

The European Union Human Rights Review Panel

ABSTRACT

The European Union Human Rights Review Panel has been in operation in Kosovo since 10 June 2010. This article examines the origins of the Panel, the rationale for its establishment, its procedural, legislative and regulatory framework, its case load and the way in which it deals with human rights violations committed by the EU Rule of Law Mission in Kosovo (EULEX) in the discharge of its executive mandate. The paper also examines how the Head of Mission (HOM) EULEX Kosovo acts to implement the remedial recommendations submitted to him by the Panel when a human rights violation has occurred. Consideration is given to the standing of the Panel in the EU Common Security and Defence Policy infrastructure as a human rights accountability mechanism that holds an international organisation accountable for its human rights violations. The achievements of the Panel, as well as the factors that limited its effectiveness and the difficulties that it encountered in the discharge of its mandate, are also examined.

Introduction

The European Union (EU) established the EULEX Kosovo Rule of Law Mission, its largest ever Common Security and Defense Policy (CSDP) mission, through the Council Joint Action of 4 February 2008.¹ Its purpose, as defined in its executive mandate mission statement, was to achieve sustainable and accountable institutions, judicial authorities and law enforcement agencies in Kosovo. Specifically, it sought to develop and foster a politically-neutral justice system supported by a multi-ethnic police force and customs service. This was to be achieved through “monitoring, mentoring and advising, whilst retaining certain executive responsibilities.”² The Joint Action also highlighted the importance of human rights and gender mainstreaming issues in order to achieve compatibility with international standards.³

EULEX Kosovo ultimately assumed the executive functions of the United Nations Mission in Kosovo, (UNMIK)⁴ and became operational on 9 December 2008. Prior to its establishment the European Union had, inter alia, to consider how a lacuna in the jurisdiction of the European Court of Human Rights (the Strasbourg Court), might be best addressed with regard to EULEX human rights accountability in Kosovo.⁵ UNMIK,

¹ Official Journal of the European Union (2008), Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo (Article 1.1), [online], available: <http://www.eur-lex.europa.eu>, [accessed 20 April 2015].

² Ibid, Article 2.

³ Ibid, Article 3(i).

⁴ Ryan, J. (2010) ‘United Nations Mission in Kosovo - The Human Rights Review Panel’, *Defence Forces Review*, 8, Dublin: Irish Defence Forces, pp. 43-48.

⁵ Council of Europe (2004) *Opinion on Human Rights in Kosovo – Possible Establishment of Review Mechanisms*, Opinion No. 280/224 of 11 October 2004, Strasbourg: European Commission for Democracy through Law (Venice Commission), Paras 76-78 & Paras 158-164.

although in existence since 10 June 1999,⁶ had belatedly addressed this jurisdictional lacuna with the creation of the UN Human Rights Advisory Panel on 26 March 2006.⁷

Background to the Establishment of the Review Panel

UNMIK had experienced mounting international criticism by Human Rights Watch, Amnesty International, the Norwegian Helsinki Committee and other concerned parties because of its failure to resolve a human rights accountability void in relation to the exercise of its executive powers from the time it became operational in Kosovo in 1999.

Thus, the aforementioned international human rights monitoring organisations recommended in a joint press release on 10 March 2008 that the proposed EU mission in Kosovo ought to subject itself to much greater human rights scrutiny and accountability than its predecessor, UNMIK:

If the EU wants to assist in building respect for human rights and the rule of law in Kosovo, it needs to lead by example. That means that its mission accepts serious independent scrutiny of its human rights record from day one.⁸

This recommendation was reinforced by the Commissioner for Human Rights, Council of Europe (COE) during his Special Mission to Kosovo from 23 to 27 March 2009 when he urged EULEX Kosovo to establish an effective accountability mechanism as a matter of priority:

The EU's Rule of Law Mission, EULEX could also consider the advantages of setting up an independent (human rights) accountability mechanism. EULEX does have the possibility to exert some executive powers. There are a number of options for accountability mechanisms for EULEX. One is that EULEX could take on the model of the current (UNMIK) Human Rights Advisory Panel⁹; another is that complaints could be dealt with by the Kosovo Ombudsperson's Institution. A third option is that EULEX could create its own independent mechanism.¹⁰

The Commissioner elaborated on his theme of human rights accountability in a press release on 8 June, 2009 wherein he stressed the importance of an international organisation such as EULEX, in the exercising of executive and legislative powers as a surrogate state, being treated to standards required of a democratic government.¹¹

6 UN Security Council, Security Council Resolution 1244 (1999), 10 June 1999, [online], available: <http://www.un.org/en/sc/documents/resolutions/>, [accessed 20 April 2015].

