

**HUMAN RIGHTS REVIEW PANEL**

**CASE-LAW NOTE ON**

**CONDITIONS OF ADMISSIBILITY OF COMPLAINTS BEFORE THE PANEL AND**

**RELATED JURISDICTIONAL ISSUES**

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# General considerations – Accountability concept as general framework to the work of the Panel

The Panel was created as a way to ensure that EULEX Kosovo would operate within the framework of its executive mandate in a manner consistent with general standards of human rights recognised under international law. this was part and parcel of the so-called “Accountability concept” pursuant to which the Panel was created.[[1]](#footnote-1)

These standards of human rights, which the Mission is expected to abide by, reflect minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.[[2]](#footnote-2)

# Scope of competence and reviewing authority of the Panel

## *2.1 General considerations*

According to Rule 25, paragraph 1, of the Rules of Procedure, the Panel can examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate in the justice, police and customs sectors. This jurisdictional framework was set for the Panel by the OPLAN of EULEX.

## *2.2 Ratione materiae*

### 2.2.1 Acts and omission attributable to EULEX resulting in or contributing to rights violation

The Panel is competent only in relation to violations of rights that are attributable to EULEX. The Panel is not competent therefore to rule on conduct attributable to third parties, such as UNMIK,[[3]](#footnote-3) Kosovo authorities[[4]](#footnote-4) or third parties.

### 2.2.2 Executive mandate in the field of justice, police and customs

The Panel’s mandate does not extend to all activities of the Mission. In particular, the Panel’s jurisdiction has been limited by the OPLAN to the “executive” part of EULEX’s mandate.[[5]](#footnote-5) Substantively, the mandate of EULEX therefore pertains to the performance of certain “executive” functions *in the field of justice, police and customs*.[[6]](#footnote-6) This mandate sets the outer limits – *ratione materiae* – of the competence of the Panel to review acts and conduct of EULEX:

“the Panel has to determine the scope of its jurisdiction for the purposes of the present case. It can only examine complaints relating to alleged violations of human rights by EULEX in the conduct of its executive mandate, including alleged actions by the EULEX police.” [[7]](#footnote-7)

This means, for instance, that employment matters, internal disciplinary and tax matters fall beyond the scope of EULEX’s executive mandate.[[8]](#footnote-8)

For further discussion of this matter, see HRRP’s Case-Law Note on Principles of Human Rights Accountability of a Rule of Law Mission.[[9]](#footnote-9)

### 2.2.3 Exclusion of competence over Kosovo courts

**The Panel has no competence over the acts and decision of Kosovo Courts**

In keeping with the principle of judicial independence, EULEX does not have executive competence over the activities of the local judiciary – whether judicial or administrative in nature. It follows from the OPLAN that the actions and omissions of the Kosovo judiciary are excluded in principle from the scope of the Panel’s jurisdiction. The Panel has clarified this issue by referring to the Rule 25 paragraph of its Rules of procedure and noting that:

“14. According to the said Rule, based on the accountability concept in the OPLAN of EULEX Kosovo, the Panel cannot review judicial proceedings before the courts of Kosovo. In particular, it is not its function to deal with errors of fact or law allegedly committed by a Kosovo court unless and in so far as they may have infringed rights and freedoms protected by international human rights law applicable in Kosovo.”[[10]](#footnote-10)

The Panel further clarified the contours of its lack of jurisdiction over judicial activities when it stated that:

“The Panel notes that the complainant’s grievances concern a dispute between him and the Organisation of KLA Veterans regarding his veteran status. The complainant unsuccessfully tried to bring his case before the Kosovo courts. According to Rule 25 paragraph 1, based on the accountability concept in the OPLAN of EULEX Kosovo, the Panel cannot in principle review judicial proceedings before the courts of Kosovo. It has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. Consequently, the Panel cannot influence the outcome of judicial proceedings or the speed with which the pending complaints are examined by the Kosovo courts. Even where EULEX judges take part in the proceedings, it does not detract from the fact that this court forms part of the Kosovo judiciary […]”[[11]](#footnote-11)

In keeping with the above, the Panel has noted that it could not evaluate complaints that pertain, for instance, to the length of judicial proceedings:

“With regard to the alleged excessive length of the criminal proceedings before the Court the present complaint concerns judicial proceedings conducted by the courts in Kosovo. The Panel therefore finds, under Rule 25 of its Rules of Procedure, that it lacks jurisdiction to examine the compatibility of judicial proceedings before the courts of Kosovo with the human rights standards (See also Panel’s decision in the case of SH.P.K “SYRI” v. EULEX (2011-05, Decision of 14 September 2011). In any event, the Panel notes that the criminal proceedings against the complainant which were pending before the courts for two years do not appear to raise an issue as to their compatibility with the right to have a case heard within a reasonable time.” [[12]](#footnote-12)

Nor, the Panel made clear, was it competent to revise or revisit a decision of the judicial authority:

“27. The present complaint concerns a request to reverse a final decision of the Supreme Court of Kosovo. 28.The Panel notes that it does not have a mandate to reverse any decision made by a Kosovo court. The Panel is not a court of appeal against the decisions of Kosovo courts. Its mandate does not cover examining errors of fact or law allegedly committed by those courts. It is not the panel’s function to examine the decisions taken by Kosovo courts with regard to admissibility and the assessment of evidence either.”[[13]](#footnote-13)

**The fact that EULEX Judges sat as members of a particular Court or bench does not affect the situation**

It is of note here that a number of EULEX staff sat as Judges of Kosovo Tribunals. The Panel made clear, however, that the presence of one or more EULEX Judge on any Kosovo court did not modify the “Kosovo” nature of that court so that the Panel did not acquire competence over a case merely because EULEX Judges sat in a particular court:

“25. The Panel has held on numerous occasions that, according to Rule 25, paragraph 1 of its Rules of Procedure, based on the accountability concept in the OPLAN of EULEX Kosovo, it has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. *The fact that EULEX judges sit on the bench does not detract from the courts the character as part of the Kosovo judiciary* [...]”.[[14]](#footnote-14)

The same principle was applied even when a particular judicial bench consisted *entirely* of EULEX judges:

“16. Furthermore, the indictment in the case has already been lodged before a court and the case is now being prepared for trial. The complaint relates to judicial proceedings before a court of Kosovo. The fact that the case has been taken over by EULEX under the provisions of Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03 L/053) does not detract from the fact that the acts of courts composed in their entirety of EULEX judges remain the courts of Kosovo. The Panel notes that it is not entitled to review the judicial proceedings (as mentioned above, Para 14.). Therefore the complaint does not fall within the ambit of the Panel’s mandate.”[[15]](#footnote-15)

To summarise, the Panel has no jurisdiction in principle over the actions of Kosovo courts, and thus no competence to address issues of length of judicial proceedings, nor can it consider alleged errors of law attributed to the judiciary.

