

COMPLAINT AND GRIEVANCE MECHANISMS IN INTERNATIONAL LAW: ONE PIECE OF THE ACCOUNTABILITY JIGSAW?

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In the rules and principles that guide and regulate international organisations, there has been a gradual, yet noticeable, transformation from a model premised upon a narrow conception of inter-governmentalism and formal legalism to one that is increasingly receptive to broader constitutional notions, including ideals such as enhancing legitimacy and promoting good governance.¹ In this process, concepts such as accountability, transparency, public participation and due administration have become prevalent both in the rhetoric and everyday reality of international organisations. This article focuses upon one element of this wider discourse, namely the increased adoption within the international community of complaint and grievance mechanisms that operate outside the traditional legal framework.

Such mechanisms are often administrative in nature, and thus clearly distinguishable from both judicial² and quasi-judicial³ dispute settlement procedures, on the one hand, and more traditional diplomatic processes,⁴ on the other. Moreover, though forming only one procedure amongst an array of “accountability” techniques increasingly employed by international

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1 On the law relating to international organisations, see for instance C Amerasinghe *Principles of the Institutional Law of International Organizations* (2nd ed, Cambridge University Press, Cambridge, 2005). As regards changing perceptions of international organisations, see for instance T Franck *Fairness in International Law and Institutions* (Oxford University Press, Oxford, 1995), J Nye “Globalization’s Democratic Deficit: How to Make International Institutions More Accountable” *Foreign Affairs* (July/August 2001) and N Woods “Good Governance in International Organizations” (1999) 5 *Global Governance* 39.

2 The reference to “judicial” should be read expansively to include judicial settlement per se (such as the proceedings of the International Court of Justice (ICJ) and the European Convention of Human Rights), binding arbitration (such as that facilitated by the Permanent Court of Arbitration (PCA)) and those systems (such as that within the World Trade Organization (WTO)) which employ a combination of both arbitration and judicial settlement (viz, the Appellate Body).

3 The reference to “quasi-judicial” refers, in particular, to the jurisdiction of autonomous international human rights bodies (such as the Human Rights Committee and the European Committee of Social Rights) to receive allegations of violations of human rights.

4 As regards the role of methods such as negotiation, mediation, conciliation and inquiry, see J Merrills *International Dispute Settlement* (4th ed, Cambridge University Press, Cambridge, 2005) chapters 1-4.

organisations,⁵ including *ante-hoc* (eg public document disclosure and consultation procedures), *post-hoc* (eg evaluation and audit) and *ad hoc* (eg committees of inquiry), the complaint and grievance mechanism stands out as an interesting, innovative and instrumental tool, both for affected stakeholders and for the organisations themselves. What is particularly encouraging is that such mechanisms seek to engage a range of communities beyond the intergovernmental level and incorporate the views and interests of civil society, which have previously been largely marginalised in the operation of such processes.

As this article will note, complaint and grievance mechanisms have been established within a wide array of international organisations, including both international financial institutions (eg the World Bank and regional development banks) and as part of the structure of internationally-administered territorial entities (including the so-called “Kosovo ombudsperson”). Moreover, as the report from the One World Trust highlights, accountability mechanisms have begun to be established not only within intergovernmental organisations (IGOs), but also within international non-governmental organisations (INGOs) and transnational corporations (TNCs).⁶

Of course, international complaint and grievance mechanisms take many forms and, as the article will show, some of these differences necessarily point to significant variations both in theoretical underpinning and operational practice. Moreover, substantial gaps remain; most of the current mechanisms that exist in the UN system, for instance, are exclusively concerned with personnel matters, rather than complaints arising from *outside* the organisation, though this should not be taken to imply that internal complaints mechanisms, including appropriate procedures to handle matters raised by “whistle-blowing”, are not intrinsic to good governance. Nevertheless, the idea of establishing a mechanism to hear public grievances, however putative the notion still is within many organisations, is increasingly emerging as integral to the broader debate on what is required for good global

5 For instance, the non-governmental organisation the One World Trust publishes an annual *Global Accountability Report*, which contains four principal areas of analysis: transparency, participation, evaluation, and complaint and response mechanisms: <http://www.oneworldtrust.org/?display=index_2007_home>.

6 J Ruggie *Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises*, John Ruggie. *Business and human rights: further steps toward the operationalization of the “protect, respect and remedy” framework* at [92], UN Doc A/HRC/14/27 (2010): “grievance mechanisms perform two key functions regarding the corporate responsibility to respect. First, they serve as early warning systems, providing companies with ongoing information about their current or potential human rights impacts from those impacted. By analysing trends and patterns in complaints, companies can identify systemic problems and adapt their practices accordingly. Second, these mechanisms make it possible for grievances to be addressed and remediated directly, thereby preventing harm from being compounded and grievances from escalating.”

governance.⁷ This development is belatedly mirroring the trend towards “alternative dispute resolution” (ADR) that has occurred over the last fifty years at the national level.⁸

Many of the complaint and grievance mechanisms in existence at the international level are reflective, perhaps even derivative, of processes and functions that already exist in the domestic sphere. The most prominent and wide-ranging form of ADR to have evolved at the national level is the office of the ombudsman, which is enshrined in many national constitutional, administrative and private structures.⁹ Given the potential within the ombudsman model, this article explores the impact of the idea in public international law. However, in recognising the sheer diversity in the range of national (and regional) ombudsmen, this article seeks neither to describe the “characteristic” ombudsman, nor to consider whether it has been adopted at the global level. Rather, the aim of this article is more nuanced: to consider to what extent core attributes of national ombudsmen and ombudsman-like processes can be ascertained in international complaint and grievance mechanisms.

Many of the underlying issues inherent within any ombudsman scheme are particularly relevant when placed in the international context. Questions such as “who is entitled to complain?”, “what level of operational independence should a complaint and grievance mechanism enjoy?”, “what is the extent of the mechanism’s mandate and jurisdiction?”, and “what powers can the mechanism employ to achieve its purpose?” all raise complex institutional issues. A further question, but one that is arguably particularly interesting in this context, is “what are the objectives of a complaint and grievance mechanism?” These objectives could range from reviewing the organisation’s compliance with its own procedures, fostering friendly solutions to disputes, investigating maladministration and/or promoting human rights, through to promoting a “lessons learnt” approach within the wider institution. Of course, all of these questions are inherently generic and applicable to any level of governance, yet they are potentially

7 M Zwanenburg *Accountability of Peace Support Operations* (Brill, Leiden, 2005) at 300: “the concept of the ombudsman does exist at the international level. It has developed mainly as a corollary of the demand for accountability of international organizations, and in particular accountability towards individuals.”

8 It should be noted that the use of methods such as conciliation, fact-finding and mediation at the international level have a much longer history: see generally Merrills, above n 4. As regards the continued use of ADR methods between States, see also suggestions for the establishment of an ombudsman within the WTO as a precursor and supplement to the formal dispute settlement system that operates between member States. (See “The Multilateral Trade Regime: Which Way Forward? The report of the first Warwick Commission” (2007) Warwick Commission at 33 <<http://www2.warwick.ac.uk/research/warwickcommission>>: “This would offer an initial non-litigious avenue for settlement and would also serve to inform consultations in the next stage of the dispute settlement process should the informal mediation fail to deliver amicable settlement.”)

9 See for instance R Gregory and P Giddings (eds) *Righting Wrongs: The Ombudsman in Six Continents* (IOS Press, Amsterdam, 2000).

more interesting, if also contentious, when placed within a global context. International organisations, which have so long had to balance carefully sovereign membership with limited institutional independence, are also now having to balance such autonomy with popular concerns of accountability and transparency.

In addressing these issues, the article is divided into four parts. Part one reviews the theoretical arguments in favour of complaint and grievance mechanisms outside the traditional legal/judicial model. It also considers some of the lessons that can be derived from the experiences gained at the national level from the use of perhaps the most advanced form of complaint and grievance mechanism outside the courts, the ombudsman. Part two provides a brief overview of the development of complaint and grievance mechanisms within international organisations and analyses the extent to which ombudsman characteristics (as, in some ways, the most readily identifiable form of complaint and grievance) have been embedded within international models. Part three then offers some thoughts on the potential for greater use to be made of the ombudsman institution in the United Nations more generally.

