...) and evidence from other key witnesses (...). Where there is a plausible, or credible, allegation, piece of evidence or item of information relevant to the identification, and eventual prosecution or punishment of the perpetrator of an unlawful killing, the authorities are under an obligation to take further investigative measures (...). Any deficiency in the investigation which undermines its ability to establish the cause of death or to identify the person or persons responsible will risk falling foul of this standard (...)."

A further requirement is that the investigation be a continuing one which demonstrates real progress in the conduct of the investigation. Any lengthy periods of inactivity in a case may be indicative of a failure to effectively continue the investigation for the purpose of identifying the perpetrators. The investigative procedure must also make sufficient provision for the involvement of the victim to the extent necessary to safeguard their legitimate interests.

Whilst "mindful of the need not to interpret the positive obligation to investigate in such a way that would impose an impossible or disproportionate burden on authorities, bearing in mind the difficulties of policing modern societies and conscious

of the difficult operational choices in terms of priorities and resources”, the Panel concluded that it must satisfy itself that the authorities have done enough to discharge their obligation to conduct an effective investigation in this case.

Applying these principles to the facts of the *Canhasi* case, the Panel concluded that there had been a number of deficiencies by UNMIK in the standards required for compliance with the procedural aspect of the right to life. Whilst UNMIK had conducted some forensic analysis, including an autopsy of the complainant’s wife, and had taken statements from a number of individuals, there was no indication that statements had been taken from all relevant witnesses, including eyewitnesses. Whilst witnesses had given UNMIK names and addresses of individuals alleged to have been involved in the killing of the victim, there was no evidence to indicate that statements had been taken from these individuals or even that efforts to take statements had been made.

Further, there was no information available to the Panel to demonstrate that any efforts had been made to continue the investigation into the murder over an eight year period of time from September 2000. Finally, the complainant was not informed about the investigative process, nor had he been provided with any explanation as to why statements were not taken from persons alleged to have been involved in the crime. Hence the authorities had failed to carry out an effective criminal investigation into the circumstances surrounding the death of Mrs. Canhasi and a violation of Article 2 had been committed.

#### *6.2.2 Right to a fair trial (Article 6 § 1 ECHR)*

31. In the complaint of *Bota Sot*, the Panel was asked, *inter alia*, to consider whether the failure of the District Court of Prishtinë/Priština to indicate possible avenues of appeal against its judgment constituted a violation of Article 6 § 1 of the right to a fair trial. The Panel held that “the right to a fair trial cannot be interpreted as generally imposing an obligation on States to make sure that parties to a lawsuit are informed by the court of first instance of any possibility to appeal against its judgment. The Panel would not exclude the possibility that such notice may be required in particular circumstances. However, the Panel does not see such circumstances in the present case. In this respect, some importance is to be attached to the fact the complainant was represented by counsel” (*Bota Sot* 02/06).

32. The right to a trial within a reasonable time was an issue in the *Emini* complaint. In its admissibility decision, and pending consideration of the merits of the complaint, the Panel noted that employment disputes, by their nature, call for expeditious decisions, in view of what is at stake for the person concerned, who through dismissal, loses his means of subsistence (*Emini* 17/08).

#### *6.2.3 Right to protection of property (Article 1 of Protocol No. 1)*

33. The complainants in *Teki Bokshi and Zeqir Bujupi* claimed a violation of their right to property on the basis of the inadequacy of their professional legal fees as paid by the court in cases of mandatory defence in criminal proceedings. The Panel noted that, “insofar as the complainants seem to challenge the amount of the fees which they are entitled to obtain, [...] Article 1 of Protocol No. 1 to the ECHR applies only to a person’s existing possessions. It does not guarantee the right to acquire property.”

Consequently, a person who complains of a violation of his or her right to property must first show that such a right existed. In the present case the Panel considers that the complainants have not shown that under the applicable regulations they had any

legitimate expectation that their fees would be increased. Nor have the complainants established that the relevant legislation guaranteed to them a right to obtain legal aid fees in a higher amount which could be qualified as ‘possession’ within the meaning of Article 1 of Protocol No. 1 to the Convention” (*Teki Bokshi and Zeqir Bujupi* 12/07).

## **7. STATISTICAL INFORMATION**

- Number of cases received
- Number of cases determined
- Number of cases pending

<b>Case status</b>	<b>2006</b>	<b>2007</b>	<b>2008</b>	<b>Total</b>
Number of cases received	3	12	69	84
Number of cases determined	0	0	20	20
Number of cases pending *	0	0	64	64

\* Of the sixty four (64) cases contained in the above total, ten (10) have been found admissible and no decision on admissibility has yet been taken on the balance of fifty four (54) cases.

## **8. ANNEXES**

ANNEX 1 – UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Panel

ANNEX 2 – Panel’s Rules of Procedure, adopted on 5 February 2008