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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<sup>1</sup>**

**Adopted by the Venice Commission  
at its 85<sup>th</sup> Plenary Session  
(Venice, 17-18 December 2010)**

**On the basis of comments by**

**Mr Pieter van DIJK (Member, the Netherlands)  
Mr Jean-Claude SCHOLSEM (Substitute Member, Belgium)  
Mr Georg NOLTE (Expert, Germany)**

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<sup>1</sup> All references to Kosovo shall be understood in full compliance with United Nations Security Council Resolution 1244 and without prejudice to the status of Kosovo.

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### I. Introduction

1. At its 60<sup>th</sup> Plenary Session (Venice, 8-9 October 2004), the Venice Commission adopted an opinion on “Human Rights in Kosovo: possible establishment of review mechanisms” (CDL-AD(2004)033). It recommended in particular, as a short term solution, the setting up of an independent Advisory Panel which would be competent to examine complaints lodged by any person claiming that his or her fundamental rights and freedoms have been breached by any laws, regulations, decisions, acts or failures to act emanating from UNMIK.

2. The Advisory Panel (hereafter: Panel) was formally established in March 2006, its members were appointed in January 2007 and it started to function in November 2007.

3. On 4 February 2008 the European Council adopted Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, whose central aim is to assist and support the Kosovo authorities in the rule of law area, specifically in the police, judiciary and customs areas, through “monitoring, mentoring and advising, while retaining certain executive responsibilities”.

4. The Parliamentary Assembly of the Council of Europe, through its Recommendation 1822(2008), welcomed the possible deployment of a European Union Rule of Law Mission to Kosovo, and invited the Committee of Ministers of the Council of Europe to provide its support and expertise to the relevant authorities in Kosovo, inter alia in the protection of human rights and in the strengthening of human rights protection mechanisms, including the ombudsperson institution and other mechanisms aimed, inter alia, at ensuring accountability of the international community in Kosovo<sup>2</sup>.

5. By a letter of 24 June 2009, the Chairman of the Political Affairs Committee of the Parliamentary Assembly requested the Venice Commission to prepare a follow-up opinion on mechanisms to review the compatibility with human rights standards of acts of UNMIK and EULEX in Kosovo.

6. A working group was set up, composed of Messers Pieter van Dijk, Jean-Claude Scholsem and Georg Nolte.

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<sup>2</sup> PACE Recommendation 1822(2008), Developments as regards the future status of Kosovo, paras. 4 and 5.

7. In July 2009, the rapporteurs were consulted by the secretariat of the Council of the European Union in the context of the preparation of a concept paper for the establishment of a Human Rights Review Panel for EULEX Kosovo.

8. On 16-17 November 2009, Mr Nolte, accompanied by Ms Simona Granata-Menghini of the Venice Commission Secretariat, travelled to Pristina, where they met with representatives of UNMIK: the Legal Advisor, the Chief of staff, Mr Nowicki (member of the Advisory Panel) and his staff; representatives of EULEX: the Chief of staff, Heads of Components, Legal advisors, human rights advisers, the President of the Assembly of EULEX judges and the Chief Prosecutor; the Ombudsperson and his Deputy; as well as representatives of three NGOs.

9. The present opinion was prepared on the basis of comments by the rapporteurs; it was adopted by the Venice Commission at its 85<sup>th</sup> Plenary Session (Venice, 17-18 December 2010).

## **II. International administration in Kosovo**

10. Following the conflict in 1999, international civil and security presences were deployed in Kosovo, under United Nations auspices and with the agreement of the then Federal Republic of Yugoslavia, pursuant to Security Council's Resolution No. 1244(1999). The United Nations Interim Mission in Kosovo (UNMIK) was thus established and mandated, under the authority of the Special Representative of the Secretary-General (SRSG), to take charge of the interim civil administration of Kosovo, in cooperation with the European Union and the Organization for Security and Co-operation in Europe (OSCE)<sup>3</sup>.