The article will then contend in part four that the key attributes of complaint and grievance processes are arguably central to implementing the ubiquitous notions of good governance¹⁰ and due process – thus further supporting the cross-fertilisation of ideas inherent within the discourse on global administrative law. Despite this, the international community still has a long way to go before it embraces fully the potential contained within especially the ombudsman concept, even though concurrently it is also arguable that automatic replication of national ombudsmen should be avoided. Complaint and grievance mechanisms at the international level are innovative both in their contribution to the operation of international organisations and as an alternative model vis-à-vis traditional dispute settlement procedures. Nevertheless, in truth it is the structural limitations of such mechanisms, as much as the opportunities they provide, which reveal a more complete analysis of the recurring tensions within global governance. Yet the inherent weaknesses of non-judicial complaints and grievance mechanisms are also a potential strength. Such “softer” forms of dispute resolution, which are able to bend more easily to the strictures of a system of law ultimately grounded in the sovereignty of States, rather than break when confronted directly against them, are arguably more amenable to the incorporation of ideals of legitimacy and governance than traditional dispute resolution regimes.

10 For an overview of good governance and, in particular, its linkages with the development of complaint and grievance mechanisms, both nationally and internationally, see L Reif *The Ombudsman, Good Governance and the International Human Rights System* (Martinus Nijhoff, Leiden, 2004) chapter 3.

I. THE THEORY BEHIND COMPLAINT AND GRIEVANCE MECHANISMS

The existence of complaint and grievance mechanisms at the global level, especially if made available to affected civil society and local communities, could rightly be heralded as a milestone in the organisation of international affairs. This development is a sign of a – gradual – shift away from a purely intergovernmental approach to one premised upon broader notions of global regulation and administration. As the impact and reach of such organisations increasingly transcend State boundaries and thus have the capacity to affect the lives and livelihoods of individuals, the call for greater accountability of such organisations was perhaps inevitable.¹¹ The fact that many organisations remain resistant to wholesale change, or hold on to the “old” premise that they are primarily engaged in technical matters and thus outside popular concern, should not disguise the fact that the discourse on global governance has changed dramatically over recent years.

Such change has been mirrored by a shift in perspective on the role of global organisations within the broader parameter of international relations. As Krisch and Kingsbury note:¹²

... central pillars of the international legal order are seen from a classical perspective as increasingly challenged: the distinction between domestic and international law becomes more precarious, soft forms of rule-making are ever more widespread, the sovereign equality of states is gradually undermined, and the legitimacy of international law is increasingly in doubt.

One response to such challenges has been to import values – traditionally dominant within the domestic and regional sphere – into the global consciousness. For want of a better name, such analysis is often referred to as global administrative law:¹³

It starts from the observation that much of global governance can be understood as regulation and administration ... [T]he increasing exercise of public power in these structures has given rise to serious concerns about legitimacy and accountability, prompting patterns of responses to those concerns in many areas of global governance.

While recognising the merits of some of the insights of the global administrative law approach, there is an equal recognition that “classical” international law remains very much the dominant paradigm. There are thus noticeable tensions between demands for greater legitimacy and transparency, on the one hand, and a retrenched belief in the traditional notions of sovereignty and political autonomy, on the other. It is the response

11 More generally, see D Bodansky “The Legitimacy of International Governance: A Coming Challenge for International Environmental Law” (1999) 93 AJIL 596 at 611: “the more international environmental law resembles domestic law, the more it should be subject to the same standards of legitimacy that animate domestic law.”

12 N Krisch and B Kingsbury “Introduction: Global Governance and Global Administrative Law in the International Legal Order” (2006) 17 EJIL 1 at 1. On the issue of legitimacy at the international level, more generally, see Franck, above n 1, chapter 2.

13 Krisch and Kingsbury, above n 12.

of international organisations in reconciling such considerations that is very much the driving force behind recent attempts to establish complaint and grievance mechanisms as a novel means of dispute resolution.

The significance of complaint and grievance mechanisms is that they can contribute to the promotion of a variety of constitutional values. Perhaps of most importance is their capacity to provide a realistic route by which grievances can be effectively pursued by those most immediately affected. Thus, the existence of such mechanisms compensates for the classic critique of the ability of judicial bodies to uphold the rule of law only when it falls within the narrow strictures of a particular factual matrix, as well as reflecting the almost universal truth that formal processes tend to be difficult to take advantage of and are prohibitively expensive and intimidating for the average litigant. With the work of international organisations increasingly impacting directly on the lives of individual citizens, these are important considerations if those same institutions are to obtain legitimacy. Moreover, the lack of a comprehensive judicial framework at the international level, particularly one which does not provide individuals with any meaningful role – other than in the case of the few human rights courts which permit individual claims against States – exacerbates both the general problem and highlights the need for alternative procedures.

But the value of complaint and grievance mechanisms can go further than securing redress. Complaint and grievance mechanisms can be utilised not only to call to account the actions of international organisations, but they can provide tangible evidence to the wider community that they are accountable and, at the same time, provide heightened incentives for international organisations to focus on the promotion of internal good governance. Furthermore, if permitted, complaint and grievance mechanisms can also monitor the responses of international organisations to their investigations and even work with investigated bodies to identify potential areas for institutional improvement.

Operating along these lines there are now a considerable number of complaint and grievance mechanisms at the international level that are worthy of study. Problems exist within many of these mechanisms and the potential gains from this form of dispute resolution have only just begun to be identified. In particular, it is evident that the global community has yet to adopt in full the ombudsman model, which has proved so popular at the national level. This must be considered a distinct area for future exploration as it has been amply demonstrated at the level of the State that the ombudsman can be a particularly useful tool in the resolution of those disputes with a quasi-political dimension. Given this potential, it could be that over the next twenty to thirty years we will see ever more ambitious models of complaint and grievance mechanisms playing an increasingly significant role in the further development of international dispute resolution.

A. The Ombudsman Technique – Lessons From the National Level

The technique of “ombudsmanry” has been described by one author as “the jurisprudential development of the 20th century”,¹⁴ whilst others have charted the incredible growth in the popularity of the idea in the latter half of the last century.¹⁵ There are now national, local and state ombudsmen in operation in approximately 120 countries¹⁶ and a growing body of academic literature is dedicated to this form of complaint and grievance mechanism.¹⁷ At the national level there have also been significant developments in theoretical and practical thinking as to how best to resolve disputes, which has resulted in at least a partial shift away from dispute resolution led by lawyers and an ever growing emphasis on so-called “alternative dispute resolution mechanisms”, of which the ombudsman is the most important example.

As with complaint and grievance mechanisms at the international level, there is much to differentiate the various models of ombudsman adopted around the world.¹⁸ With a few notable exceptions,¹⁹ most are relatively young institutions. The vast majority of ombudsmen now in operation around the world were established in the last fifty years and, in many cases, the last twenty years. As a consequence, in many countries there is still a lack of full appreciation and knowledge as to how the institution operates and what it is fully capable of. Thus, the concept of ombudsmanry is still in its infancy. Moreover, the development of the practice has been hampered by a number of factors. Commonly, new ombudsman institutions are required to spend a significant amount of institutional energy embedding their place within the

14 N Lewis “World Ombudsman Community: aspects and prospects” (1993) 39 *Indian Journal of Public Administration* 676.

15 Gregory and Giddings, above n 9.

16 See the International Ombudsman Institute website for details: <<http://www.law.ualberta.ca/centres/oi/About-the-I.O.I./History-and-Development.php>>.

17 While the notion of “complaint and grievance mechanism” is sufficiently broad to incorporate the office of the ombudsman, at the national level it is generally more appropriate to refer to “ombudsman” as that is the principal – though not exclusive – mechanism by which grievances are aired outside the formal legal context. However, see Reif, above n 10, at 366 where she makes a distinction between the office of ombudsman and mechanisms such as the World Bank’s inspection panel: “a classical ombudsman is a non-judicial, soft mechanism having only the sanctions of recommendation and public reporting. The inspection panel has even more limited functions and powers”. There is further discussion of the World Bank Inspection Panel below.

18 Around the world, ombudsman institutions are given a range of different titles. As the website for the International Ombudsman Institute <<http://www.law.ualberta.ca/centres/oi/About-the-I.O.I./History-and-Development.php>> explains, “*Defensor del Pueblo* is the title of the ombudsman office in a number of Spanish-speaking countries (such as in Spain, Argentina, Peru and Colombia). *Parliamentary Commissioner for Administration* (Sri Lanka, United Kingdom), *Médiateur de la République* (eg France, Gabon, Mauritania, Senegal), *Public Protector* (South Africa), *Protecteur du Citoyen* (Québec), *Volksanwaltschaft* (Austria), *Public Complaints Commission* (Nigeria), *Provedor de Justiça* (Portugal), *Difensore Civico* (Italy), *Investigator-General* (Zambia), *Citizen’s Aide* (Iowa), *Wafaqi Mohtasib* (Pakistan), and *Lok Ayukta* (India) are the titles of some other ombudsman offices around the world.”