7 UNMIK (2006), 'UNMIK Regulation No. 2006/12 on the Establishment of the United Nations Human Rights Advisory Panel of 23 March, 2006', [online], available: <http://unmikonline.org>, [accessed 20 April 2015].

8 Human Rights Watch (2008) *Kosovo: EU Should Ensure International Mission is Accountable*, Brussels: The Norwegian Helsinki Committee & Amnesty International.

9 UNMIK (2006), *op cit*.

10 Council of Europe (2009) 'Report of the Council of Europe Commissioner for Human Rights Special Mission to Kosovo 23/27 March 2009', [online], available: <http://www.coe.int>, [accessed 20 April 2015].

11 Office of the Commissioner for Human Rights (2009), 'Press release 450 of 8 June 2009' [online], available: <http://www.coe.int>, [accessed 20 April 2015].

Establishment of the EU Human Rights Review Panel

Ultimately, the EU decided on the option of creating an independent mechanism, resulting in the establishment of the EU Human Rights Review Panel (Panel) on 29 October 2009. The Panel was formally appointed by the Acting Head of Mission EULEX Kosovo on 4 May 2010. The deliberations of the Panel members are conducted on a part-time basis, backed-up with a permanent Secretariat located in Pristina.

The Panel is composed of three international experts in human rights law, two of whom are externally based lawyers: the Presiding Member is a lawyer at the Registry of the European Court of Human Rights, Strasbourg, France and the other external member is a Defence Counsel and Consultant who practices law before international criminal jurisdictions (ICTY, ICC, STL and ECCC). The internal EULEX Panel member is an international criminal judge, Mitrovica Basic Court, Executive Division, EULEX Kosovo. There is also a substitute Panel member who is a Criminal Judge in the Supreme Court/Appellate Court, Executive Division, EULEX Kosovo. The Panel became operational concurrent with the adoption of its Rules of Procedure on 10 June 2010.

The COE observed at the time of the creation of the Panel, that, for the first time in history an individual applicant could invoke the human rights accountability of international organisations operating in the executive role.¹² Heretofore, accountability for human rights violations had been the exclusive preserve and responsibility of international member states. COE now stressed that the administration of territories by international organisations, being a classic government function, impacted directly upon the lives of individuals and had to be accompanied by appropriate legal (human rights) safeguards and accountabilities.

Procedural Framework

The Rules of Procedure (Rules) are broadly based on the Rules of the European Court of Human Rights (Strasbourg Court) and contain provisions for the review of complaints as well as the deliberations of the Panel. It also contains several procedural aspects for adherence by the Panel and other listed parties. It stipulates that the Panel be independent in the exercise of its functions and should act in accordance with international human rights standards and norms.

Its procedures further directed that the Panel could only examine complaints which related to alleged violations that occurred after 9 December 2008. Complaints had to be submitted within six months from the date of the alleged violation and anonymous complaints were permitted if complainants feared for their safety or security. It also stated that the Panel could only review a complaint once all other review mechanisms within the Kosovo court system had been exhausted. Additionally, for jurisdictional reasons, the Panel was prohibited from conducting reviews of judicial proceedings before the courts of Kosovo.

¹² Council of Europe (2013), *Accountability of International Organisations for Human Rights Violations*, Strasbourg: Parliamentary Assembly, pp. 5-6, Paras 4-7 and Page 17 Paras 58-59.

Legislative / Regulatory Framework

The Council Joint Action is the source of authority and power of EULEX Kosovo. A regulatory framework was formulated which guides the activities of the Panel. It lays down the mandate of EULEX and, inter alia, specifies the responsibility of EULEX to act in compliance with relevant human rights standards in order to “ensure that all its activities respect international standards concerning human rights and gender mainstreaming.”¹³

Pursuant to the provisions of its establishment, the Panel may review complaints of alleged human rights breaches under the standard international human rights declarations, conventions and covenants. In practice, most complaints fall under the European Convention on Human Rights.