11. UNMIK was empowered, in particular, with promoting the establishment, pending a final settlement, of substantial autonomy and self-government in Kosovo; performing basic civil administrative functions where and as long as required; organizing and overseeing the development of provisional institutions for democratic and autonomous self-government pending a political settlement, including the holding of elections; transferring, as soon as these institutions would be established, its administrative responsibilities while overseeing and supporting the consolidation of Kosovo's local provisional institutions and other peace-building activities; facilitating a political process designed to determine Kosovo's future status; maintaining civil law and order, including establishing local police forces, and meanwhile through the deployment of international police personnel to serve in Kosovo; protecting and promoting human rights; and assuring the safe and unimpeded return of all refugees and displaced persons to their homes in Kosovo.

12. The adoption of the Constitutional Framework for Provisional Self-government in Kosovo on 15 May 2001 (UNMIK Resolution 2001/9) aimed at facilitating the transfer of powers from UNMIK to Kosovo's newly created institutions of self-government: the Assembly; the President of Kosovo; the Government; the Courts; and other bodies and institutions set forth in this Constitutional Framework.

13. After years of international administration, during which a range of competences had gradually been transferred to the Kosovo Provisional Institutions of Local Self-Government, the so-called "Ahtisaari Plan" was presented to the UN Security Council in March 2007. It envisaged supervised independence and termination of the UN mandate in Kosovo, while laying the ground for a set of new international presences in Kosovo in view of enhancing Kosovo's European perspective, in particular, the International Civilian Office (ICO) double-hatted as EU Special

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<sup>3</sup> Four "pillars" were initially set up by UNMIK: Pillar I: Police and Justice, under the direct leadership of the United Nations; Pillar II: Civil Administration, under the direct leadership of the United Nations; Pillar III: Democratisation and Institution Building, led by the Organization for Security and Co-operation in Europe (OSCE); and Pillar IV: Reconstruction and Economic Development, led by the European Union (EU).

Representative (EUSR) - who was to succeed UNMIK - and the EU Rule of Law Mission in Kosovo (EULEX).

14. Following the rejection of the compromise solution based on the Ahtisaari Plan and the failure of the Troika (comprising representatives of the USA, Russia and the EU) to find a consensual solution, on 17 February 2008 representatives of Kosovo unilaterally declared Kosovo independent. On 4 February, the EU Council adopted the Joint Action<sup>4</sup> establishing EULEX Kosovo and appointed Pieter Feith as EUSR in Kosovo.

15. The re-organisation of the international presence in Kosovo and a scaling down of UNMIK started in November 2008, further to an arrangement with the UN, which placed the EULEX Mission under UNSC resolution 1244 and the overall authority of the United Nations<sup>5</sup>.

16. Today, four international organizations remain present in Kosovo:

- KFOR is mainly responsible for maintaining the security and stability of Kosovo at the border posts, in the Serb regions of Kosovo and in the city of Mitrovica. It has 10,000 troops (as of May 2010) and is transitioning towards becoming a deterrent presence which will lead to further reduction in its troop levels.
- UNMIK maintains a residual presence in close cooperation with the other international stakeholders present on the ground (it has about 500 personnel including one-third international staff). Since June 2008, it has been led by Lamberto Zannier, the UN Secretary-General's Special Representative for Kosovo.
- The OSCE Mission focuses on issues related to strengthening institutions, as well as democracy and human rights. It operates within the framework of UNMIK.
- The EU's presence is made up of three components: a) a *political entity* in the EUSR, that is supporting the Kosovo authorities to meet its obligations and conform to European standards (double-hatted as ICO); b) an *operational entity* in the EULEX Mission which is the largest civilian mission deployed by the EU within the framework of the Common Security and Defense Policy (CSDP); and c) a *reform driving entity* in the the European Commission office that assists Kosovo in its long-term reform efforts and economic development.

17. In accordance with the reconfiguration of the international presence, EULEX now carries out among others the operational tasks associated with the rule of law, which previously came under the responsibility of UNMIK. The mandate of the EULEX Mission is large: it assists the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and a multi-ethnic police and custom service, ensuring that these institutions are free from political interference and adhering to internationally recognized standards and European best practices. It also has some limited correctional powers in the broader field of the rule of law, in particular to investigate and prosecute serious and sensitive crimes. Led by General Yves de Kermabon, EULEX operates under the local political guidance provided by the EUSR in Kosovo and reports to the Civilian Operations Commander in Brussels. The EU Political and Security Committee (PSC) exercises, under the responsibility of the Council of the EU, political control and strategic direction of the mission.