19 In particular, the office of the Swedish Ombudsman (*Justitieombudsman*) is two hundred years old in 2009.

constitutional order and gaining the acceptance of both citizens and established public authorities, including the courts. Other barriers to successful operation include securing adequate funding, maintaining independence and persuading authorities to implement their recommendations. Such institutional barriers, coupled with the relative newness of this form of dispute resolution mechanism, means that there is still little agreed understanding, and few practical examples, as to the full capacity of the ombudsman institution.²⁰ These inherent problems put into context the relative underdevelopment of the idea at the international level and, at the same time, highlight a key lesson: that the relative strength of ombudsman schemes owes much to the background political and institutional support that they receive.

A generic observation that can be made about ombudsmanry at the national level is the lack of uniformity in the model that has been adopted. Although there have been efforts to describe the “classical ombudsman”,²¹ in truth the key feature of the ombudsman institution is its flexibility and the ability for the office to be moulded to meet a variety of different needs and situations. A few examples serve to demonstrate the point. In Latin America, where the ombudsman (the *Defensor del Pueblo*) has become an important part of the constitutional scene, the office is normally established along the model developed in Spain and Portugal. This entails that the primary focus of the institution has been to promote and protect human rights and uphold human rights legislation and treaties. A similar development can be seen to have occurred in Eastern Europe and in several countries in Africa. By contrast, in the Nordic countries, where the modern ombudsman began, the onus has been on using the institution as an upholder of the law, with there being an explicit crossover between the work of the courts and the ombudsman. In common law countries, however, much less emphasis is placed on the ombudsman pursuing breaches of the law, with instead ombudsmen empowered to investigate alleged breaches of more equitable standards, such as maladministration or denial of fairness.

Thus, the ombudsman model has proved to be an extremely adaptable tool that has contributed to dealing with a variety of jurisprudential problems in a range of different jurisdictions. The concept has also crossed over from the public to the private sector and has been used to tackle issues as diverse as the environment and corruption.²² Given that the ombudsman has proved to be flexible at the national level, it is hardly surprising that it has been identified as a potentially useful device at the international level, despite the very different issues of governance that arise.

20 For a more detailed exposition, see T Buck, R Kirkham and B Thompson *The Ombudsman Enterprise and Administrative Justice* (Ashgate, 2011, forthcoming).

21 D Gottehrer and M Hostina *Essential Characteristics of a Classical Ombudsman* (1998) United States Ombudsman Association <http://www.usombudsman.org/en/references/more_references/>.

22 For example in Hungary, there is now a Parliamentary Commissioner for the Rights of Future Generations which is responsible for environmental protection and in India the lead function of the “Lok Ayukta” is to investigate allegations of fraud.

Insofar as there is such a thing as a “classical ombudsman” model, the key is the specific institutional features that the ombudsman ordinarily possesses.²³ Above all, ombudsmen are seen as independently appointed officers of the state or parliament who operate autonomously of the executive and public authority more generally. The most significant evidence of their autonomy is found in the wide-ranging powers that they possess to summon witnesses and discover documents. However, in stark contrast to their investigatory powers, ombudsmen do not ordinarily possess any powers of legal enforcement. Indeed, such enforcement powers are considered to be contradictory to the overall methodology of the ombudsman. Rather than being an institution of legal authority and force, the key technique of the ombudsman is one of intellectual authority and powers of persuasion backed up, if necessary, by access to means of political pressure and embarrassment.

There are further flexibilities inherent in the ombudsman technique that are also key to their popularity and potential. Although the primary aim of the institution is to resolve grievances and secure redress, the ombudsman is capable of achieving much more. Due to its design, the ombudsman has an inherent capacity to promote accountability and institutional learning. Its strong investigatory powers enable it to obtain information that classic techniques of legal dispute resolution can find hard to uncover, while the softer approach necessitated by the lack of powers of enforcement generally facilitates a more positive cooperative relationship with the public authorities investigated.²⁴ At its best, the nature of this relationship, backed up by the ombudsman’s broad inquisitorial powers, enables the ombudsman to uncover information and arrive at an understanding of events that adds significantly to the wider constitutional efforts to secure the accountability of public authorities. More than that though, the softer approach of the ombudsman can encourage the public authority involved to take on board the complaints handling process as an opportunity to learn rather than a challenge to resist. While ombudsmen may deliver firm conclusions, which can have a significant long-term impact, in general, ombudsmen seek to emphasise potential solutions and ways forward to address the errors made. Again, given the frequently politically sensitive overtone of activities undertaken by international organisations, such a soft law approach to dispute resolution has many attractions.

As argued above, the full potential of the ombudsman institution is only just beginning to be properly explored at the national level. The New South Wales Ombudsman, for instance, now has a remit that goes well beyond resolving complaints or promoting good administration to include conducting own-initiative investigations,²⁵ scrutinising systems in place within government agencies and reviewing the implementation of

23 Gottehrer and Hostina, above n 21.

24 M Hertogh, “Coercion, Cooperation, and Control: Understanding the Policy Impact of Administrative Courts and the Ombudsman in the Netherlands” (2001) 23 *Law and Policy* 47.

25 These are investigations initiated even without the submission of a complaint.

legislation.²⁶ There is, however, an argument to suggest that the ombudsman is a particularly useful institution in those areas where law meets politics and/or where dispute resolution is complicated by the existence of a number of different competing political and social interests. Lon Fuller famously argued that courts were not a good place to resolve what he described as polycentric disputes.²⁷ In polycentric disputes there are a range of conflicting interests involved, with it being highly probable that not all affected parties are represented in the dispute. In such disputes often there are also moral judgments to be made and difficult issues of resource allocation to face up to. In short, the dispute is politically and morally complex with contentious issues which, taken together, make the balancing exercise that has to be then undertaken by the dispute resolution mechanism beyond the boundaries of traditional legal reasoning. Yet there is still a dispute to be resolved. An argument in favour of the ombudsman technique being used to resolve such complex disputes is that it is not restricted by the arguments presented by the immediate parties and has wide investigatory powers to pursue all the issues involved. Perhaps of even more importance though is the idea that because it has no binding powers of enforcement the ombudsman cannot rely upon its legal authority to force a solution. Instead, the ombudsman is driven by necessity to make logically consistent and defensible findings and to use its tools of persuasion, as well as logical reasoning, to arrive at workable solutions:²⁸

It may be stated that this inability to force change represents the central strength of the office and not its weakness. It requires that recommendations must be based on a thorough investigation of all facts, scrupulous consideration of all perspectives and vigorous analysis of all issues. Through this application of reason, the results are infinitely more powerful than through the application of coercion.

All of the characteristics noted above make the ombudsman institution an extremely interesting jurisprudential device. It is no doubt because of these features that the number of ombudsmen around the world has grown significantly over the last fifty years. At the same time in many countries the limitations of the court mechanism have become steadily more apparent, further fuelling the search for other solutions. Evidently, there are certain issues that are best resolved in the courts and in general it is understood that questions of legal interpretation should remain the prerogative of the courts. Yet in many other instances the highly procedural, cumbersome and restrictive way in which legal disputes are resolved is inappropriate, excessively expensive and often not particularly relevant to the needs of either side of the dispute. On a wider constitutional level, it is also of concern that while the court process provides a very strong form of accountability, it does not always make

26 For details see NSW Ombudsman <<http://www.ombo.nsw.gov.au/>>.

27 L Fuller "The Forms and Limits of Adjudication" (1978-1979) 92 Harv L Rev 353.

28 S Owen "The Ombudsman: essential Elements and Common Challenges" in L Reif, M Marshall and C Ferris (eds) *The Ombudsman: Diversity and Development* (International Ombudsman Institute, Edmonton, 1992) 52.

a particularly positive long-term contribution towards improved governance within public bodies. In these two senses, the ombudsman's flexibility allows it to provide a much more tailored and constructive service.

II. COMPLAINT AND GRIEVANCE MECHANISMS AT THE INTERNATIONAL LEVEL

The aim of this second part is to consider how far the underlying values of the ombudsman have been endorsed at the international level through the development of complaint and grievance mechanisms. With the exception of the European Ombudsman,²⁹ it is difficult to find any examples of fully fledged ombudsman systems along the lines established at the nation-state level. Nevertheless, there does exist a range of complaint and grievance mechanisms that adopt various aspects of the technique and/or pursue similar objectives.

In one sense, complaint and grievance mechanisms are reasonably well established in international organisations. Thus, for instance, one area where the introduction of complaint and grievance mechanisms has been significant has been in areas of internal dispute resolution between international organisations and their staff.³⁰ To name but a few, the United Nations, the World Health Organization, the World Bank Group, the International Monetary Fund and the World Trade Organization all employ some form of workplace ombudsman or mediator to deal with staff grievances. But as Reif notes:³¹

... this type of ombudsman mechanism should not be overly controversial or threatening to either international organization or member state interests. Rather, the model is designed to settle secretariat employment disputes informally, avoid the more legalistic and expensive formal dispute settlement alternatives and thereby improve both staff morale and organizational efficiency.