**No exception for non-executive matters**

The Panel has also made it clear that it lacks competence over activities other than those coming within the “executive” actions of the EULEX judges, when it noted that:

“19. The complaint submitted to EULEX, referred to in par. 11 above, did not trigger the Panel’s jurisdiction to examine the case as a matter falling within the executive mandate of EULEX. When the EULEX judge replied to the complaint, he did not exercise executive authority within the meaning of the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel […]”[[16]](#footnote-16)

**Competence of the Panel over the actions of EULEX Prosecutors (prior to indictments)**

The Panel made it clear that, “in certain circumstances its jurisdiction would cover decisions and acts of judicial authorities as such, in particular where credible allegations of human rights violations attributed to EULEX judges have not been fully addressed by the competent judicial authorities in the appellate proceedings [...].”[[17]](#footnote-17) The Panel further specified this narrow exception in the following terms:

“[T]he Panel cannot in principle review decisions of EULEX judges as such. The Panel has already held, however, that it cannot be excluded that in certain circumstances the Panel’s jurisdiction would cover decisions and acts of the prosecuting authorities in criminal investigations even when they were subject to a subsequent judicial review. The Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities (see [*Z against EULEX*](http://hrrp.eu/docs/decisions/Inadmissibility%20decision%202012-06%20pdf.pdf), no. 2012-06, 10 April 2013 at par. 34). The same reasoning could apply to a complaint pertaining to the acts and decisions of judicial authorities as such where credible allegations of human rights violations attributed to EULEX judges have not been fully addressed by the competent judicial authorities in the appellate proceedings.”

16.In this regard, the Panel refers to the explanatory memorandum of 15 September 2009 to the Accountability Concept of EULEX Kosovo. It makes it clear that the Panel is not excluded from evaluating judicial actions as: “[a]*ll matters dealt with by the ordinary courts in Kosovo have to be addressed […]. This does not mean, however, that the judiciary is entirely exempted from the review by the Panel per se. In the same way as individual deeds by a judge may be addressed separately if the action of the respective judge amounts to perverting the course of justice, the Panel may review complaints addressing human rights violations of similar nature or violations of the procedural human rights, notably the right to a fair trial. The Panel will at any time respect the independence of the judiciary.” [[18]](#footnote-18)*

This narrow qualification regarding the Panel’s competence was drawn up to account for the situation where a violation of rights occurred in the context of judicial proceedings and where the tribunal seized of the matter failed to fully address the alleged violation, thereby leaving the complainant without an effective remedy to address his right-based complaint. The following provides an illustration of that situation:

“18. The Panel recalls that the right of access to a court, namely the right to institute proceedings before the court, is, in principle, guaranteed by Article 6 of the Convention […]. An individual may not benefit from the further guarantees laid down in paragraph 1 of Article 6, namely fair, public and expeditious judicial proceedings if such proceedings are not first initiated. And in civil matters one can scarcely conceive of the rule of law without there being a possibility of having access to the courts. Although the right of access to court may be subject to limitations in the form of regulation by law, they must pursue a legitimate aim and there must be a reasonable relationship of proportionality between them and the aim sought to be achieved […].

19.The requirement to pay fees to civil courts cannot be regarded as a restriction on the right of access to a court that is incompatible, per se, with Article 6 § 1 of the Convention […] It largely depends on the amount of the fees assessed in light of the particular circumstances of a given case, including the applicant’s ability to pay them, and the phase of the proceedings at which that restriction has been imposed that are material in determining whether or not a person has enjoyed his/her right of access […].

The Panel notes that a requirement to provide translations of relevant documents into English may constitute a serious financial burden for some claimants, such as the complainant, who is an unemployed IDP and is living on modest benefit. This might undermine the claimant’s ability to seek and obtain a relief to which she would otherwise be entitled by law. It is noteworthy in this context that the provisions of Law No. 04/l-033 were amended on 29 March, 2014 to give effect to the demands of Article 5 of the Kosovo Constitution and Article 13 of the Law on the Use of Languages, which both provide that Albanian and Serbian are official languages in Kosovo, to be used in all its institutions.

20.The Panel notes that the decision taken by the EULEX SCSC single judge did not end the proceedings. In the instant case, the payment of a fee or translation costs has not been placed as a condition precedent for the initiation of the proceedings before the SCSC and the requirement in the instant case has only resulted in a delay. The activity of the court is not dependent on the payment of these costs. The case itself has, therefore, proceeded and a decision is awaited regarding the merits of the complainant’s case. It follows that the decision not to exempt the complainant from costs of translation has no prejudiced her right to have access to court […].

21.The Panel notes furthermore that the legal basis for a decision on costs is provided for in Article 12 of the Law of the SCSC. Such a decision may be rendered in favour of the defendant who then may not be obliged to bear the costs. Should the complainant be held liable for the costs, she still has a legal remedy, namely, the option of filing an appeal before the SCSC trial panel. Should the complainant be ordered to pay these costs and having exhausted these procedural avenues, she can again file a new complaint before the Panel if she considers that her rights have been violated and that all relevant jurisdictional requirements have been met to seize the Panel anew. The trial panel will then decide on the final costs of the proceedings according to Article 67 of the Law.”[[19]](#footnote-19)

### 2.2.4 EULEX Police and Prosecutors

**Competence of the Panel over the conduct of the police**

The actions of EULEX prosecutors and the police are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel’s mandate.[[20]](#footnote-20) The Panel has thus determined that a core aspect of its jurisdiction pertains to the activities of EULEX police officers:

“[…] the actions taken by the EULEX Police during the arrest of the complainant’s son and the subsequent house search on 23 September 2009 might have been deemed by the Panel as falling within the executive mandate of EULEX.”[[21]](#footnote-21)

The Panel’s jurisdiction covers in principle all action and measures taken by the police, such as arrests, searches, the monitoring and overseeing of public events as well as investigative activities carried out by the police.[[22]](#footnote-22)

**Competence of the Panel over the conduct of EULEX prosecutors**

Regarding the actions of EULEX prosecutors, investigative and prosecutorial activities – at least up a certain point – come within the scope of the Panel’s reviewing authority. As outlined above, the Panel has recalled that:

“[T]he actions of the EULEX Prosecutors are part of the executive mandate of the EULEX Kosovo and therefore fall in principle within the ambit of the Panel’s mandate […] It sees no reason here to depart from this view.”[[23]](#footnote-23)

This is because investigative and initial prosecutorial activities are non-judicial in character. The Panel has explained that:

“16. Contrariwise, the Panel is of the opinion, that actions or omissions by the prosecutors during the investigative phase of criminal proceedings may not be considered as being made in the context of “judicial proceedings” and that “the actions and omissions of EULEX prosecutors […] before the filing of indictment may fall within the ambit of the executive mandate of EULEX” […].”[[24]](#footnote-24)

In another case, the Panel made a thorough and explicit assessment of the nature of investigations and prosecutorial activities in relation to its mandate and concluded as follows:

“54. Judicial proceedings to which the guarantees derived from Article 6 of the Convention apply are to be understood as those being conducted by an independent and impartial tribunal within the meaning of this provision.

55.In this connection, the Panel notes that the competences of EULEX prosecutors are mainly defined in the “Law on Jurisdiction” as well as in the “Law on the Kosovo Special Prosecutors Office (SPRK)”.