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<sup>4</sup> Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, Official Journal of the European Union, L/42/92, of 16 February 2008, as amended by Council Joint Action 2009/445/CFSP of 9 June 2009.

<sup>5</sup> Statement by the President of the Security Council, S/PRST/2008/44, of 26 November 2008; see also: UN Security Council, Report of the Secretary General on the UN Interim Administration Mission in Kosovo, S/2008/692, 24 November 2008, Para. 21-29 and 48-51.

### III. The UNMIK Human Rights Advisory Panel

#### A. The structure

18. The Advisory Panel was established by the Special Representative of the Secretary-General (SRSG) through UNMIK Regulation No. 2006/12 of 23 March 2006 which provides as follows:

#### 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 years. The appointment may be renewed for further terms of two years.

##### Section 6 - Oath or Solemn Declaration

Upon appointment, each member of the 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 [sic!] 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.

#### 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.

19. On 12 January 2007 the SRSG appointed the following members: Mr. Paul Lemmens (Belgium); Mr. Marek Nowicki (Poland) and Ms. Michèle Picard (France). The Advisory Panel held its inaugural session in Pristina on 15 and 16 November 2007.

20. The appointments were made in pursuance of Section 5 of UNMIK Regulation No. 2006/12 (see above) as amended by UNMIK Regulation No. 2007/3 of 12 January 2007, as follows:

*"5.2 The members shall be appointed for a term of one year. The appointment may be renewed for a further term(s) subject to any decision of the Security Council regarding UNMIK's mandate under United Nations Security Council Resolution 1244."*

21. On 5 February 2008, the Panel adopted its Rules of procedure, which were subsequently amended on 11 September 2009, 21 November 2009 and 12 February 2010.

22. Following the resignation of Ms Picard in March 2008, on 6 May 2008 the SRSG appointed Ms Snezhana Botoucharova (Bulgaria).

23. In June 2009, Ms Botoucharova resigned. At that moment, a question of interpretation of the role of the President of the European Court of Human Rights in the appointment of Panel members arose, concerning whether the President of the ECtHR should provide only one name per position (as had been done until then) or whether instead (as UNMIK now wished) the President should provide two or more names per position, thus allowing the SRSG to make a choice among the proposed candidates on grounds such as gender balance or geographical representation. The President considered that his practice of naming one candidate was an essential safeguard of the independence of the members of the Panel.

24. On 17 October 2009, the SRSG adopted Administrative Direction No. 2009/1, Implementing UNMIK Regulation No. 2006/12 on the Establishment of the Human Rights Advisory Panel, which provided *inter alia* the following:

*"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."*

25. Following exchanges between the United Nations and the President of the European Court of Human Rights concerning the latter's role in the appointment procedure, the President nominated Ms Christine Chinkin (UK), who was subsequently, on 11 February 2010, appointed by the Special Representative of the Secretary-General as the third member of the Advisory Panel.

26. As of 1 December 2010<sup>6</sup>, 460 cases were pending before the Panel. Since the commencement of its activities, the Panel has rejected or struck off the list a total of 43 cases, declared 33 cases partly admissible and 25 cases entirely admissible. Thus far, the Panel has issued opinions on the merits for 19 cases, and found that a violation occurred in 18 of these cases.

27. According to the 2009 Annual Report<sup>7</sup>, most cases were received in 2009. They concerned allegations of ineffective investigation into disappearances and murders that took place in the period preceding, during, or following the eruption of the violent conflict in Kosovo in 1999, allegedly in violation of the right to life. Several cases concerned excessive length of proceedings

<sup>6</sup> [http://www.unmikonline.org/human\\_rights/documents/Statistical-summary-eng.pdf](http://www.unmikonline.org/human_rights/documents/Statistical-summary-eng.pdf) . The update to 15 December 2010 was provided by the Panel itself.

<sup>7</sup> Human Rights Advisory Panel, Annual Report for 2009, [http://www.unmikonline.org/human\\_rights/documents/annual\\_report2009.pdf](http://www.unmikonline.org/human_rights/documents/annual_report2009.pdf)



and the denial of access to a court in cases for damages filed against KFOR, UNMIK, the Provisional Institutions of Self-Government (PISG) of Kosovo and various Municipalities, as well as other property-related cases.