This is, of course, an interesting and important development. Not only does it demonstrate a healthy commitment from international organisations towards taking the rights of their employees seriously, but it also provides evidence of awareness of the benefits of alternative dispute resolution mechanisms. However, these internal forms of dispute resolution only touch upon the surface of what such mechanisms can offer.

In this part some of the more far-reaching forms of complaint and grievance mechanisms are considered. What can be noticed is that though such mechanisms might, at first glance, appear rather distinctive from traditional notions of the national ombudsman, there are also key similarities. These include that the aim of such mechanisms is to resolve

29 The European Ombudsman is modelled on the ombudsman design that has evolved, albeit in subtly different forms, in EU Member States. Thus the European Ombudsman is fully independent, investigates maladministration, has strong investigatory powers (including through a power of own initiative investigation) and reports to the European Parliament. See The European Ombudsman <<http://www.ombudsman.europa.eu/home/en/default.htm>>.

30 For a general overview of such international ombudsmen, see Reif, above n 10, at 336-346.

31 *Ibid.*, at 364-365.

grievances without recourse to formal judicial proceedings, that they are established to operate independently and autonomously and that their authority derives not from any designated powers of enforcement but purely from the persuasiveness of their arguments. Of course, there are significant divergences in approach – as there are at the national level – but such differences should not mask the very real synergies that nevertheless exist between such mechanisms.

A. World Bank Inspection Panel: A Radical, Yet Conservative, Innovation

One of the earliest, and certainly one of the most discussed, complaint and grievance mechanisms at the international level is the World Bank's³² Inspection Panel.³³ Established in 1993, its creation was an institutional response to criticism that the World Bank was failing to follow its own internal policies and procedures, specifically with regard to the negative impact World Bank sponsored large infrastructural projects were having on local environments and communities.³⁴ Significantly, such criticism did not just come from civil society, but also included some of the Bank's own members, most noticeably the United States.³⁵ In the light of such pressure, the World Bank had little choice but to respond. The Inspection Panel was rightly heralded as the first international organisation to seek to address such accountability concerns, though it is perhaps more conservative than radical in its actual operation, certainly as compared to other, more recent, mechanisms.³⁶

32 Technically, the "World Bank" is shorthand for the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). It is these two institutions which jointly established the Inspection Panel, and over whose activities the Panel may receive complaints. As regards other institutional components of the World Bank group, both the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA) have developed an alternative model: the office of the Compliance Advisor Ombudsman (CAO), whose role combines the investigation of complaints, overseeing compliance reviews of IFC/MIGA activities and providing independent advice to IFC/MIGA management on environmental and social aspects of their policies.

33 See generally D Clark, J Fox and K Treacle *Demanding Accountability: Civil Society Claims and the World Bank Inspection Panel* (Rowman & Littlefield, Lanham, 2003), I Shihata *The World Bank Inspection Panel: In Practice* (2nd ed, Oxford University Press, New York, 2000), S Schlemmer-Schulte "The World Bank's Experience With Its Inspection Panel" (1998) 58 *ZaöRV/HJIL* 353, and C Chinkin "Alternative Dispute Resolution under International Law" in M Evans (ed) *Remedies in International Law: The Institutional Dilemma* (Hart, Oxford, 1998) 123 at 134-137.

34 For the range of issues that beset the World Bank in the early 1990s, see K Horta "The World Bank and the International Monetary Fund" in J Werksman (ed) *Greening International Institutions* (Earthscan, London, 1996) 131 at 132-133.

35 I Bowles and C Kormos "Environmental Reform at the World Bank: The Role of the U.S. Congress" (1994-1995) 35 *Va J Int'l L* 777. See also R Bissell and S Nanwani "Multilateral Development Bank Accountability Mechanisms: Developments and Challenges" (2009) 6 *MJIEL* 2.

36 For a comprehensive analysis of such mechanisms within multilateral development banks and related institutions, see D Bradlow "Private Complainants and International Organizations: A Comparative Study of the Independent Inspection Mechanisms in International Financial Institutions" (2004-2005) 36 *Georgetown Journal of International Law* 403.

The function of the Inspection Panel is to consider allegations from persons, and in certain circumstances their representatives, whose:³⁷

... rights or interests have been or are likely to be directly affected by an action or omission of the Bank as a result of a failure of the Bank to follow its operational policies and procedures with respect to the design, appraisal and/or implementation of a project financed by the Bank ... provided in all cases that such failure has had, or threatens to have, a material adverse effect.

The Inspection Panel – though housed in the World Bank – is independent of the World Bank’s management and reports directly to the Board of Executive Directors, individuals who are either appointed or selected by the Bank’s member State constituencies. The three members who make up the Inspection Panel are appointed for one five-year term and though as officials of the Bank are subject to the requirement of exclusive loyalty to the Bank,³⁸ their appointment is based upon, *inter alia*, “their ability to deal thoroughly and fairly with the requests brought to them, their integrity and their independence from the Bank’s Management”.³⁹

The Inspection Panel is neither a binding nor a judicial process; its purpose is to investigate allegations and to report its findings to the Bank’s Board of Executive Directors, which will – together with the management’s response and, where appropriate, its recommendations for remedial action – “consider” the matter.⁴⁰ The Inspection Panel procedure is a two-stage process, involving first, a determination whether an allegation requires investigation, and second, the investigation itself. As regards the first stage of the process, since 1999 the Executive Board has automatically authorised an investigation “without making a judgement on the merits of the claimants’ request”, so long as certain “technical eligibility criteria” are met.⁴¹

As regards investigations, several key points are worth noting. First, the Panel is entitled to interview all relevant Bank staff and to access all pertinent Bank records in undertaking its investigations. Second, the Panel will, where necessary, consult with other internal Bank accountability and evaluation bodies, including the independent evaluation group⁴² and the internal auditor.

37 *The World Bank Inspection Panel* Resolution No. IBRD 93-10/Resolution No. IDA 93-6 (1993) at [12].

38 *Ibid*, at [10].

39 *Ibid*, at [4]. For a more detailed account of how the Inspection Panel operates, see A Gualtieri “The Environmental Accountability of the World Bank to Non-State Actors: Insights from the Inspection Panel” (2001) LXXII *British Yearbook of International Law* 213.

40 Merrills, above n 4, at 62: “The findings of the Panel are not binding, but based as they are on impartial investigation ... carry considerable weight. As evaluation has a quasi-judicial aspect, Panel reports go beyond inquiry in the strict sense, but clearly incorporate a significant fact-finding element.”

41 “1999 Clarification of the Board’s Second Review of the Inspection Panel” (1999) at [9] <<http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/1999ClarificationoftheBoard.pdf>>.

42 Independent Evaluation Group “Mandate of the Director-General, Evaluation” at 1 <<http://go.worldbank.org/GU2KYF31B0>>: “The independent evaluation function is responsible for the assessment of the relevance, efficacy, and efficiency of World Bank Group’ operational

Third, where inspections are to take place in the territory of the borrower country, they shall not be carried out unless prior consent has been given, though there is equally an explicit assumption that consent will be granted. During such visits, though the Bank recognises that Panel members will wish “to gather information through consultations with affected people”,⁴³ the rules governing Panel activities do very carefully note that such in-country investigations should:⁴⁴

... be kept as low [-profile] as possible in keeping with its role as a fact-finding body on behalf of the Board. The Panel’s methods of investigation should not create the impression that it is investigating the borrower’s performance.

This language is particularly interesting as it reflects the diverse pressures between improving global governance, on the one hand, and respecting domestic sovereignty, on the other.

The Inspection Panel has now been in existence for over fifteen years, and has conducted an increasing number of important investigations. The results of these investigations have prompted the Bank’s management to make significant changes to a number of high-profile projects,⁴⁵ as well as affecting the operation of its overall project cycle.⁴⁶ It can also be claimed that as a result of the Inspection Panel’s work there is “much greater sensitivity in the institutions to their own operational policies and procedures”.⁴⁷ As Bissell, a one-time chairman of the panel, has commented, the Inspection Panel is both “enriching and modifying the Bank’s approach to its legal obligations”.⁴⁸ Changes are, of course, most likely to occur when the project remains at an early stage of implementation. Those projects reviewed at a later stage of development have, therefore, proved much more difficult to remedy.

A significant weakness identified by a number of commentators is the lack of ongoing supervision.⁴⁹

The Inspection Panel does not have oversight authority over the implementation of those remedial measures; nor is it able to provide the Board with an assessment of whether Management’s proposed remedial measures would satisfy the concerns of the claimants and/or bring the project into compliance with Bank policy.

programs and activities, and their contribution to development effectiveness. Evaluation enhances accountability and informs the formulation of new directions, policies and procedures, and country and sector strategies for the Bank’s work.”