Mandate

The mandate of the Panel, as expanded upon in the Accountability Concept¹⁴ (Concept) issued by the General Secretariat of the Council, is to review complaints from any person, other than EULEX Kosovo personnel, who claims to be a victim of a violation of human rights by EULEX Kosovo in the conduct of its executive mandate in the justice, police and customs sectors.

The Concept stated that the establishment of an effective, transparent human rights accountability mechanism was a fundamental requirement for EULEX Kosovo as a Rule of Law Mission vested with certain executive powers, particularly as they relate to factors of security, namely: organised crime, corruption, conflict-related property issues, war crimes, terrorism, ethnically motivated crimes, inter-ethnic crime, as well as financial and economic crimes.

The Concept further stipulates that the Panel will publish annual reports with a detailed account of its operations accompanied by supporting statistical material. It also states that the Panel may continue with its mandate for a limited supplementary period after completion of the executive mandate of EULEX Kosovo. This provision is designed to facilitate the Panel to process the complaints still under review at that time or complaints that may yet be filed within the six month time limit, from the date of the alleged violation.

Public Outreach Campaign

In developing the procedural frameworks that guide the workings of the Panel, The Secretariat recognised the importance of imparting its existence, operating structures and rules of procedure to the public¹⁵:

... EULEX Kosovo will ensure a proper dissemination of public information on the Panel and its work, including the rules to make a complaint and the availability of the human rights accountability mechanism.¹⁶

¹³ Official Journal of the European Union (2008), op cit.

¹⁴ European Union (2009) *Accountability Concept (Concept) EULEX Kosovo – Human Rights Review Panel*, Brussels: General Secretariat of the Council.

¹⁵ Ibid.

¹⁶ Ibid.

This was reinforced in-country by the Civilian Operations Commander, who declared that the Road Map for the Civilian Planning Conduct Capability should include, inter alia, “the preparation of a comprehensive public relations campaign.”¹⁷ The Concept also emphasised that a proactive communications policy was not only to the benefit of civil society, it was equally beneficial to the EULEX Mission in the conduct of its operations and in the achievement of its objectives.

Accordingly, a public outreach campaign, which commenced in June 2010 and has been ongoing since, has involved the use of broadcast media to disseminate information on the Panel and its activities. The campaign has shown incremental success, as evidenced by the steady increase in the Panel's caseload since it commenced its operations five years ago. Forty two new cases were registered with the Panel in 2014 in comparison with twenty seven cases in the previous year. By the end of 2014, a total of one hundred and thirty six cases were filed with the Panel of which ninety four cases have been finalised.

Complaints

While some complaints of human rights violations by EULEX Kosovo resulted from its actions, many alleged violations resulted from its supposed inaction. Such complaints relate to alleged refusals by EULEX prosecutors to initiate investigations and/or their failure to file indictments. Additionally, there were allegations that EULEX police did not adopt reasonable or adequate measures in certain circumstances to protect complainants from harm by third parties.

The most common types of alleged human rights violations examined by the Panel were in the areas of: the right to life; prohibition of torture; inhuman or degrading treatment; violation of the right to liberty and security; right to a fair trial; right to respect for private and family life; right to freedom of thought, conscience and religion; right to an effective remedy; and the right to the peaceful enjoyment of one's possessions.¹⁸

Admissibility – The Panel's Competence to Review Proceedings Before Kosovo Courts

The Panel addressed various important issues pertaining to the admissibility of complaints in the following decisions: *Emin Maxhuni against EULEX*, Case no. 2013-24; *Gani Gashi against EULEX*, Case no. 2013-22; *Gani Zeka against EULEX*, Case no. 2013-15; and *J against EULEX*, Case no. 2013-04¹⁹. The Panel reiterated its position that, according to Rule 25, paragraph 1, of its Rules of Procedure, based on the accountability concept in the OPLAN of EULEX Kosovo, it had no jurisdiction in principle in respect of the deliberations of Kosovo courts. The fact that EULEX judges sit on the benches of such courts does not detract from the fact that such courts form part of the Kosovo judiciary.

On the other hand, the Panel upheld its view that the actions of EULEX prosecutors taken within the context of a criminal investigation were part of the executive mandate of EULEX Kosovo; therefore, in principle, it fell within the ambit of the mandate of the Panel.