28. Pursuant to Section 5 of UNMIK Administrative Direction No. 2009/1, the Panel ceased to accept complaints on 31 March 2010.

#### B. Assessment and proposals

29. The Venice Commission has been requested to prepare a follow-up opinion on the mechanism of review of acts of UNMIK in Kosovo for their conformity with human rights standards. This mechanism was set up further to a recommendation by the Venice Commission. The Venice Commission considers, however, that its task under the present request is not to assess whether its own recommendations have been followed by UNMIK: the Commission's recommendations are not binding and represent its preferred options, but not necessarily the only options possible and legitimate. For this reason, the Commission will rather assess in more general terms whether the current Advisory Panel represents in its view an appropriate and sufficient review mechanism.

30. The Venice Commission is of the opinion that the setting up of the Panel was a positive development, since it shows efforts on the part of UNMIK to abide by European and world-wide standards and at the same time proves its commitment to finding pragmatic solutions for remedies of possible failures in that respect and its intention to be accepted and respected by the Kosovo people.

31. The Venice Commission notes that the structure of the panel is similar to the one which it had proposed in its opinion of 2004. The Venice Commission had indeed recommended, as a short-term solution, the setting up of a Human Rights Advisory Panel for UNMIK with the following features:

- three (six/nine) independent members
- formal appointment by the SRGS upon the proposal of the President of the European Court of Human Rights
- fixed term of office
- availability of panel members in Pristina
- competence to examine complaints lodged by any person claiming that his or her fundamental rights and freedoms have been breached by any laws, regulations, decisions, acts or failures to act emanating from UNMIK
- determinations by the Panel by majority vote
- determinations that will be rendered in English, Albanian and Serbian and promptly made public
- determinations that will not be binding, but which UNMIK will accept unless the SRSG will personally determine that extraordinary reasons exist that do not make this possible.

32. Since its establishment, the Panel has opened its office, adopted its rules of procedure on 5 February 2008, opened a website (which explains the jurisdiction and the procedure for applying to the Panel), recruited its staff, carried out public information campaigns, held monthly, or regular sessions; examined complaints (it communicated a total of 140 cases for information to the SRSG<sup>8</sup>); and issued two annual reports (for 2008 and 2009). The decisions, in English, Albanian and Serbian, are promptly posted on the website and are easily found under the reference number or chronologically. Up until February 2009, monthly press releases kept the public informed of the results of each session of the Panel.

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<sup>8</sup> See statistics, note 6 above.

33. The Venice Commission welcomes these achievements. The Panel has managed to settle down and function despite obvious practical difficulties. In this connection, the Venice Commission underlines that the setting up of the monitoring mechanism of an international mission should ideally and normally take place at the same moment of the setting up of the mission. In the case of UNMIK, the Panel was set up some seven years later, which has clearly created additional difficulties. Against this background, the achievements of the Panel are even greater.

34. It cannot but be noticed, however, that the current backlog of cases pending before the Panel is very significant (over 450 cases), especially when compared to the number of substantive decisions taken so far by the Panel (since its inauguration in mid-November 2007, only 53 cases have been closed, with substantive determinations in nineteen cases). In the light of the circumstance that the duration of the Panel is limited in time, with UNMIK phasing out of Kosovo, this is an issue of concern and priority.

35. There is indeed the risk that the Panel may cease to exist before it has had the possibility of dealing with all the currently pending cases. This, in the Commission's view, would represent a very serious shortcoming of the mechanism established, as it would mean that individual claims of human rights breaches remain without an effective remedy. The 460 cases which are pending before the Panel should be decided by the Panel itself within the available time.

36. It is certainly not the Venice Commission's task to identify all the practical and political impediments which the Panel has encountered since its establishment and even less to assess who bears responsibility in this connection. However, the Commission has been asked to assess this monitoring mechanism in Kosovo, and it feels that it should make constructive proposals in order to increase the efficiency of the mechanism so that the pending cases may be decided shortly.