56.The EULEX prosecutors, in addition to performing monitoring, mentoring and advising activities of the EULEX Rule of Law Mission in Kosovo, exercise executive powers by conducting criminal investigations and by prosecuting new and pending cases, as defined in Articles 7 and 8 of the Law on Jurisdiction (see paragraph 37 above).

57.Furthermore, under the PCPCK, Article 221, a criminal investigation shall be initiated by a public prosecutor’s decision. The six (6) month investigation period begins to run from the date of such decision. The said ruling is sent to the pre-trial judge who is, in accordance with Article 225 of the PCPCK, empowered to grant an extension of that period, if requested by the prosecutor. Persons under investigation are not under indictment, nor are they necessarily informed of such investigation.

58.After the investigation has been concluded, the prosecutor decides whether to continue the proceedings by filing an indictment with the court of first instance or to discontinue the investigation.

59.The Panel emphasizes that on many occasions the European Court of Human Rights (hereafter “the Court”) has held that a public prosecutor cannot be regarded as an officer exercising “judicial power” within the meaning of Article 5 § 3 of the Convention […]. Even less so can a public prosecutor be considered to be endowed with the judicial attributes of “independence” and “impartiality” […].

60.As the Court has pointed out, the legal framework within which interventions of public prosecutors are taken lack the guarantees of judicial procedure (such as, inter alia, participation of the persons concerned, the holding of hearings, publicity, adversarial character, equality of arms between the parties etc). The prosecutors make decisions on their own motion and enjoy considerable discretion in determining the course of action to be pursued, but they are normally hierarchically subordinated to a higher prosecutor.

61.The mere fact that appeals can be made against the prosecutors’ decisions to a hierarchically higher prosecutor cannot neither compensate for the lack of judicial guarantees nor be identified with such guarantees. Furthermore, the fact that the prosecutors act as guardians of the public interest cannot be regarded as conferring on them a judicial status of independent and impartial actors […].

62.The Panel observes that no arguments have been submitted to it in the present case to demonstrate that the institutional and procedural position of EULEX prosecutors is such as to confer on them an independent judicial status, comparable to that enjoyed by courts.

63.Therefore the actions or omissions by the prosecutors during the investigative phase of criminal proceedings may not be considered as being made in the context of “judicial proceedings”.

64.For these reasons the Panel holds that the actions of a EULEX prosecutor taken while examining a case are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel’s mandate as long as no indictment has been filed with a court competent to examine the merits of a case.”[[25]](#footnote-25)

**Cutting point between “judicial” and “non-judicial” matters**

The cutting point between prosecutorial/investigative on the one hand and “judicial” activities on the other has been taken to be the filing of an indictment lodged by the prosecutor. That is the point at which activities become *judicial* in character and where the Panel loses in principle competence over the matter. On this “cutting point” the Panel has noted the following:

“16. Furthermore, the indictment in the case has already been lodged before a court and the case is now being prepared for trial. The complaint relates to judicial proceedings before a court of Kosovo. The fact that the case has been taken over by EULEX under the provisions of Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03 L/053) does not detract from the fact that the acts of courts composed in their entirety of EULEX judges remain the courts of Kosovo. The Panel notes that it is not entitled to review the judicial proceedings (as mentioned above, Para 14.). Therefore the complaint does not fall within the ambit of the Panel’s mandate.”[[26]](#footnote-26)

Similarly, in another case the Panel has noted the following:

“38. The Panel has previously found that the actions of a EULEX Prosecutor taken while examining a case are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel’s mandate as long as no indictment has been filed with a court competent to examine the merits of a case […].

39.The Panel, after considering the facts of this case, is satisfied that the conduct complained of relates directly to the actions of EULEX Prosecutors in the discharge of their executive functions between January 2009 and December 2014 during which time EULEX prosecutors were responsible for the criminal investigation against the complainant.

40.In such circumstances, the Panel unanimously decides that the complaint falls within the ambit of its mandate and satisfies the admissibility criteria as set out.”[[27]](#footnote-27)

The fact that the investigative or prosecutorial actions have been subject to judicial review by the Kosovo judiciary would not exclude the Panel’s jurisdiction over the acts of the prosecutors. However, in such a case, the Panel would *only* intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities.[[28]](#footnote-28) Where allegations of rights violation have been fully addressed by Kosovo courts, the Panel would not be competent.

**Failure to act as basis of complaint**

The responsibility of EULEX could be triggered by an omission attributable to the prosecuting authorities.[[29]](#footnote-29) For an omission to be capable of engaging the responsibility the Mission, an EULEX prosecutor must have failed to act when they were competent and required to do so. The Panel has clarified this when it stated the following:

“73. The Panel accepts the HOM’s statement that EULEX was informed about this case on 25 June 2009 when the complainant requested the EULEX prosecutor in Mitrovicë/Mitrovica to take appropriate measures in order to have the legal situation of the property clarified, if need be, by way of criminal investigation and prosecution.

74.The Panel takes note of the fact that there is no obligation on the prosecutor to inform the complainant on the proper procedure with regard civil proceedings.

75.However, the Panel cannot but note that it has not been argued, let alone shown, that any steps have been taken by the EULEX prosecution services to effectively address the complainant’s situation since 25 June 2009.

76.The Panel, while appreciating the difficult situation in the courts in Mitrovicë/Mitrovica, concludes, however, that there has been a violation of the complainant’s right of access to a court under Article 6 § 1 of the Convention and a violation of his right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 to the Convention.[[30]](#footnote-30)

For the same reason, a decision not to take over a case from the local authorities where this was justified and necessary to protect human rights effectively could, under some circumstances, form a basis for a violation by omission. The Panel has touch upon this in the following case:

“20. The Panel notes that the decision of EULEX Kosovo not to take over the complainant’s case was communicated to him on 26 January 2010. The complaint should have been lodged at the latest on 9 September 2010.The complaint was lodged 1 April, 2011. Thus, the complaint does not comply with the requirement of Rule 25, paragraph 3 of the Rules of Procedure.“[[31]](#footnote-31)

Following the same logic, a decision not to proceed with a case could under some circumstances have the same effect where, for instance, that decision is unreasonable or arbitrary. The Panel has determined precisely this in a cases related to a civil case of usurpation of an apartment:

“47. The current case relates to alleged actions and inactions of EULEX Prosecutors at the pre-investigative stage. In this regard, no arguments have been brought forward that the case would not fall in principle under the Panel’s jurisdiction.

[…]

50.The Panel stresses that it is not its task to evaluate the merits of a prosecutorial decision as such, related to the initiation of an investigation or the taking over of cases by EULEX prosecutors from Kosovo prosecutors. However, it appears that a formal decision in relation to the initiation of an investigation has never been taken.