¹⁷ Instruction of the Civilian Operations Commander, 13 November 2009 - A restricted document.

¹⁸ Human Rights Review Panel (2014) 'Annual Report 2013 European Union Human Rights Review Panel - Subject matter of complaints', [online], available: <http://hrrp.eu/>, [accessed 21 April 2015].

¹⁹ Human Rights Review Panel (2014) 'File No 2 – Case Management – Decisions *Emin Maxhuni against EULEX*, Case no. 2013-24; *Gashi against EULEX*, Case no. 2013-22; *Gani Zeka against EULEX*, Case no. 2013-15 and *J against EULEX*, Case no. 2013-04' [online], available: <http://hrrp.eu/>, [accessed 21 April 2015].

Actions or omissions by EULEX prosecutors during the investigative phase of criminal proceedings were therefore not considered to be a part of 'judicial proceedings' for the purpose of determining the competence of the Panel.

The actions of EULEX prosecutors might therefore be subject to the reviewing authority of the Panel where human rights violations were alleged to have occurred, e.g., *Goran Becić against EULEX*, Case no. 2013-03 (decision on admissibility) and *B.Y. against EULEX*, Case no.2014-06.²⁰

Furthermore, the Panel noted that it could not be excluded that it might be competent to evaluate the actions of EULEX prosecutors in criminal investigations even when these are subject to judicial review, if they raised issues of human rights that were not being fully addressed by the competent judicial authorities, e.g. *Tomë Krasniqi against EULEX*, Case no. 2014-04.²¹

Jurisprudence

The Jurisprudence of the Panel has emanated primarily from rulings on preliminary procedural matters such as jurisdiction in general, temporal jurisdiction, admissibility, complaints manifestly ill-founded and the exhaustion of remedies. The Panel also ruled on a number of substantive issues such as the right to life, the right to a fair trial and the right to protection of property.

It has also dealt with specific issues such as the definition of the scope of the acts or omissions which are attributable to EULEX and the identification of continuing and non-continuing violations arising from factual matters which occurred prior to that date, where these facts give rise to a continuing violation in the context of restricted temporal jurisdiction of the Panel. The Panel additionally addressed issues of "legitimate aim," "necessity" and "proportionality" of the interference with the right to respect for the private and family life of complainants.

Recommendations of the Human Rights Review Panel

Recommendations provided by the Panel may include proposals for remedial action for implementation by the Head of Mission (HOM) who has exclusive authority and discretion as to whether to act or not to act on the recommendations. Such recommendations may include: verification of the facts; the removal of the cause of the human rights violation; restitution of the situation that prevailed before the violation occurred; measures to avoid/preempt similar violations in the future; as well as recommendations for the improvement of the EULEX organisation and/or its operations.

The Panel may also furnish recommendations pursuant to deliberations even if EULEX has not committed a violation in the case at hand as such recommendations may, on occasion, assist the Mission in the improvement of its operations and organisation. The Decisions of the Panel are published in the English, Albanian and Serbian languages on

²⁰ Human Rights Review Panel (2014) 'File No 2 – Case Management – Decisions – *Goran Becić against EULEX*, Case no. 2013-03 and *B.Y. against EULEX*, Case no.2014-06, [online], available: <http://hrrp.eu/>, [accessed 22 April 2015].

²¹ Human Rights Review Panel (2014) 'File No 2 – Case Management – Decisions - *Tomë Krasniqi against EULEX*, Case no. 2014-04', [online], available: <http://hrrp.eu/>, [accessed 22 April 2015].

its website and in the print media as are the Decisions of the HOM. Such publication, inter alia, demonstrates the transparency and accountability of the Panel and EULEX Kosovo respectively in these matters and it furthermore facilitates scrutiny of its decisions everywhere by interested parties.