37. The Venice Commission is not a fact-finding body and is not equipped to investigate in detail what are the hurdles to a smooth and prompt case-processing by the Panel. Although the Commission is aware of its limited investigative powers, during its visit and subsequent contacts it has itself identified a certain number of problems, and has been informed about others. The Commission will take them into consideration in making its recommendations for the future functioning of the Panel. As a general observation, the Venice Commission stresses that it is essential that a relationship of mutual trust exist between the Panel and UNMIK, and all necessary steps should be taken in order to maintain or re-establish such a relationship.

#### Mandate of the panel

38. Although UNMIK is reducing its presence in Kosovo, the Panel's mandate should be extended for such a reasonably long period of time as to allow it to process all pending applications.

#### Composition of the panel

39. The composition of the panel has changed frequently, and the filling up of one of the three seats has required considerable time. The mandate of the three current panel members has just been extended. The Venice Commission proposes that no changes be made to the composition of the Panel until the end of its mandate.

### Availability of panel members

40. A panel session is held in Pristina every month, each time for three to four days. During this session, the members of the Panel examine the applications. While an increased presence of panel members in Pristina would be preferable, it may not be possible in practice. The Venice Commission is of the opinion therefore that the Panel should have broader recourse to the procedure foreseen in Rule 13 of its Rules of procedure (“where it is necessary for the Panel to decide a point of procedure or any other question other than at a scheduled meeting of the Panel, the President may direct that the deliberation may take place through electronic means”); to that end Rule 13 might be rephrased to the effect that the Panel may reserve the ordinary procedure for the more complex and sensitive cases.

### Nature of the Panel

41. In its opinion of 2004, the Venice Commission considered the character of the Panel as an UNMIK internal body of independent experts<sup>9</sup> as opposed to an international tribunal. While the Panel must carry out its functions in a rigorous, objective and transparent manner, its operation does not need to be in all points the same as that of a tribunal.

### Panel’s staff and budget

42. In order for the Panel to be able to process its workload efficiently and speedily, it is essential that it be given sufficient – additional - means (staff, interpreters, financial means) to do so.

### Panel’s determinations

43. In its opinion of 2004, the Venice Commission adopted the position that the Panel was to express a view as to whether or not there had been a breach of the applicant’s fundamental rights and freedoms, while UNMIK would have to commit itself to providing appropriate redress including possible compensation. The Commission gave as its opinion 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.”<sup>10</sup> Regulation 2006/12 empowers the Panel to make recommendations where necessary. The Panel sees its role in this respect as follows: if the Panel finds that UNMIK is responsible for a violation of one or more of the complainant’s human rights, it may make recommendations to UNMIK, including where appropriate, recommendations on the reparation to be offered.<sup>11</sup>

44. In all the cases where it found that there had been a violation of Convention rights, the Panel has recommended that UNMIK award “adequate compensation for non pecuniary damage”<sup>12</sup>.

45. Payment of non-material damage is, however, an issue of controversy between the Panel and UNMIK. The position of the latter is the following: “Current UN General Assembly resolutions do not allow the Organization or its Missions to pay compensation other than for material damage or physical harm. UNMIK therefore is not in a position to pay any compensation for human rights violations that may have occurred. UNMIK will, however, continue to address the

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<sup>9</sup> See CDL-AD(2004)033, para. 116.

<sup>10</sup> See CDL-AD(2004)033, paras.121-123.

<sup>11</sup> See HRAP Annual Report 2009, p. 15.

<sup>12</sup> See Opinion of 9 September 2010, Cases Nos. 62/08, Božidar PORTIĆ; 30/09, Novica ULAMOVIĆ; 31/09, Spasoje MARTINOVIĆ against UNMIK; Opinion of 24 March 2010, Cases No. 38/08, Petko Milogorić; 58/08, Milisav Živaljević; 61/08, Dragan Gojković; 63/08, Danilo Ćukić; and 69/08, Slavko Bogičević against UNMIK; Opinion of 15 May 2010, Case No. 08/07 Nadica KUŠIĆ against UNMIK.

issue with the United Nations Headquarters in New York with the aim of drawing the attention of the General Assembly to this problem, also taking into account the human rights standards that prevail in the context in which UNMIK is operating”<sup>13</sup>.