51.The Panel notes that it was submitted by EULEX that EULEX Prosecutors “*were not and still are not in possession of the necessary information concerning this case”* (compare par. 33 above). The Panel cannot therefore accept the conclusion “*that in accordance to the assessment made by the Office of the Chief EULEX Prosecutor in its response to the issues raised by the Panel referred to that office by the EULEX Human Rights and Legal office, the alleged offences could not be categorized as a hate motivated crime*” (see pars. 29 to 32 above).

52.The Panel considers that, in the light of the parties’ submissions, the complaint raises serious issues of fact and law pertaining to alleged violations of human rights in relation to Articles 13 and 14 ECHR as well as Article 1 of Protocol 1 of the ECHR, the determination of which requires an examination of the merits of the complaint.”[[32]](#footnote-32)

When deciding on the merits of the said case, the Panel found that the lack of action by EULEX did amount to a violation of the rights of the complainant:

“58. The Panel’s assessment solely concentrates on EULEX’s obligation to register and to make an initial assessment of such human rights complaints brought to its attention which can arguably be said to impinge on the exercise of its executive mandate. This did not happen in the current case. While EULEX commends the actions taken by the EULEX Property Rights Coordinator, it stresses, that those do not constitute an effective remedy and do not replace a thorough assessment by EULEX prosecutors, especially as the EULEX Property Rights Coordinator has mainly a coordinating role but no executive powers.

59. The fact that the judicial mechanisms in Kosovo ultimately functioned which led to the sentencing of the usurper and the restitution of the complainants’ property does not absolve EULEX Kosovo from its own obligations, in particular, its obligation to diligently record and, in turn, duly register grievances formally brought and communicate them to the competent bodies within the mission. In the present case the failure to do so precluded a timely assessment of the case by EULEX.

60. The failure of EULEX at the time to put in place a reliable system of recording and registering complaints involving allegations of violations of rights resulted in the case of the complainant remaining dormant for a period of approximately two years and nine months. During that period, EULEX was therefore not diligently discharging its mandate in relation to that complaint. The fact that the Kosovo authorities were also competent in relation to this matter does not discharge EULEX of its own obligations to act at all times in a manner that is consistent with minimum standards of human rights.”[[33]](#footnote-33)

**Refusal to act as basis of competence**

Similarly, the refusal of EULEX prosecutor to take over the responsibility of a case could trigger the responsibility of the mission:

“23.However, in the present case it is not a decision of a EULEX prosecutor given in the context of an investigation of a case which is concerned, but a refusal to take over the investigation.

24. In this connection, the Panel finds that the complainant’s case, concerning taxation matters, manifestly does not fall within the ambit of cases which can be taken over by EULEX prosecutors within the meaning of the Law on Jurisdiction. A decision to that effect is also at the discretion of the EULEX prosecutor and as such it cannot be subject to examination by the Panel.” [[34]](#footnote-34)

**Lack of specificity and clarity of investigative file**

The lack of specificity or clarity of the investigative file could similarly amount to a violation of rights that could trigger the responsibility of the Mission by reason of the acts and failures of the investigative authorities:

“14. The Panel notes that prosecuting authorities collected evidence from various sources, through questioning of witnesses and from financial experts as well as through the review of unidentified physical evidence.

15.The Panel notes, however, that the prosecutor’s decision of 21 December 2012 does not enable the Panel to ascertain what facts were established by the prosecuting authorities on the basis of the evidence available to them. For instance, no findings of fact were made as to whether the trees had actually been planted as planned and whether the school playground had been arranged or not. No other findings of fact were made in relation to the charges of corruption. Nor has it been explained how the provisions of substantive law were applied by the prosecution to the circumstances of the case and what was the reasoning which had led the prosecuting authority to its legal assessment that no criminal offence had been committed.”[[35]](#footnote-35)

**Standard of arbitrariness and reasonableness as being relevant to evaluating the actions of the Prosecutor**

In order to evaluate the propriety of the Prosecutor’s conduct in a particular case, the Panel conducted a thorough review of the information communicated by the parties with a view to determine whether the prosecutor had acted arbitrarily or unreasonably in that particular case:[[36]](#footnote-36)

“14. As regards the present case, the Panel notes the EULEX Prosecutor’s statement that the (local) prosecuting authorities conducted “all necessary actions” in this case.

15.The Panel notes that the EULEX prosecuting authorities reviewed the case twice and decided not to investigate the case. While it would be commendable to provide the reasons for declining to take over a case, the Panel notes the decisions of the Kosovo State Prosecutor who decided, having examined the complainant’s allegations, that no criminal offence of causing general danger had been committed.

16.Therefore, the Panel cannot conclude that those decisions were taken by EULEX Prosecutors arbitrarily. Further, it cannot be concluded on the basis of information available to the Panel, that the alleged criminal offence would fall under the authority of EULEX Prosecutors under the Law on the Jurisdiction, Case selection and Case allocation of EULEX Judges and Prosecutors. Lastly, the Panel notes that the EULEX Prosecutor informed the complainant about the possibility of submitting his complaint about the alleged failure of the Kosovo Police to act to the Police Directorate of Kosovo.” [[37]](#footnote-37)

**Constructive competence and responsibility of the Mission**

The Panel also determined that a matter could be said to be constructively within the competence of EULEX prosecutors where information pertaining to a case was within their reach in the diligent exercise of their duties and that a failure to act upon it could constitute a possible basis for responsibility. The fact that the information was not diligently forwarded by one branch of the mission to another provided not justification for the Mission’s failure to act if it resulted in the violation of the complainant’s rights:

“61. [...] the claim that the case never reached the Mission is contradicted by the fact that the record of this case has been within the custody of the DFM since at least December 2008. Since the case was in a database to which EULEX Prosecutors had access, this information may be said to have been constructively in their custody. In the diligent exercise of their responsibilities, they should and could have obtained information pertaining to that case. The Panel has already noted in earlier cases that a Mission such as EULEX is expected to organise its records and the transfer thereof in such a way that it is able to guarantee in all circumstances the effective protection of the rights of those concerned by those files […]. Furthermore, in a case of that importance, it is not unreasonable to expect that EULEX experts in charge of that file should have brought it to the attention of the competent investigative authorities with a view to ensure that the case was duly investigated.” [[38]](#footnote-38)

For the Panel to be competent to address such a matter, the complainant must therefore demonstrate that the impugned action or omission which, he claims, resulted in his rights being violated are attributable to the prosecuting authorities rather than to the courts.[[39]](#footnote-39) As noted above, under certain circumstances, the Panel could be competent to review the acts of EULEX prosecutors even where their actions are subject to judicial review:

“[I]t cannot be excluded that the Panel might be competent to evaluate the actions of EULEX prosecutors in criminal investigations even if they are subject to judicial review. The Panel would be competent to examine such acts and decisions, for instance, where the subject matter of acts and decisions subject to such review touches on human rights issues such as, for example, the right to personal liberty and security within the meaning of Article 5 of the ECHR. The Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities [...].”[[40]](#footnote-40)