43 “1999 Clarification”, above n 41, at [12].

44 Ibid.

45 R Bissell “Recent Practice of the Inspection Panel of the World Bank” (1997) 91 AJIL 741. See also the annual reports of the Inspection Panel <<http://www.worldbank.org/inspectionpanel>>.

46 See Bradlow, above n 36, at 409-410.

47 Ibid.

48 Bissell, above n 36, at 744.

49 D Clark, “The World Bank and Human Rights: The Need for Greater Accountability” (2002) 15 Harv Hum Rts J 205 at 218.

This is a significant weakness and one that some of the subsequent mechanisms established in the wake of the Inspection Panel have sought to resolve. The Compliance Review Panel of the Asian Development Bank, for instance, monitors implementation of remedial measures and reports to the Board annually on issues of implementation.⁵⁰ More recently, there have been examples where the World Bank Board of Executive Directors has itself asked the Inspection Panel to review the Bank Management's progress reports on implementing its action plans.⁵¹ This is a positive step forward, but one which should be codified within the legal framework which established the Panel, particularly as such an innovation would seem, in fact, to be contrary to the stated expectations of how the Panel would operate, as set out in the initial Bank resolutions on the matter.⁵²

Moreover, there is also some argument that the very existence of the Inspection Panel (along with the World Bank's safeguard policies which the Panel monitors) has had a potentially detrimental effect on how the Bank operates *in practice*. It has been suggested that such innovations not only encourage Bank staff to focus too specifically on "panel-proofing" Bank activities, but also they provide a negative incentive within the Bank to water down the policies on which the Panel reports.⁵³

When the Bank first adopted environmental safeguard policies, the policies tended to be comprehensive and demanding. The Bank saw the policies as guiding policies, rather than as binding rules. When civil society began demanding compliance with these policies, the conversion process weakened them in an attempt to make them easier to meet.

Of course, if true, this clearly suggests that – at one level – the Inspection Panel must be operating reasonably successfully, otherwise there would be no need for such a reactive response. Politically, however, civil society and its member States should seek to ensure that positive institutional change, such as the establishment and effective operation of the Inspection Panel, does not prompt retreat in other areas, notably the normative and procedural standards under which the Bank operates.

Overall, the Inspection Panel must be considered an important institutional development both within the World Bank itself and as a precursor to the development of other mechanisms elsewhere, specifically within other international financial organisations. Nevertheless, as Hunter notes:⁵⁴

50 Bradlow, above n 36, at 431.

51 The Inspection Panel *Annual Report: July 1, 2006, to June 30, 2007* (The International Bank for Reconstruction and Development / The World Bank, Washington, DC, 2007) at 15: "During fiscal year 2007, the Panel also reviewed, at the Board's request, Management's Progress report on its Action Plan in response to the Panel's Investigation Report on the Mumbai Urban Transport Project."

52 "1999 Clarifications", above n 41, at [16]: "The Board should not ask the Panel for its view on other aspects of the action plans nor would it ask the Panel to monitor the implementation of the action plans."

53 N Bridgeman "World Bank Reform in the 'Post-Policy' Era" (2000-2001) 13 *Geo Int'l Envtl L Rev* 1013 at 1024.

54 D Hunter "Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People" (2003) 4 *Chi J Int'l L* 201 at 210.

The Panel is still a work in progress. ... [T]he short-term benefits that come from the added attention brought by filing a Panel claim do not necessarily translate into long-term sustainable benefits.

This seems also to be the benchmark that the Panel sets itself; as it noted in its 2006-2007 annual report, “[w]e hope that our work will contribute to ensuring sustainable and equitable development, an important goal of the World Bank.”⁵⁵ High rhetoric, of course, but also containing a certain element of truth; as with much of the general movement towards accountability and good governance in the international arena, the changes are not intended to be the end-goal, but will hopefully also improve the *delivery* of the organisation’s wider aims and purposes.

B. Mechanisms Within Other International Institutions

The World Bank may have been the first multilateral development bank to adopt such a mechanism for external grievances and complaints, but many other institutions, particularly – though not exclusively – international financial institutions, have also responded to such demands for accountability to create their own procedures and systems.

Though it is beyond the limits of this article to review these mechanisms, there are certain general themes surrounding the development of complaint and grievance mechanisms in international law which can be noted. Bradlow, in his work on complaint mechanisms within international financial organisations, for instance highlights a number of key issues. First, he argues that the range of functions that such mechanisms undertake vary greatly to include not only compliance-review (as with the World Bank’s Inspection Panel) but also, in some instances, problem-solving/mediation and significantly, at the culmination of an investigation, a “lessons learnt” and dissemination of good practice role. Both of these additional functions are important, if for slightly different reasons. As regards problem-solving/mediation, he argues:⁵⁶

In reality, non-state actors are more interested in having the problems caused by the organization’s operations solved than they are in ensuring that the staff and management comply with the applicable operational policies and procedures.

As regards the inclusion of a “lessons learnt” function, this can:⁵⁷

... demonstrate to the organization’s staff and management and to its member states that the purpose of the mechanism is not ‘finger pointing’ but improvement in the operations of the organization.

Civil society will also wish to know that the international organisation has learnt from its mistakes and will – hopefully – not replicate the same errors again. On both issues the World Bank Inspection Panel lags behind

55 The Inspection Panel, above, n 51, at 16.

56 Bradlow, above n 36, at 484.

57 Ibid, at 486.

some – though not all – of the other institutional mechanisms. On the issue of “lessons learnt”, Bradlow sees this as a particular failing as it means that the World Bank’s Executive Board and Management “are currently being deprived of ... unique knowledge about the impact of their operations on affected communities and about the implementation of their operational policies and procedures.”⁵⁸

Second, he notes a progression – what he refers to as “generations” of inspection procedures – within such institutions.⁵⁹ What he means by this is relatively nuanced but essentially it is the narrative of how complaint and grievance mechanisms have evolved from the model established by the World Bank (“first generation”), to incorporating problem-solving within the compliance function (“second generation”), through to retaining these diverse functions but ensuring they are administered separately (“third generation”).⁶⁰ This “generational” account would seem to be a reasonably accurate description of the development of such mechanisms, though it must also be recognised that there is also room for over-generalisation, especially outside the financial arena. For instance, a small (yet increasing) number of UN institutions⁶¹ which permit consideration of external complaints have not established bespoke mechanisms but have rather “opened-up” their internal procedures for external complaints.⁶² This may be far from ideal, though it does again indicate the inherent flexibility and broad span of approaches currently taken, as well as, perhaps, a disinclination to endorse complex institutional arrangements in all instances.

C. *The Kosovo Ombudsperson*

One of the most notable examples of a recent complaints mechanism established through the framework of international law – though, in reality, it had more of the appearance of a domestic procedure, or at least a hybrid of the two – was the creation of the “Ombudsperson Institution” by the United Nations Interim Administration Mission in Kosovo (UNMIK). Established in June 2000⁶³ by the Special Representative of the UN Secretary-General under authority given to him by the UN Security Council to administer the territory, the role of the ombudsperson was to:⁶⁴

58 Ibid, at 462.

59 Ibid, at 484.

60 Cf Reif, above n 10, at 365: “all of the mechanisms are limited to an examination of the organization’s policies and procedures and do not have the freedom to look at other legal norms or fairness considerations”.

61 Such as the UN Development Programme, the UN Environment Programme and the World Food Programme.

62 R Lloyd, J Oatham and M Hammer 2007 *Global Accountability Report* (One World Trust, London, 2007) at 53.

63 *On the Establishment of the Ombudsperson Institution in Kosovo* UNMIK/REG/2000/38 (2000).

64 Ibid, at [1.1].

... promote and protect the rights and freedoms of individuals and legal entities and ensure that all persons in Kosovo are able to exercise effectively the human rights and fundamental freedoms safeguarded by international human rights standards, in particular the European Convention on Human Rights and its Protocols and the International Covenant on Civil and Political Rights.

Though established by the UN, the ombudsperson institution was, in fact, developed by the Organization for Security and Cooperation in Europe (OSCE) as part of the broader multi-agency approach to tackling the range of complex administrative, institutional, economic, security and political issues in Kosovo, subsequent to NATO's intervention in 1999.⁶⁵ The establishment of the ombudsperson was considered particularly necessary as the international community, in establishing UNMIK, had ranged beyond its normal functional capacities to undertake one of the most ambitious tasks in its history. Along with the UN Transitional Administration in East Timor (UNTAET),⁶⁶ the undertaking of "international territorial administration"⁶⁷ in Kosovo raised a variety of institutional and practical questions, as well as generating more fundamental issues around the very "act" of international organisations administering a territory.⁶⁸ In effect, the UN and its institutional partners were not just behaving *as* – but for a significant period of time *were* – the governing administration of Kosovo, together with all the incumbent rights and legitimate expectations of how such a government should operate. Thus, with the international actors performing this enlarged role of domestic administration, it is of little surprise that there was a concurrent demand for accountability mechanisms similar to those that exist in many national jurisdictions.