46. The Venice Commission finds that this controversy undermines the authority and effectiveness of the Panel, and should be addressed by way of urgency by the Panel and UNMIK so that a satisfactory, pragmatic if need be, solution may be found and Panel determinations may be complied with by UNMIK.

47. In this context, the Venice Commission wishes to stress that there exist several remedial possibilities, and payment of financial compensation is only one of them. The whole range of restorative measures of satisfaction and rehabilitation (acknowledgment of the violation and public apologies, to name only the most obvious) should be explored. Payment of monetary compensation could be reserved for the most extreme cases of violations in which no other form of remedy appears appropriate. It could be envisaged to obtain additional and specific funds through voluntary contributions, e.g. by individual member States and/or the European Commission.

#### **IV. The Human Rights Review Panel of Eulex Kosovo**

##### **A. Background**

48. In its opinion of 2004 on the human rights situation in Kosovo, the Venice Commission stressed that, when an international organisation carries out executive functions that are similar to those of a state, it must not be exempted from any independent legal review, in particular a system of independent review of conformity with international human rights standards.<sup>14</sup>

49. In his report on his Special Mission to Kosovo in 2009, the Commissioner for Human Rights of the Council of Europe stated with respect to EULEX:

“The EU’s Rule of Law Mission, EULEX could also consider the advantages of setting up an independent accountability mechanism. EULEX does have the possibility to exert some executive powers, even if they will not be used very often. For the time-being complaints made against EULEX personnel are being dealt with internally. There are a number of possibilities for accountability mechanisms for EULEX. One possibility is that EULEX could take on the model of the current Human Rights Advisory Panel; another is that complaints could be dealt with by the Ombudsperson’s Institution. A third option is that EULEX could create its own independent mechanism. The Commissioner urges EULEX to establish an effective accountability mechanism as a matter of priority. Such a mechanism would have the power to investigate thoroughly any allegation of wrongdoing and would subject EULEX representatives to the scrutiny of an independent and transparent body. The International Civilian Representative could also consider the advantages of such an accountability mechanism.”<sup>15</sup>

50. As noted by the Commissioner, EULEX has certain executive functions (see para. 17 above). It has been accorded immunity against local legal and administrative procedures, which is a standard phenomenon for international and diplomatic missions. It follows that local legislation cannot be enforced against EULEX or its staff members. However, EULEX and its staff members must observe local legislation and if staff members fail to do so, their immunity might be waived and they can be prosecuted in their home country.

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<sup>13</sup> See the SRSG’s comments in relation to the case of Nadica KUSIC, cited above: [http://www.unmikonline.org/human\\_rights/documents/Decisions/eng/DC\\_No\\_08-07-SRSG\\_comments.pdf](http://www.unmikonline.org/human_rights/documents/Decisions/eng/DC_No_08-07-SRSG_comments.pdf).

<sup>14</sup> CDL(2004)033, para. 91.

<sup>15</sup> Report of the Council of Europe Commissioner for Human Rights’ Special Mission to Kosovo 1 23 – 27 March 2009, para. 80, at: <https://wcd.coe.int/ViewDoc.jsp?id=1466279>.

51. According to the EULEX paper<sup>16</sup>, accountability includes operational, internal (legal and disciplinary) and external accountability elements, applying with respect to both the people of Kosovo and the people of the European Union. External accountability comprises political accountability to the EU Member States and participating third states, accountability vis-à-vis the political authorities in Kosovo, social accountability to the people of Kosovo and financial accountability (the mission is accountable to the European Commission, that is supervising the financial aspects of the mission, and indirectly to the EU).

52. As concerns external Human Rights accountability, the EU decided to promote the establishment of a Human Rights Review Panel (HRRP) for EULEX Kosovo for complaints from any person claiming to be the victim of human rights violations by EULEX Kosovo in the conduct of its executive mandate.

## B. Structure

53. The HRRP was established pursuant to a decision of the European Union of 20 November 2009<sup>17</sup>. A description of the HRRP is available on the latter's website and is as follows:

### **The Human Rights Review Panel (Panel)**

#### **Background**

The Joint Action establishing EULEX KOSOVO as well as the CONOPS and the OPLAN of the Mission stipulated that the Mission should ensure respect for internationally recognized human rights standards. This should be done by an external accountability mechanism, the Human Rights Review Panel which complements the overall accountability of the Mission, including the Internal Investigation Unit and the Third Party Liability Insurance. Accordingly, the HRRP was established on 29 October, 2009 in accordance with the provisions of the Joint Action.