This principle was applied, for instance in the case of *Y.B. against EULEX* where the intervention of the judiciary came too late to reverse the Prosecutor’s actions and their consequences and the relief granted judicially did not entirely remedy the prejudice caused to those rights. The alleged damage to the complainant’s rights would have already been done with the filing of the indictment, the Panel noted. The Panel concluded that it could not therefore be concluded that the interference with the complainant’s rights took place in the context of “judicial proceedings”, nor were they fully addressed by the and therefore declared itself competent to examine the complaint.[[41]](#footnote-41)

**Broad interpretation of EULEX Prosecutors’ competence over certain categories of cases**

The Panel has similarly taken a generally broad view of EULEX prosecutors’ executive competence over certain categories of cases. In *D.W. et al*, for instance, a case pertaining to enforced disappearance, the Panel rejected the narrow interpretation of its competence given by EULEX prosecutor to investigate such cases and gave its own interpretation of the law to determine the scope thereof. The Panel also noted that the Mission’s *obligation* to investigate these cases arises not from these provisions which set out EULEX Prosecutors’ jurisdictional competence over these cases, but from Articles 2-3 of the European Convention, which mandates the Mission to guarantee the effectiveness of these rights in the context of its executive function.[[42]](#footnote-42)

In this context, the Panel generally rejected interpretations of the role and responsibilities of EULEX prosecutors that would be inconsistent with their general obligation to guarantee the effective protection of rights in the performance of their duties. The Panel has thus interpreted EULEX Prosecutor’s “exceptional” competence pursuant to Article 7(A) of the (amended) Law on Jurisdiction in a manner that gives effect to the mission’s overall responsibility to guarantee the effective protection of rights in the investigative context and, in effect, rejected the minimalist and purely discretionary interpretation of that concept that both EULEX Prosecutors and the mission had favoured. In so doing, it has expanded the proposed narrow interpretation of what would constitute “extraordinary circumstances” as would allow EULEX prosecution to intervene under its residual competencies after the amendment of the Law on Jurisdiction in May 2014.[[43]](#footnote-43) Such a purposeful approach to setting the outer limits of EULEX Prosecutor’s competencies is also apparent from the Panel’s view that EULEX Prosecutors might bear a residual investigative obligation if and where local authorities fail to perform their duties in relation to categories of offences over which EULEX Prosecutors have competence.[[44]](#footnote-44)

The Panel’s purposive reading of the EULEX prosecutors’ obligations is intended to ensure that rights are protected effectively and that rights’ victims are not left without a remedy where EULEX could provide one.

### 2.2.5 Private disputes

The Panel does not have reviewing authority over private disputes.[[45]](#footnote-45)

### 2.2.6 No competence over violations against EULEX personnel

The Panel is not competent to deal with alleged violations of rights committed against EULEX personnel.[[46]](#footnote-46) Thus, complaints over matters such as recruitment procedures fall beyond the scope of the Panel’s competence.[[47]](#footnote-47)

## 2.3 *Ratione temporis*

**2.3.1 Competence starting on 9 December 2008**

*Ratione temporis*, the jurisdiction of the Panel commences on 9 December 2008, the date when EULEX became operational. Accordingly, the Panel’s temporal jurisdiction commences at that point and covers its activities since that time.[[48]](#footnote-48) Allegations of violations of rights committed prior to that date will not therefore come within the competence of the Panel.[[49]](#footnote-49)

**2.3.2 Competence over alleged violations that commenced before that date and continued thereafter**

This does not mean, however, that events that took place before the inception of the Mission are necessarily of no relevance to the Panel. A determination will have to be made as to whether the Mission was competent over a matter and, if so, whether it failed to deal with it in a diligent manner consistent with relevant human rights exigencies.

Thus, in a number of cases, the Panel has determined that EULEX had failed to investigate allegations of rights that had occurred prior to 9 December 2008, but in relation to which an obligation to investigate continued to exist in relation to the Mission.[[50]](#footnote-50) Therefore, the Panel may under certain circumstances have regard to facts which occurred prior to that date because of their causal connection with subsequent facts which form the sole basis of the complaint submitted to the Panel.[[51]](#footnote-51) For instance, whilst the Panel could not in principle consider a past violation of rights, it could consider an alleged violation by the mission of its procedural duty to investigate a case involving human rights violations that took place prior to the mission’s inception.[[52]](#footnote-52) In such a case, there must be a genuine connection between the original violation and the date marking the beginning of the Panel’s jurisdiction for the procedural obligations imposed upon the mission to investigate the matter.[[53]](#footnote-53)

The Panel would also be competent *ratione temporis* to consider allegations of violations of rights that commenced prior to the creation of the Mission but which are on-going after that time. In such a case, the Panel would be competent only in relation to those violations (or aspects of the violations) that occurred after the mission’s creation. This would be the case, for instance, where an individual was a victim of an act of enforced disappearance before the beginning of the mission but a failure to investigate such a case occurred (or continued) under the mission’s watch:

“The Panel will once again stress that it is not competent to examine the disappearance of the complainant’s relative itself for which EULEX cannot be held responsible for obvious reasons. Nor will be Panel consider the initial failure to investigate which might be attributable to other authorities prior to the creation of the EULEX Mission. It will only consider those acts and omissions of the Mission itself that are said to have occurred from the point at which the Mission commenced to operate (see *Sadiku-Syla* *against EULEX*, 2014-34, Decision on Admissibility of 29 September 2015, § 50).”[[54]](#footnote-54)

This means that the Panel will be competent only in relation to those acts or omissions of the mission that occurred during the relevant timeframe. Thus, where an act of enforced disappearance has *commenced* before the inception of the mission, the mission could not be held responsible for the initial acts that resulted in a disappearance but only for subsequent actions or omissions that are attributable to the mission during the time of activity of the Mission.[[55]](#footnote-55)

**2.3.3 Successive involvement of different authorities and competence of the Panel**

The fact that a succession of authorities followed in each other’s steps in investigating a particular allegation of rights violation cannot in principle prejudice a claimant. Therefore, whilst the Mission can only ever be held responsible for its own actions (and failures), it cannot evade that responsibility by pointing to the failures of others. A claimant is fully entitled to seek relief from the Mission in relation to that part of the harm that it is able to pin onto the mission and relief from another entity that might also have contributed to the violation of his rights.[[56]](#footnote-56)

## 2.4 *Ratione personae*

**2.4.1 Panel’s competence is limited to acts and omission attributable to EULEX Kosovo**

The Panel only has jurisdiction over acts and omission of EULEX Kosovo. It is not competent to deal with violations attributable to any third party.[[57]](#footnote-57) Therefore, the Panel made it clear on a number of occasions that it had no competence to deal with complaints pertaining to the acts of UNMIK or to local authorities.