Of course, such accountability is not a legal prerequisite, per se; nothing is formally required beyond the normative force of a UN Security Council resolution.⁶⁹ However, it is unimaginable that UNMIK should not also seek domestic support, if not broader legitimacy, for its actions, particularly as such institutional control raises both political and jurisprudential issues about the very special relationship between the UN and those it is seeking to protect. As

65 For a succinct history of the establishment of the Kosovo Ombudsperson, see C Waters "Human Rights in an International Protectorate: Kosovo's Ombudsman" (2000) 4 *The International Ombudsman Yearbook* 141-152. More generally, on the role of ombudsmen as a feature of post-conflict peace-building, see Reif, above n 10, chapter 8.

66 UNTAET was in operation between 1999 and 2002. See also Reif, above n 10, at 285: "In the case of East Timor, UN transitional administration lasted less than three years and a UNTAET Ombudsperson operated for about one year before East Timor became an independent state – although it was a welcome development, there was not much time for the office to be formalized or developed".

67 On this issue, see R Wilde *Territorial Administration by International Organizations: How Trusteeship and the Civilizing Mission Never Went Away* (Oxford University Press, Oxford, 2008).

68 As regards the very different issues which arose resolving post-conflict tension in Bosnia and Herzegovina and the role of the ombudsman therein, see A Wetzel "Post-Conflict National Human Rights Institutions: Emerging Models from Northern Ireland and Bosnia & Herzegovina" (2007) 13 *Colum J Eur L* 427.

69 In this case, UN Security Council Resolution 1244 (1999) 10 June 1999.

the Kosovo ombudsperson noted in Special Report No.1 (2001), “UNMIK acts as a surrogate state”.⁷⁰ Of course, the creation of an accountability mechanism is not the only – or, by itself, the exclusive – means to generate such legitimacy; in particular, a traditional ombudsman is rarely considered an adequate replacement for – rather than a corollary and supplement to – the rule of law, as administered by the courts. Nevertheless, ensuring that the local population can ‘air’ their grievances has increasingly been accepted as having a significant role in the wider machinery of government. It is also important to note that the function of the Kosovo ombudsperson was never just limited to receiving – and investigating – complaints against the international administration of the territory, but was also “to provide oversight for local self-governing bodies, bodies which have grown in importance as UNMIK’s role has shrunk”.⁷¹

There was, however, a second – and arguably more substantive – factor which justified the creation of an ombudsman-like process within UNMIK. It was that in administering Kosovo during this period, the United Nations maintained the traditional view that international organisations and their staff possessed legal immunity from local jurisdiction. This clearly separated them from national governments, especially those in liberal democracies, which are subject to judicial review and/or oversight by municipal courts. As the ombudsperson again noted, quite pointedly in the same first special report:⁷²

... no democratic state operating under the rule of law accords itself total immunity from any administrative, civil or criminal responsibility. Such blanket lack of accountability paves the way for the impunity of the state. ... the actions and operations of [the executive and legislative] branches of government must be subject to the oversight of the judiciary, as the arbiter of legality in a democratic society.

The creation of the ombudsperson was, in part, to counter this lack of accountability; indeed, a *total* lack of accountability would undoubtedly be incompatible with recognised standards of human rights. Though the level of control and compulsion exerted by an ombudsman, in contrast to a judicial body, is ultimately based upon persuasiveness rather than legal authority, this is not necessarily an obstacle to effectiveness. Nevertheless, it should be noted that in most national systems, the office of ombudsman co-exists alongside a fully functioning judicial structure. Whether an ombudsman is able to operate as completely and successfully without this supporting pillar of the rule of law is debatable.⁷³

70 Ombudsperson Institution in Kosovo *Special Report No. 1: on the compatibility with recognised international standards of UNMIK Regulation No. 2000/47 on the Status, Privileges and Immunities of KFOR and UNMIK and Their Personnel in Kosovo (18 August 2000) and on the Implementation of the above Regulation* (2001) at [23].

71 C Waters “Nationalising Kosovo’s Ombudsperson” (2007) 12 JC&SL 139.

72 Ombudsperson Institution in Kosovo, above n 70, at [23]-[24].

73 P Diamandouros, European Ombudsman “The role of the Ombudsman in strengthening accountability and the rule of law” (Speech to the Constitution Unit, University College London, London, 29 November 2005).

Nevertheless, and notwithstanding such reservations, the creation of the Kosovo ombudsperson remains an important innovation in this area of international law. Moreover, the role of the ombudsperson (to “ensure that all persons in Kosovo are able to exercise effectively ... [their] human rights and fundamental freedoms”) would seem to be encouragingly broad. However, it should be noted that this generously-worded purpose is somewhat narrowed by a noticeably more specific jurisdictional remit. First, though the ombudsperson was to investigate complaints “concerning human rights violations and actions constituting an abuse of authority by the interim civil administration or any emerging central or local institution”, the ombudsperson was denied jurisdiction over complaints against the “international security presence”⁷⁴ until such time as the commander of KFOR, the international security force, entered into an agreement with the ombudsperson. This, in fact, never occurred, thus placing one of the most significant areas of potential complaints outside the reach of the ombudsperson’s jurisdiction. However, while this prevented the ombudsperson from receiving complaints directly concerning the international security presence, that did not prevent the ombudsperson from imaginatively ensuring that more general issues which affected *both* the civil and military aspects of the international framework were effectively scrutinised. In his work on the possible establishment of ombudsmen in peace support operations, Zwanenburg notes that the Kosovo ombudsperson did not shy away from incorporating references to KFOR when required, thus suggesting that the office “indirectly exercises jurisdiction ... in spite of the lack of a formal basis for jurisdiction”.⁷⁵ This is perhaps too strong a conclusion, though it does highlight the inherent flexibility which is entrusted to an ombudsman, especially where the competence is of a sufficiently broad character.

It is also worth noting, in this regard, that such flexibility was also used by the ombudsperson to “stretch” the applicable law to include consideration not just of human rights standards but also, arguably rather tentatively, basic tenets of international humanitarian law, where applicable.⁷⁶ This again underlines the rather difficult task of accurately demarcating *in practice* the remit of an ombudsman, particularly when the original mandate would appear to conflict with what the ombudsman him-/herself considers to be fair and in accordance with general principles of good governance and the rule of law.

The second limitation on the jurisdiction of the ombudsperson was its focus on human rights violations; though commendable that the function of the ombudsperson was so intrinsically tied to the protection of recognised standards of human rights, there was some regret that there was not a more general role in the investigation of maladministration, as more generally

74 *On the Establishment of the Ombudsperson Institution in Kosovo*, above n 63, at [3.4].

75 Zwanenburg, above n 7, at 310.

76 *Ibid.*, at 308-310.

understood.⁷⁷ Maladministration is a key focus of many domestic complaint and grievance-style mechanisms. In reality, this may not have been a particularly serious issue; as has been commented upon, “the Ombudsperson seems to interpret the term ‘abuse of authority’ broadly to include many elements of maladministration as defined by, for example, the European Ombudsman”.⁷⁸

Third, the ombudsperson was precluded from investigating disputes between the international administration and its staff. Fourth, as the political situation changed in Kosovo, and following the arguably premature “nationalization” of the ombudsperson in 2006,⁷⁹ oversight of UNMIK became less transparent as accountability was transferred from the ombudsperson to a less independent Human Rights Advisory Panel.⁸⁰

Thus, it is very clear that within the very fabric of the jurisdiction of the ombudsperson institution itself existed some very obvious limitations, reflecting significant political and institutional tensions concerning both its initial set-up and the extent of its mandate. And while it would be wrong to suggest that the work of the ombudsperson was thus hamstrung from the start, it is reasonably clear that while playing an important, if limited, role in the rebuilding and reconstruction of Kosovo, this was perhaps despite, rather than because of, the political will to support proactively its work. As Hoffman and Mégret cautiously observe:⁸¹

Despite ... successes, this image of emerging accountability has been substantially blurred. The ombudsperson is essentially an OSCE institution, tolerated rather than supported by the UN. The UN's cooperation and responsiveness record vis-à-vis the ombudsperson has been dismal.