Human Rights Violations by EULEX Kosovo

The Panel made two findings of human rights violations in its cases by EULEX Kosovo in 2011, seven such findings in 2013 and it made a further two such findings in 2014. The Panel submitted detailed recommendations in these case violations to the HOM EULEX Kosovo in order to avoid or pre-empt future similar violations as well to improve the operational planning and organisation of EULEX, inter alia, in the furtherance of its mission objectives. A representation of some of the violations is as follows:

Djeljalj Kazagic against EULEX – Case No. 2011-01

The Panel adopted its first decision on a human rights violation in Djeljalj Kazagic against EULEX²² on 8 April 2011. This case involved a property dispute in the Kosovo court system in Mitrovica between the Complainant and a lending institution relating to the granting of a mortgage to the Complainant's nephew on the Complainant's house without either the knowledge or consent of the Complainant.

The Complainant requested a EULEX Kosovo prosecutor to initiate a criminal investigation in June 2009 which was duly assigned to a EULEX Prosecutor in April 2010. However, despite repeated efforts to communicate with the Prosecutor thereafter, he did not receive any further information or assistance with his case.

The Panel found that there had been a violation of the right of the Complainant to a fair hearing within a reasonable time in contravention of Article 6.1 of the Convention as well as a violation of the right to the peaceful enjoyment of his possessions in contravention of Article 1, Protocol 1 to the Convention.

Blerim Rudi against EULEX – Case No. 2010-07

The Panel adopted its second decision in Blerim Rudi against EULEX²³ on 8 June 2011. The Complainant in this case was employed as Deputy Director, Financial Intelligence Centre (FIC), EULEX from 01 September 2008 until 28 January 2010, when his contract of employment was suddenly terminated.

The FIC was established pursuant to the provisions of UNMIK Regulation 2004/02 and it became part of the Executive Department, EULEX Police Component on 9 December 2008. It was an independent entity which was responsible for the collection and analysis of data and information to prevent money laundering and related offences as well as to stop/interrupt the flow of financial support to terrorist organisations.

²² Human Rights Review Panel (2010) 'File No 2 - Case Management - Decisions - Case No 2010- 01, Djeljalj Kazagic against EULEX', [online], available: <http://hrhp.eu/>, [accessed 23 April 2015].

²³ Human Rights Review Panel (2010) 'File No 2 - Case Management - Decisions - Case No 2010- 07, Blerim Rudi against EULEX', [online], available: <http://hrhp.eu/>, [accessed 23 April 2015].

The Panel found that there had been a violation of the right of the Complainant to the peaceful enjoyment of his possessions by virtue of the manner in which his contract of employment was terminated - contrary to Article 1, Protocol 1 to the Convention.

A, B, C & D against EULEX – Cases No. 2012-09, 2012-10, 2012-11 and 2012-12

The three Kosovo Serb teenagers in this case submitted that they were attacked by an unknown group of persons, who threw stones and Molotov cocktails at them as they travelled home in buses after their participation in the Vidovdan celebrations in Gazimestan on 28 June 2012. A fourth Complainant submitted that he had been assaulted in his car close to Gazimestan by Kosovo Police.²⁴

The Panel held that poor planning and inadequate operational control as well as limited EULEX police human resources had contributed to the Complainants being denied the full and effective enjoyment of their right to a private life, their freedom of assembly as well as their right to exercise their religion safely and without undue hindrance. Therefore, it decided that there were violations of human rights by EULEX under Articles 8, 9, 11 and 13 of the ECHR, as well as Articles 17, 18, 21, 22 and 2 of the ICCPR in these cases.

Actions by the Head of Mission on the Recommendations of the Panel

The Panel, as a matter of procedure, requests the HOM to acknowledge that the circumstances of the human rights violations in the above mentioned cases amounted to breaches of the rights of complainants attributable to the actions or inactions of EULEX in the performance of its executive mandate. However, the HOM has declined the invitation to make such acknowledgements or declarations.

The acknowledgment of a human rights violation by states is a well-established practice in the procedures of the Strasbourg Court and in the UN Human Rights Advisory Panel. Given the fact that the Panel cannot recommend monetary compensation, a formal acknowledgement of a violation may, inter alia, go some way in the provision of a form of redress for a victim/complainant. The actions taken by the HOM in the various cases were as follows:

Kazagic Djeljalj against EULEK Kosovo – Case No. 2011-01

The HOM stated that EULEX did not initiate a prosecutorial investigation since the matter had already been investigated by a Kosovar prosecutor. It was also concluded that the criteria for the assignment of a EULEX judge to the case had not been complied with. However, certain positive measures were undertaken by the HOM to address the situation within the framework of his executive mandate and the Panel concluded that the HOM had, by and large, exercised his functions as appropriate.