**2.4.2 Responsibility of the Mission over the actions of its staff and organs**

It is not relevant for the purpose of determining whether the impugned actions comes within the scope of the mission’s executive mandate what office or organ of the mission is responsible for that conduct. What matters is the nature of the function performed and whether this function comes within the scope of the “executive” mandate of the Mission. The Mission cannot for instance evade its human rights obligations by distinguishing between its executive and “strengthening” functions.[[58]](#footnote-58) Similarly, the fact that the EULEX staff acted as a training advisor to the police rather than as a police officer would not allow the Mission to evade its human rights responsibilities in relation to his actions.[[59]](#footnote-59)

**2.4.3 *Ultra vires* actions**

*Ultra vires* actions (and even unlawful acts) could also come within the competence of the Panel if the underlying act is sufficiently connected to the performance of the Mission’s executive mandate and that the individual responsible remained at the time under the overall authority of the mission. This was the case, for instance, in the Zahiti case, where an EULEX policeman had intentionally ran over a Kosovo police woman and thus caused injury to her. The unlawful character of the conduct does not exclude that the underlying act may be said to have formed part of the Mission’s executive mandate. In such a case, it must be shown, however, that the act is sufficiently connected to the performance of an aspect of the Mission’s executive mandate. Thus, in *Zahiti*, a case involving a (EULEX) police officer who rammed his car intentionally into a Kosovo police women, the Panel said this:

“33.The Panel adopts the approach developed by the Court, that “[a] *State may also be held responsible even where its agents are acting ultra vires or contrary to instructions* (see *Ilascu and others v. Russia and Moldova*, application no. 48787/99, judgment of 8 July 2004, at par. 319, page 79).

[...]

35.The Panel notes the view expressed by the International Law Commission that it is *“a particular problem […] to determine whether a person who is a State organ acts in this capacity. It is irrelevant for that purpose if the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.*” Further, state responsibility is excluded if “*the act had no connection with the official function and was in fact merely the act of a private individual. The case of purely private conduct should not be confused with that of an organ functioning as such but acting ultra vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State* (see “The International Law Commissions Articles on State Responsibility: Introduction, Text and Commentaries”, James Crawford, Cambridge University Press (2002) at page 99).” [[60]](#footnote-60)

The Panel proceeded to reject EULEX’s submissions that the Mission did not have “effective control” or “ultimate authority and control” over the activities of the staff member in question and therefore could not be held liable to acts or omissions imputable to it.[[61]](#footnote-61) The Panel found the Mission responsible for the acts of the staff member on the basis that what could be connected to the Mission’s executive mandate was not his underlying act of violence but the Mission’s subsequent failure to provide an adequate remedy for the victim so that she could seek justice for what had been done to her.[[62]](#footnote-62)

## 2.5 *Ratione loci*

The Panel’s jurisdiction over the acts and conduct of EULEX are not per se limited to any territorial area, although as a matter of fact, its competence will be limited in practice to the territory of Kosovo as the area over which EULEX’s executive mandate is operational. In *Gecaj*, the Panel thus made it clear that it would have no competence (*ratione materiae*) over the conduct of Swiss authorities in Switzerland, adding that “it has no jurisdiction over proceedings that took place outside Kosovo”.[[63]](#footnote-63)

# Scope of reviewing authority of the Panel

## 3.1 Complaint by a victim and absence of *proprio motu* competence

**3.1.1 Complaint as triggering competence of the Panel**

The competence of the Panel is triggered by a complaint of a person who alleges to have been a victim of a violation of rights attributable to EULEX. The filing of a complaint is a necessary condition for the Panel to be properly seized. The Panel does not have *proprio motu* authority to commence investigation of a case without a complaint having been filed.

**3.1.2 Complainant as alleged victim of right’s violation**

A complaint may be filed by a victim him- or herself or by counsel representing the victim.[[64]](#footnote-64) The Panel will verify and ensure, in each case, that the complainant qualifies as a “victim” of the alleged right violation. The notion of “victim” has been defined by the Panel very much in the same way as this concept is understood before the European Court of Human Rights.[[65]](#footnote-65) The Panel has thus held that, in accordance with well-established case-law of the European Court of Human Rights, close relatives of a person whose death is alleged to engage the responsibility of the authorities can themselves claim to be indirect victims of the alleged violation of Article 2 of the Convention.[[66]](#footnote-66)

Whether a person is such a victim will depend on the existence of special factors which give the suffering of the applicant a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include, among others, the existence and proximity of the family tie, the particular circumstances of the relationship, the extent to which the person witnessed the events in question.[[67]](#footnote-67)

A complainant could therefore have standing of an “indirect victim” or in respect of the alleged violations of the complainant’s own rights.[[68]](#footnote-68)

**3.1.3 No *actio popularis* before the Panel**

The Panel has made it clear that its Rules of Procedure do not envisage the bringing of an *actio popularis;* they do not permit individuals to complain against alleged actions and omissions on the part of EULEX *in abstracto* simply because they feel that they infringe human rights.[[69]](#footnote-69)

## 3.2 No appellate function of the Panel

The Panel is not conceived as an appellate from the decisions of other authorities.[[70]](#footnote-70) Instead, it will consider afresh allegations of rights violations resulting from the implementation of the Mission’s executive mandate.

## 3.3 Recommendatory competence only

The Panel’s remedial powers are limited by reason of the OPLAN which sets limits to its authority to grant relief in a particular case. In particular, by reason of these statutory limitations, the Panel cannot render binding decisions. Instead, it was only given the power and authority to issue recommendations.[[71]](#footnote-71)

# Requirements of form and procedure

## 4.1 Requirements of form

### 4.1.1 Filing of a complaint by an alleged victim of rights violations

**4.1.1.1 Requirements of form and discretion of the Panel**

The procedure before the Panel starts with the filing of a written complaint signed by the complainant (or his/her representative[[72]](#footnote-72)). The Rules of Procedure of the Panel include certain requirements of form and content that must be satisfied.[[73]](#footnote-73) A complaint will not be rejected in principle, however, merely because it fails to meet these procedural requirements. This is subject to the discretion of the Panel.

**4.1.1.2 Anonymous complaints**

Anonymous complaint will not in principle be entertained by the Panel.[[74]](#footnote-74) In the exercise of its discretion, however, the Panel may grant a request by the complaint to keep its identity confidential.[[75]](#footnote-75) Where the circumstances so justify, and with a view to protecting the safety, privacy and identity of the complainant, the Panel may take this decision *proprio motu*.[[76]](#footnote-76)

**4.1.1.3 Joinder of complaints**

Complaints may be joined pursuant to Rule 20 of the Rules of Procedure where the Panel considers that it is in the interests of the proper conduct of proceedings to do so. This was done, in particular, where there existed a great deal of factual overlap between separate complaints.[[77]](#footnote-77)

### 4.1.2 6-month requirement

To be admissible, a complaint must be submitted to the Panel within six months from the date of the alleged violation.[[78]](#footnote-78) Complaints filed beyond that timeframe will in principle be declared inadmissible in accordance with Rule 29(c) of the Panel’s Rules of Procedure.[[79]](#footnote-79)

In some instances, however, the Panel has exercised its discretion to declare admissible complaints that were filed belatedly but where particular circumstances pertaining to the case justified that the matter not be declared inadmissible on such grounds. The particular gravity of the alleged violation or the belief on the part of the complainant that the matter was still under the Mission’s consideration have been regarded as particularly relevant in that regard by the Panel.[[80]](#footnote-80) Furthermore, if the violation is ongoing, the 6-month deadline has not lapsed.[[81]](#footnote-81) The deadline starts to run on the date after the impugned action said to have caused or resulted in a right violation.[[82]](#footnote-82)

### 4.1.3 Requirement of substantiation

In order for the complaint to be admissible, it must be sufficiently substantiated by the complainant. It will otherwise be declared inadmissible as “ill-founded” in accordance with Rule 29(e) of the Panel’s Rules of Procedure.[[83]](#footnote-83)

### 4.1.4 Abuse of right

Rule 29(f) of the Panel’s Rules of Procedure provides that a complaint will be declared inadmissible where it constitutes an abuse of right. This provision has not thus far been relied upon by the Panel and it is not therefore entirely clear what might qualify as an ‘abuse of right’ for the purpose of that provision.