The same authors conclude that the principal lesson to be learnt from the Kosovan experience is that though “there seems to be nothing impossible in theory about having ombudspersons exercise vigorous scrutiny over the UN itself”, actual practice suggests all is dependent upon political support, especially where “institutional resistance remains high”.⁸²

III. A UN OMBUDSMAN?

Thus, when compared to the operation of ombudsmen at the national level, even the most advanced of complaint and grievance mechanisms at the international level, whilst innovative, are nevertheless structurally limited. However, achievements can be identified and their institutional designs can be viewed as realistic given the political context within which they were

77 Waters, above n 65, 145.

78 Zwanenburg, above n 7, at 307.

79 See Waters, above n 71.

80 Ibid, at 144-145. See also B Knoll and R Uhl “Too Little, Too Late: The Human Rights Advisory Panel in Kosovo” (2007) 7 EHRLR 534.

81 F Hoffmann and F Mégret “Fostering Human Rights Accountability: An Ombudsman for the United Nations?” (2005) 11 Global Governance 43 at 56.

82 Ibid, at 57.

established. The question becomes how much further can the non-judicial concept of complaint and redress mechanisms go at the international level? Already, the experience of the Kosovo ombudsman has led others to call for more ambitious complaint and grievance mechanisms either in discrete areas previously devoid of such procedures (such as the gradual emergence of accountability mechanisms in peacekeeping, “peace support” and humanitarian operations) or, more radically, for the UN as a whole. Certainly, some action, if of variable and limited nature, has already taken place, though undoubtedly such processes could be greatly strengthened in both instances.

As regards accountability innovations in discrete areas of UN activity, there have, for instance, been obvious developments in the use of accountability mechanisms during peacekeeping and peace support operations. After several high profile human rights and sexual abuse scandals, involving particularly peacekeepers in various zones of conflict in Africa, which highlighted to many for the first time⁸³ that the UN – through its staff – was able to breach, rather than promote, human rights,⁸⁴ the UN has been keen to be seen proactively dealing with the problem.⁸⁵

As the UN’s Under-Secretary General for Peacekeeping Operations noted in a letter printed in the British newspaper *The Independent* in 2007:⁸⁶

... we have established conduct and discipline teams and independent investigative offices in all of our largest peacekeeping operations and training on prevention of sexual exploitation and abuse is now mandatory for all of our peacekeeping personnel in the field. Missions have established networks of focal points to receive complaints of this nature and premises where prostitution is known or suspected to occur are placed off-limits to our personnel and patrolled. Other measures such as curfews, “non-fraternization” policies and “hotlines” for anonymous complaints are also in place in many missions. It may be impossible to completely ensure zero incidents, but we can and do mandate zero tolerance.

This would appear to be an impressive response – at least from a particularly low base – and accountability forms just one part of a much more complex package of measures that the UN is increasingly attempting to put in place to try to ensure that not only are past wrongs not repeated but that institutional responses are in place if they do reoccur.

However, there remains a residual concern amongst some that senior officials in the UN are unconvinced, despite the general acceptance of greater accountability to deal with such shocking acts, of the need for even greater

83 Cf *ibid* at 44: “Already during the UN operation in the Republic of Congo (1960-1964), for example, concerns were raised about the possibility that troops operating under UN command had violated international humanitarian law”.

84 See, for instance, F Mégret and F Hoffmann “The UN as a Human Rights Violator? Some Reflections on the United Nations Changing Human Rights Responsibilities” (2003) 25 *Hum Rts Q* 314.

85 *Secretary-General’s Bulletin: Special measures for protection from sexual exploitation and sexual abuse*, ST/SGB/2003/13 (2003).

86 J-M Guéhenno “USG Guéhenno responds on sexual exploitation and abuse by UN peacekeepers” *The Independent* (UK) 9 January 2007.

and more radical institutional change. As has been argued, the UN adopts a “somewhat ambiguous attitude towards its *own* accountability”,⁸⁷ traversing somewhere between accepting responsibility and seeking to ensure that others, such as the State providing the peacekeepers, take the lead in ensuring the necessary measures are adopted. Though such criticism perhaps underplays the extent to which the UN does accept responsibility both in *law* and in *practice* for actions that are attributable to it,⁸⁸ it nevertheless highlights a perennial issue for those individuals who are seeking redress in being able to identify the relevant body responsible. Such a problem is, unsurprisingly, greatly exacerbated at the international level where delimitation of roles and responsibilities, particularly between the plenary jurisdiction of the State and the more limited role of international institutions, is usually less than clearly defined.

More radical still, there have also been suggestions that the UN would benefit from a wide-ranging ombudsman, with a significant overview of much of what the UN does. Of course, all organisations within the UN family do have accountability mechanisms to a certain extent already, ranging from offices of audit and internal oversight⁸⁹ to work-place ombudsmen and, in a few cases, external complaint mechanisms. As noted above, the UN General Assembly itself established an office of ombudsman in 2002, though its function is limited to “address[ing] the employment-related problems of staff members”.⁹⁰

Nevertheless, for those who view accountability as a prerequisite of good governance and, in particular, a means to uphold key norms and values, especially the protection of human rights within international institutions, a more radical answer is required:⁹¹

... [I]f the UN wanted to send a strong signal to the world community that it was serious about accountability, the best solution would point in the direction of a new, *sui generis* organ along the lines of the EU ombudsperson. ... Although legitimate concerns about costs are bound to arise, centralizing the tasks of the ombudsperson ... would probably be a much more cost-effective measure than the multiplication of theatre- or agency-specific mechanisms.

87 Hoffmann and Mégret, above n 81, at 47.

88 P Sands and P Klein *Bowett's Law of International Institutions* (5th ed, Sweet and Maxwell, London, 2001) at 520: “Breaches of international obligations by members of UN peacekeeping forces have been inevitably attributed to the organisation itself, rather than to the member states providing the contingent to which the peacekeepers concerned were attached.”

89 *Review of the efficiency of the administrative and financial functioning of the United Nations* GA Res 48/218 B, at 3, A/Res/48/218 B (1994): “The purpose of the Office of Internal Oversight Services is to assist the Secretary-General in fulfilling his internal oversight responsibilities in respect of the resources and staff of the Organization through the exercise of the following functions: (i) Monitoring. ... (ii) Internal audit. ... (iii) Inspection and evaluation. ... (iv) Investigation. ... [and] (v) Implementation of recommendations and reporting procedures”.

90 *Secretary-General's Bulletin: Office of the Ombudsman – appointment and terms of reference of the Ombudsman* at [1], ST/SGB/2002/12 (2002).

91 Hoffmann and Mégret, above n 81, at 60.

How such an ombudsman office would in fact work would, of course, be subject to a plethora of practical and political objections. Key issues that would need to be resolved include the appointment and tenure of such an ombudsman, the extent of its jurisdiction,⁹² the scope of its investigatory powers, the range of ADR techniques at its disposal (ie whether it would be focused on compliance-review or also mediation), and the line of authority (ie to whom would an ombudsman report?). These are, of course, general matters relating to any ombudsman; but one can also think of some institutional-specific difficulties, including – as merely examples of how difficult it will be to demarcate between the permissible and impermissible – how far would such an ombudsman be able to receive complaints about the work of the UN's political organs including the Security Council, should the ombudsman be able to receive complaints if it also involves activities of States and how should the work of the ombudsman relate to the role of the International Court of Justice as the principal judicial body within the UN system? Moreover, who would be entitled to make a complaint and how would the UN ensure that those who depend upon the UN the most – those most marginalised in the global South – benefit from simply another administrative innovation far removed from their daily existence? These are all difficult issues, and while similar matters have been raised at the national level and not proved insurmountable to resolve, the scale of the project at the international level is recognised to be of a significantly different magnitude.

Notwithstanding the myriad of practical and political hurdles which would bedevil such a project, the existence of greater accountability mechanisms would arguably not only serve to enhance the reputation of individual UN operations, but would also improve the legitimacy of the organisation of the UN as a whole. However, what becomes quickly apparent is that just as States fervently protect their own national interests wherever they are perceived to be at risk, international institutions are equally defensive of their own rights and responsibilities. In this regard, the “opening up” of institutions through complaint and grievance mechanisms is often viewed with a certain level of suspicion and mistrust as to how far the process will undermine how such organisations have traditionally functioned. What is often missing in such deliberations, however, is the realisation that such accountability mechanisms are now viewed as integral to the implementation of good governance, which itself is increasingly essential to ensuring international organisations possess both political credibility and, more fundamentally, normative legitimacy.

92 This includes the very contentious issue of how far the mandate *ratione materiae* of such an ombudsman should range beyond procedural issues to incorporate matters of substance and policy. For instance, should a UN ombudsman be able to receive complaints about the lack of sanitation in a UN-run refugee camp from its inhabitants? (Thanks to a member of the audience at Brunel Law School, United Kingdom, who raised this issue during a presentation of this article for this example.)