Blerim Rudi against EULEX Kosovo – Case No. 2010-07

The HOM implemented the essence of the Panel's recommendations in this case. In particular the Panel noted that the HOM requested the Director of the Financial Intelligence Centre to take steps to reinstate the Complainant in his post and to pay him his full arrears of salary. The Panel considered that the measures taken should offer some

²⁴ Human Rights Review Panel (2010) 'File No 2 - Case Management - Decisions - Case Nos. 2012-09, 2012-10, 2012-11 and 2012-12, A, B, C & D against EULEX', [online], available: <http://hrrp.eu/>, [accessed 23 April 2015].

restitution to the Complainant and go towards the restoration of professional reputation. Based on the foregoing, the Panel concluded that the HOM exercised his functions appropriately in this case.

A, B, C & D against EULEX Kosovo – Case Nos. 2012-09, 2012-10, 2012-11 & 2012-12

The Panel noted that the HOM fully addressed and implemented its recommendations in these cases in relation to the planning and organisational shortcomings that adversely impacted from a security perspective on the June 2012 Vidovdan celebrations. The Panel noted in particular that EULEX conducted a risk assessment with a view to the identification of any potential threats to the safety and protection of participants from a human rights perspective.

There was a much greater EULEX police presence in 2013 and clear guidelines and instructions were issued, in particular with regard to the circumstances under which the EULEX Police should intervene to prevent human rights violations. The HOM also directed that EULEX police officers record any human rights violations that they might witness or that were reported to them during the celebrations.

Effective means of communication were also established to ensure prompt intervention and adequate coordination between the Mission and competent Kosovo authorities. Also, Kosovo Police were fully briefed on their responsibilities, and the security recommendations provided by EULEX were duly implemented by Kosovo Police authorities. The Panel noted with some considerable satisfaction that the HOM implemented all of its recommendations with regard to organisational planning and operational control for the involvement of EULEX in the Vidovdan celebrations of 28 June 2013 and to great effect.

Conclusion

On the basis of its experiences to date, some five years after its establishment, the Panel has identified a number of factors which limit its effectiveness. These include: its inability to issue binding decisions; the fact that it does not have jurisdictional competence over judicial proceedings; the situation whereby it cannot recommend monetary compensation for successful claimants; the position of its limited jurisdiction *ratione temporis*;²⁵ and the fact that it has no *proprio motu*²⁶ trigger of jurisdiction, in that it cannot act of its own volition. These are matters that could be considered when such a Panel may be established in the future in these circumstances.

The Panel is now well established within the CSDP mission infrastructure as an effective accountability mechanism for the protection and promotion of international human rights standards and norms. As such, it serves as an effective means to ensure EULEX accountability for breaches of international human rights instruments in the exercise of its executive mandate in Kosovo. The Panel also provides a good role model for the protection and promotion of human rights and serves as an excellent practical example of human rights accountability for the state institutions of Kosovo.

²⁵ Temporal jurisdiction.

²⁶ Of its own initiative.

It has helped, through its decisions, to provide some respite to those complainants whose human rights have been violated by EULEX Kosovo. By its mere presence, it has both directly and indirectly raised human rights awareness in the Kosovo state institutions and amongst the public at large.

The Panel decisions and their implementation by the HOM have helped to clarify in a practical way and in the operational sense, the accountability of EULEX Kosovo for its human rights violations in the context of its executive mandate responsibility. The Panel Vidovdan Decisions have also been of assistance to EULEX CIVPOL as evidenced by the improvements which came about in its operational planning and organisation for the Vidovdan celebrations on 28 June 2013, which, incidentally, went off almost without incident.

Through its operations, the Panel has enhanced the credibility of EULEX Kosovo from a human rights accountability perspective as it has subjected itself to external scrutiny of its actions in the discharge of its executive mandate in Kosovo. Additionally, it constitutes a potential model or prototype for the implementation of a viable and meaningful human rights accountability mechanism for the protection and promotion of human rights when the European Union next exercises executive authority in a CSDP mission.

Finally, the Panel is making its contribution to the promotion of international human rights protection and accountability and it is playing its part in the development of international human rights law in a mission where the EU is exercising executive powers for the first time in its history.