#### **Members**

On 4 May 2010 the EULEX Kosovo Acting Head of Mission, Mr. Roy Reeve, appointed the three selected members to the Panel as follows:

1. Mr Antonio Balsamo, Italian national,
2. Ms Magdalena Mierzevska, Polish national and
3. Mr Francesco Florit, Italian national, (serving EULEX Judge).

The Panel members were appointed for a one year term, renewable. In addition, a substitute member, Ms Gabriele Gaube, German national, was also appointed on 4 May, 2020. She is also a serving EULEX judge who will replace Mr Florit should a conflict of interest arise in connection with his responsibilities as a EULEX Judge.

The HRRP is supported by a permanent secretariat located in the city centre at Rrustem Statovci, No 29, Prishtina.

#### **Mandate**

The mandate of the HRRP is to review alleged human rights violations committed by EULEX in the performance of its executive mandate. The HRRP is an independent body which discharges its functions with integrity and impartiality.

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<sup>16</sup> <http://www.eulex-kosovo.eu/docs/Accountability/EULEX-Accountability-05.01.2010.pdf>

<sup>17</sup> The "accountability concept" of the HRRP, adopted by the Council of the European Union in November 2009, is a restricted document. Although the Venice Commission feels obliged to respect this restricted character, it is of the view that transparency and accessibility of the mechanism requires that the legal basis of the HRRP be made known to the public.

**Jurisdiction**

The HRRP examines complaints relating to alleged violations that occurred since 9 December 2008 in Kosovo. Complaints must be submitted to the HRRP within three months from 9 June, 2010, when the HRRP became operational or within six months from the date of the alleged violation, whichever is the more favorable to the Complainant.

**Procedure**

The HRRP reviews complaints based on written information and may receive oral presentations.

**Complainant**

A complaint may be filed by any person, excluding EULEX personnel, claiming to be victim of a human rights violation by EULEX. The complainant may be represented before HRRP by a lawyer or other representative of his/her choice.

**Complaint**

The complaint must be written and signed by the complainant. It must contain all relevant information including contact details and the facts of the alleged violation with all available documentary evidence. If earlier decisions in the matter exist, these must be attached to the complaint.

**Findings**

The HRRP submits its findings to the Head of Mission and, where necessary, makes non-binding recommendations for remedial action. The recommendations may not result in monetary compensation. The findings and recommendations are made public.

54. The HRRP became operational on 9 June 2010. During its first session (9-11 June 2010) it adopted its rules of procedure<sup>18</sup>.

55. According to the data available as to 15 December 2010<sup>19</sup>, 16 cases had been registered, 6 of which had been declared inadmissible.

**C. Assessment**

56. The Venice Commission has limited itself to assessing the monitoring mechanism in respect of the executive functions of EULEX. It welcomes the establishment of the Panel as a mechanism for the accountability of EULEX in respect of possible human rights violations committed by it in the exercise of these functions.

57. The rapporteurs were consulted during the preparatory stages in summer 2009. The Venice Commission welcomes that several of their recommendations were taken into account in the preparation of the concept paper.

58. The HRRP appears to be generally in conformity with the recommendations which the Venice Commission had formulated in 2004 in respect of an advisory mechanism of human rights review for Kosovo. The Venice Commission wishes to stress, however, that those recommendations had been made in a context of a post-conflict emergency situation with only partly operating institutions. A different situation pertains in Kosovo today, and in this respect the Venice Commission is of the opinion that, as long as the acts of EULEX are supportive or corrective within a generally peaceful situation, EULEX should be put under a more stringent review.

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<sup>18</sup> <http://www.hrrp.eu/docs/ROP.pdf>

<sup>19</sup> <http://www.hrrp.eu/Statistics.php>; last visited on 20 December 2010.

59. The Venice Commission notes that the HRRP has become operational and has already, only some weeks after its establishment, started to examine complaints; it has a website where the decisions are promptly posted in three languages and has carried out a major outreach campaign to raise awareness of its mandate and functions among the public at large. The Venice Commission is of the opinion that such efficient and proactive attitude deserves to be commended and encouraged.