IV. COMPLAINT MECHANISMS: INCREASING SYNERGIES, AVOIDING UNFAIR COMPARISONS

One of the central rationales of this article has been that a well-functioning complaint and grievance mechanism (including the office of the ombudsman) can go a long way towards promoting and achieving accountability within a governance structure and defending the rule of law, whether that be at the national, regional or global level. There is inevitably some debate as to whether such processes can only ever truly work where there is a sufficient link between the institution and the complainant, most clearly shown in the connexion between national and local administrations and the *demos* they serve.⁹³ But it has been argued in this article that such mechanisms are also useful at the international level to ensure improved operational performance and accountability to stakeholders.

This may, on first glance, suggest a relatively restrictive understanding of the place of such mechanisms within international institutions, which focuses upon their utility in increasing the overall effectiveness of such organisations rather than recognising the broader constitutional significance of complaint and grievance mechanisms.⁹⁴ However, as has been highlighted above, the establishment of innovative accountability mechanisms also plays a significant role in ensuring the development of increased standards of good governance and legitimacy within international institutions. There can be little denying how important the existence of transparent, accessible and administratively-workable accountability mechanisms has become, both within those international organisations that have adopted such procedures and, more generally, within the broader dialogue on the future direction of international institutional governance.

Moreover, it is not just the existence of complaint and grievance mechanisms per se that is important – though undoubtedly they are both novel and innovative in their own right – it is the role of such mechanisms in allowing private individuals and local communities to complain, to a greater or lesser extent, about the policies and procedures of hitherto hermetically-sealed international institutions that truly underlines their

93 This is not to suggest that there are not increased links between private individuals and international organisations, but rather that the connexion between them is usually more distant than the connexion between the individual and the administrative apparatus of his/her State. This is, of course, not as true as once it were; as the work of the European Union, United Nations and the World Bank – to a greater or lesser extent – shows, international organisations are now affecting the lives and behaviours of individuals much more directly, and with less direct State involvement (see also Bodansky, above n 11).

94 For an alternative understanding on the role and status of complaint and grievance mechanisms at the international level, see the “concentric circles” approach of Reif, above n 10, at 364-365: the “inner circle of activity” of the workplace ombudsman, the middle circle “representing an organization’s attempts to improve the relationship among member states” (Reif notes that this “has not been the site of the development of the ombudsman”, but see the Warwick Commission, above n 8) and the outer circle “provid[ing] an external accountability mechanism for non-state actors affected by its activities”.

overall importance. As well as reflecting what Zwanenburg previously referred to as “a corollary of the demand for accountability of international organizations, *and in particular accountability towards individuals*”,⁹⁵ the “opening up” of such mechanisms to individuals and local communities is, equally, a substantive contribution to the engagement of the individual as a participant in international law.⁹⁶

Thus, it must be recognised that the role of individuals in these processes is far from being purely instrumental – the individual *qua* catalyst for complaint handling and institutional review – what is actually happening is that individuals are, in fact, seeking to enforce *their* interests. These interests may not necessarily always be legal rights or entitlements in the traditional sense of the term, though, as with the Kosovo Ombudsman, if the complaints are human-rights based, this does suggest a potential amalgam of *private* complaint and *legal* right. Thus, such mechanisms permit, if not also directly encourage, individuals to assert that which they were unable to protect previously at the international level, and in an increasingly expansive number of international organisations. In short, not only is this an important – if still putative – constitutional sea-change in the status of the individual in international law, but it also heralds an emerging expectation in how international organisations should operate and treat non-State interests. This may, of course, be overstating the actuality of the current situation and how, in particular, such mechanisms operate in practice, but one cannot deny a fundamental shift has now taken place.

Moreover, as noted above, there is a strong argument that much of what has happened at the global level is reflective of changing patterns in institutional behaviour, which were first introduced at the national and regional level. To this extent, it is unsurprising that many of the same issues arise concerning how such mechanisms should (and do) operate and the continuing obstacles they face. This linkage between the global and national is not all one-way either. There is also evidence that the international community is aware of the positive benefits that can be gained through the development of these and other methods of ADR. So, for instance, in recent years, many international organisations have promoted the work of such mechanisms at the national level in contributing towards the implementation of standards of good governance and human rights, often as part of a wider development agenda.⁹⁷

95 Zwanenburg, above n 7 (emphasis added).

96 Moreover, without seeking to question the validity of Franck’s general work on the legitimacy of international law, in which he propounds four “indicators”: determinacy, symbolic validation, coherence and adherence (Franck, above n 1, at 30-46), it might be tentatively suggested that consideration also be given to a fifth, *participation* – both at the stage of formation of the rule/policy and, in this context, at the stage of *post hoc* accountability.

97 See, for instance, Reif, above n 10, at 70: “In proposing ideas for strengthening good governance, the [United Nations Development Programme] has suggested the establishment of ombudsman and human rights oversight bodies”.

However, any attempt to make direct comparisons between the techniques adopted at the global and national levels has to be approached cautiously, especially given the very different approaches to, and attributes of, governance that exist.⁹⁸ To that extent, it would be a mistake to argue for a “one model fits all” approach to the utility of the ombudsman and other complaint and grievance mechanisms. Thus, a preliminary conclusion must inevitably be that automatic replication of such mechanisms should be avoided, and concurrently that any such proposal must therefore always take into account the particular institutional and political framework in which it is to operate.

This is not to say that there are not certain fundamental features which all such mechanisms should demonstrate, but rather that they should be applied flexibly and with due care for the overarching governance structure already in place. Moreover, it should also not be ignored that though such mechanisms are rarely considered a form of “dispute settlement” in the formal sense of the term – “dispute avoidance” often being considered a better description – they share very similar goals. Though complaint and grievance mechanisms do not have the inherent characteristics of either judicial proceedings or arbitration, at a generic level, the purpose of each in seeking to resolve differences, to ensure accountability and perhaps to provide redress are ultimately not very far apart.⁹⁹ Thus, complaint and grievance mechanisms should be viewed not only as innovative in the way international organisations operate *internally* but also as an alternative means of raising *external* issues of accountability within them. Of course, complaint and grievance mechanisms are not an institutional panacea for the perceived failings of international dispute settlement, and the truth is that such mechanisms should at best be considered supplementary procedures, and only then within certain institutional settings.

Nevertheless, what might originally appear to be the weaknesses in such complaint and grievance mechanisms – their limited jurisdiction, their lack of binding authority, their dependence on political goodwill for subsequent implementation – are also potential strengths. It is relatively clear that many of the international organisations which have incorporated a complaint and grievance mechanism within their governance model would be wholly unwilling to establish more intrusive procedures – with greater legal enforcement powers – over the same subject-matter. This is not a viable political alternative: it is simply unrealistic to expect the World Bank, for instance, to permit independent judicial supervision of its operating policies

98 This also raises a more wide-ranging question of methodology and approach. As this was the first time both of us had written with someone from each other’s respective disciplines, discerning the “public” in (domestic) administrative law and international law – and how this “public” is both congruent and divergent from each other – has highlighted broader issues deserving further exploration.

99 On a related point, see Merrills, above n 4, at 315-316: “the role of law and the role of adjudication are two issues, not one ... While it is difficult to imagine adjudication without law, law without adjudication is actually the normal situation in international affairs ... [A]lthough international disputes are generally resolved without adjudication, law will frequently play a significant part in defining the points in issue”.

and procedures, rather than the present practice of accountability via the in-house Inspection Panel. Such “softer” forms of dispute resolution, which are able to respond more flexibly to the competing demands of an international governance system so very obviously predicated on national and institutional interests, reflect more accurately the political contours of the current international system.¹⁰⁰

In any event, it is not at all clear that “harder” procedures would be any more effective in incorporating the ideals of legitimacy and governance within international institutions. In this area of international law and policy, the maxim “the perfect is the enemy of the good” seems particularly apt; in fact, it is not at all clear that other – binding – processes could achieve as much as complaint and grievance mechanisms have the *potential* to do. The goal of international institutions must now be to refine and build upon the mechanisms that already exist to ensure that such “good” is realised still further.

100 Moreover, as is clear from this article, it is not yet the situation that all international organisations are either prepared to adopt even “soft” accountability mechanisms or that they are firmly – and permanently – embedded within the institutional “consciousness”. See Shihata, above n 33, at 264: “Once accountability to the affected public is postulated as an efficient complementary element in the overall accountability system of an international organization, it is difficult to see why such an element should be restricted to ... multilateral development institutions. Obviously, this would not be the case if the function were to contradict or dilute existing systems of governance and accountability in the organization involved *or otherwise hinder its efficient operation*” (emphasis added).