### 4.1.5 Premature complaints

A complaint will be declared inadmissible where it is premature. In *Radunovic*, for instance, the Panel declared the matter premature as the violation of rights envisaged by the complainant had not yet in fact occurred and was dependent on a decision of the authorities that had yet to be taken.[[84]](#footnote-84) In that sense, *pre-emptive* complaints are not permissible.

## 4.2 Procedure before the Panel – Select aspects

### 4.2.1 Written complaints and orality

As noted above, complaints must be in writing. Proceedings too will generally take place in writing. On a number of occasions, however, complainants have met with staff of the Secretariat of the Panel to provide additional information. In such cases, the Secretariat of the Panel would prepare a written record of such meetings and, at the discretion of the Panel, such information might be communicated for comments to the Head of Mission where relevant to the admissibility or merit of the case.

On a limited number of occasions, the Panel has also agreed to the Mission making oral representations to the Panel, rather than in writing. This was done where particularly sensitive information was at stake.[[85]](#footnote-85)

### 4.2.2 Adversarial nature of proceedings before the Panel

Proceedings before the Panel are adversarial in nature, in the sense of each party having the right in principle to comment upon the other party’s submissions.[[86]](#footnote-86)

The Panel has carved very narrow exceptions to that principle where particularly sensitive information had been provided by a party which requests non-disclosure to the other party. In those cases, the Panel has refrained from communicating certain information to the opposing party in the interests of justice. In doing so, it has weighed the interests at stake and ensured that the non-disclosure of information would not in any way prejudice the rights and position of the opposing party. Where possible, it has provided a summary or more generic information to the opposing party so as to ensure that each side possessed all relevant information. In all cases, it has sought to ensure that no prejudice was caused to the opposing party and that the withholding of information did not affect the fairness of proceedings.

In order to ensure the effective and timely advancement of its proceedings, the Panel will often set time-limits for the parties to provide information or submissions.[[87]](#footnote-87)

### 4.2.3 Panel sessions and voting

With a view to conducting deliberations,[[88]](#footnote-88) the Panel organises regular (generally bi-monthly) sessions. During those sessions, deliberations take place between Panel members, draft decisions are finalised and voting takes place. Most sessions take place in person. On a limited number of occasions, the Panel has made use of the possibility of holding deliberations by electronic means.[[89]](#footnote-89)

Decisions of the Panel are taken by majority.[[90]](#footnote-90) The Panel has not made use of the possibility of individual opinions.

### 4.2.4 Decision on admissibility

Where the Panel (unanimously or by majority) declares a complaint admissible (in whole or in part), it renders a written decision to that effect in accordance with Rule 32. The Panel’s findings are then communicated to the parties. The parties will then generally be invited to make further submissions on the merits (if that was not already done) or to answer particular questions raised by the Panel in its admissibility decision.[[91]](#footnote-91) A re-examination of an admissibility decision is procedurally possible in accordance with Rule 42 of the Panel’s Rules of Procedure.

On a number of limited occasions and where it was able to do so without prejudice to the parties, the Panel has rendered its decision on admissibility and on the merits at the same time.