60. As the panel has been set up in the meantime, there is little point in repeating all the suggestions which the rapporteurs had made in summer 2009. The Venice Commission will confine itself to pointing out the main points which in its view would deserve re-consideration.

#### Independence of the Panel

61. The HRRP is composed of three international persons with a demonstrated expertise in human rights; one of them is a EULEX judge. They are appointed following a competitive procedure by the Head of Mission (for the EULEX judge in consultation with the President of the Assembly of the EULEX judges). They are not in the chain of command of the Head of Mission. In order for the HRRP to also be seen in an objective sense as independent and as exercising its functions with impartiality, the Venice Commission is of the view that an external input in the nomination procedure is crucial. It is of the opinion that the two external panel members should be appointed by the head of Mission in consultation with the President of the European Court of Human Rights or the President of the Court of Justice of the European Union.

62. Panel members are currently appointed for one year. According to the information provided by the EULEX mission, their mandate may be extended "upon request by the Panel member". The Venice Commission is of the opinion that, for the sake of objective independence, the length of the initial mandate of the panel members should be extended automatically within the limit of the mandate of EULEX.

#### Mandate

63. The HRRP's mandate is formulated as follows: "*to review complaints from any person, other than EULEX Kosovo personnel, claiming to be the victim of a violation of human rights by EULEX Kosovo in the conduct of EULEX Kosovo's executive mandate. The Panel will not review judicial proceedings before the courts in Kosovo.*" In the Commission's view, the mandate in respect of the justice sector is unclear; it will now be for the "case-law" of the HRRP to clarify what matters can be submitted to the panel.

#### Non-binding nature of the HRRP's determinations

64. The HRRP had advisory functions; its findings and recommendations are non-binding. The Head of Mission may decide not to implement a recommendation. It is the Venice Commission's understanding that possible decisions by the Head of Mission not to implement the Panel's findings will be duly and publicly motivated. It would be preferable if this were spelled out explicitly.

#### HRRP's recommendations

65. The HRRP may suggest remedial action such as verification of facts, addressing the cause of the violation of human rights, concrete action to avoid similar violations in the future, improvement of the organization or conduct of activities etc.

66. It is explicitly provided that “a review by the Panel may not result in recommendations in terms of compensation”. Pursuant to the Eulex accountability concept, any claims of financial compensation for alleged damage caused by EULEX Kosovo will, as a general rule, be handled through the existing insurance cover. Any claim of financial compensation should thus be addressed to the Head of Mission, who sees to it that “the claim is dealt with appropriately”.<sup>20</sup>

67. The Venice Commission is of the opinion that, in principle, *restitutio in integrum* is the most suitable manner of redress of human rights violations. The possibility for the HRRP to recommend remedial action removing the effects, and the causes, of the violation is therefore crucial. However, in some cases the most effective remedy is financial compensation, which instead the HRRP cannot recommend. In such cases it will be possible to claim monetary compensation, at least for the material damage, under the Third Party Liability Insurance scheme of EULEX. The Venice Commission stresses, however, that the procedure under the insurance scheme should not be unduly lengthy or complex. It notes in this respect that the Head of Mission of EULEX has committed himself to reviewing the insurance procedures to ensure that they remain effective.

## **V. Conclusion**

68. The Venice Commission reiterates that it is a basic principle of the rule of law and essential for a full and effective respect for human rights that international organisations which carry out executive functions in Kosovo be subject to a monitoring mechanism of review of human rights compliance.

69. The Venice Commission welcomes the establishment in November 2007 of the UNMIK Human Rights Advisory Panel largely in line with its own recommendations of 2004. The Commission urges this Panel and UNMIK to find a solution so that the over 450 cases currently pending before the Panel may be processed before UNMIK leaves Kosovo.

70. The Venice Commission also welcomes the establishment of the EULEX Human Rights Review Panel in November 2009, and encourages this Panel to maintain its proactive attitude. The Commission nevertheless advises the Council of the European Union to reconsider some of the features of the Panel in the light of European and international standards.

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<sup>20</sup> See EULEX concept paper.