1. See, generally, *Rajovic against EULEX*, Inadmissibility Decision, 9 April 2014, par 13; ; I against EULEX, Inadmissibility Decision, 27 November 2013, par 10; *Pajaziti against EULEX*, 4 October 2012, par 9; *Zeka against EULEX*, 4 October 2012, par 21; *Rexhepi against EULEX*, 20 March 2012, par 36; *Sharku against EULEX*, 20 March 2012, par 18; *Gashi against EULEX* 23 November 2011, par 12; *Rruka against EULEX*, 14 September 2011, par 10; *Thaqi against EULEX*, 14 September 2011, par 53; *Sokoli against EULEX*, 9 January 2017, par 19. [↑](#footnote-ref-1)
2. See, e.g., *Axhemi Zydhi against EULEX*, 17 October 2017, par 12; *Uka against EULEX*, 17 October 2017, par 18; *Qela against EULEX*, 17 October 2017, par 9; *Rajovic against EULEX*, Inadmissibility Decision, 9 April 2014, par 13; *I against EULEX*, Inadmissibility Decision, 27 November 2013, par 10. [↑](#footnote-ref-2)
3. See, e.g., *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 30 September 2015; *Fanaj against EULEX*, 14 September 2011. [↑](#footnote-ref-3)
4. *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013 (where the Panel did not consider the actions attributed to the Kosovo police, but only failures and omissions attributed to the Mission in response to these); *Maloku against EULEX*, 19 January 2017 (to the same effect, regarding acts of violence attributed to the Kosovo police); *Sokoli against EULEX*, 9 January 2017 (regarding an investigation conducted by both EULEX and local police, only the former being relevant to the Panel’s competence); *Jovanovic against EULEX*, 7 March 2017 (concerning measures taken by the Kosovo Property Claims Commission). [↑](#footnote-ref-4)
5. See, generally, Case-Law Note on Principles of Human Rights Accountability of a Rule of Law Mission, pp 15 *et seq* (<http://www.hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf>). [↑](#footnote-ref-5)
6. Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO, and its subsequent amendments. [↑](#footnote-ref-6)
7. *Zahiti against EULEX*, 2012-14, 4 February 2014, pars 52 *et seq*. [↑](#footnote-ref-7)
8. See Case-Law Note on Principles of Human Rights Accountability of a Rule of Law Mission, pp 16 *et seq.* [↑](#footnote-ref-8)
9. Reference in footnote xx above. [↑](#footnote-ref-9)
10. *Avdyl Smajli against EULEX*, 2011-16, 23 November 2011, par 14. See also *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, par 18. [↑](#footnote-ref-10)
11. *Z.A. against EULEX*, 2014-36, 29 February 2016, par 17, and its references to *Gani Zeka against EULEX,* 2013-15, 4 February 2014, par 13, and *Shaban Kadriu against EULEX,* 2013-27, 27 May 2014, par 17. [↑](#footnote-ref-11)
12. *Slobodan Martinovic against EULEX*, 2011-13, 23 November 2011, par 15**.** [↑](#footnote-ref-12)
13. *Burim Ramadani against EULEX*, 2010-09, 8 June 2011, pars 27-28. See also *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, par 18. [↑](#footnote-ref-13)
14. *E against EULEX*, 2012-17, 30 August 2013, par 25 (emphasis added); see also *Halili against EULEX*, 2012-08, 15 January 2013, par 21; *Pajaziti against EULEX*, 2012-05, 4 October 2012 pars 9-10; *Dobruna against EULEX*, 2012-03, 4 October 2012 para. 12; *Zeka against EULEX*, 2012-02, 4 October 2012 par 21. See also *Shaban Syla against EULEX*, 2015-10, 1 March 2016, par 14. [↑](#footnote-ref-14)
15. *Samedin Smajli against EULEX*, 2011-15, 23 November 2011, par 16. [↑](#footnote-ref-15)
16. *Ajet Kaçiu against EULEX*, 2014-26, 2 February 2015, par 19, and its references to *Hamiti against EULEX*, 2012-01, 5 June 2012, par 17; and *Shaban Kadriu against EULEX*, 2013-27, 27 May 2014, par 18. [↑](#footnote-ref-16)
17. *Milica Radunovic against EULEX*, 2014-02, 12 November 2015, par 17. See also *Mazlam Ibrahimi against EULEX*, 2014-05, 21 April 2015, par 24. [↑](#footnote-ref-17)
18. *Tomë Krasniqi against EULEX*, 2014-04, 27 May 2014, paras. 15-16. [↑](#footnote-ref-18)
19. *Milica Radunovic against EULEX*, 2014-02, 12 November 2015, paras.18- ,and its references to ECtHR, *Tolstoy Miloslavsky v UK*, judgment of 13 July 1995, para. 59; *Golder v. the United Kingdom*, 21 February 1975, paras. 34-36*; Z. and Others v. the United Kingdom*, Application no. [29392/95](http://hudoc.echr.coe.int/eng#{"appno":["29392/95"]}), Judgment of 2001, paras. 91‑93; and *Kreuz v. Poland*, Application no. [28249/95](http://hudoc.echr.coe.int/eng#{"appno":["28249/95"]}), Judgment of 2001, para. 52; *Stankov v. Bulgaria*, Application no. 68490/01, Judgment of 12 July XX, para. 52; *Kreuz v. Poland*, cited above, para. 60; *Harrison McKee v. Hungary*, Application no. 22840/07, Judgment of 3 June 2014, para. 29; *Urbanek v. Austria*, Application no. 35123/05, Judgment of 9 December 2010, paras. 55-56. [↑](#footnote-ref-19)
20. *Y. against EULEX*, 2011-28, 15 November 2012, para. 35, and its references to *Lafit Hajan against EULEX*, 2010-06, 14 September 2011. [↑](#footnote-ref-20)
21. *Novica Trajkovic against EULEX*, 2011-12, 23 November 2011, para. 12 [↑](#footnote-ref-21)
22. *Ibid*. See also further references below. [↑](#footnote-ref-22)
23. *Desenka and Stanisic,* 2012-22, 11 November 2015, para. 54, and its references to *Krlić against EULEX*, 2012-21, 26 August 2014, para. 23*; Y against EULEX*, 2011-28, 15 November 2012, para. 35. See also *I. against EULEX*, 2013-01, 27 November 2013, para. 12; *E against EULEX*, 2012-17, 30 August 2013, para. 20; *Y. against EULEX*, 2011-28, 15 November 2012, para. 35; *Krasniqi against EULEX*, 2014-33, 21 April 2015, para. 15; *Goran Becić againt EULEX*, 2013-03, 1 July 2014, para. 45. [↑](#footnote-ref-23)
24. *Slobodan Martinovic against EULEX*, 2011-13, 23 November 2011, para. 16, and its reference to *Sadik Thaqi v. EULEX,* 2010-02, 14 September 2011, paras. 64 and 93. See also *I. against EULEX*, 2013-01, 27 November 2013, para. 13; *E against EULEX*, 2012-17, 30 August 2013, para. 21; *Krasniqi against EULEX*, 2014-33, 21 April 2015, para. 16; *Goran Becić againt EULEX*, 2013-03, 1 July 2014, para. 46; *W.D. against EULEX*, 2015-13, 1 March 2016, para. 18. [↑](#footnote-ref-24)
25. *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, paras. 52 *et seq*., and its references to *Merit v. Ukraine*, Application no. 66561/01, Judgment of 30 March 2004, paras. 62-63; *Nevmerzhitsky v. Ukraine*, Application no. 54825/00, Judgement of ECHR 2005‑II (extracts), para125; *Niedbała v. Poland*, Application no. 27915/95, Judgment of 4 July 2000, para. 53; *Schiesser v. Switzerland*, Application no. XX, judgment of 4 December 1979, Series A no. 34, pp. 12-17, paras. 27-41; *Zlínstat, spol. s.r.o., v. Bulgaria*, Application no. 57785/00, Judgment of 15 June 2006, para. 78. [↑](#footnote-ref-25)
26. *Samedin Smajli against EULEX*, 2011-15, 23 November 2011, para. 16. See also *Z against EULEX*, 2012-06, 10 April 2013, para. 33; *Thaqi v. EULEX*, 2010-02, 14 September 2011, para. 93. [↑](#footnote-ref-26)
27. For an illustration, see, generally, *Maksutaj against EULEX*, 2014-18, 12 November 2015, paras. 38-40:

    *“*45.Notwithstanding the above considerations, the Panel reiterates what it has already held on numerous occasions. In certain circumstances its jurisdiction would cover decisions and acts of the investigative authorities in criminal investigations even when they were subject to a subsequent judicial review. The Panel is of the view that it would have jurisdiction to examine such acts and decisions where the subject matter of acts and decisions subject to such review touches on human rights issues such as, for example, the right to personal liberty and security within the meaning of Article 5 of the Convention. However, the Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities. […]. The Panel sees no reason why this principle should not apply to actions of EULEX police as well.

    46.Turning to the circumstances of the present case, the Panel observes that the complainants were brought before the Pristina Court for Minor Offences on 8 January 2013 and released in the evening of the day. That court was therefore given an opportunity to examine whether their arrest was lawful and justified in the circumstances. However, neither party has submitted to the Panel, in support of their arguments, a copy of any relevant document.

    47.Having regard to the fact that the complaint made under Article 5 of the Convention has not been properly substantiated by any document crucial to the examination whether the detention complained of was lawful and justified and, consequently, whether the actions of EULEX in this connection were compliant with the standards determined by this provision, the Panel finds it manifestly ill-founded. ”

    See also and its references to *B.Y against EULEX,* 2014-06, para. 12; *I against EULEX*, 2013-01, 27 November 2013, para. 12; *E against EULEX*, 2012-17, 30 August 2013, paras. 20-22; *Z against EULEX*, 2012-06, 10 April 2013, para. 32; *W against EULEX*, 2011-07, 5 October 2012, para. 21; *Hoxha against EULEX*, 2011-18, 23 November 2011, para. 22; *S.M. against EULEX*, 2011-11, 23 November 2011, para.15; *Sadik Thaqi v. EULEX*, 2010-02, para. 64. [↑](#footnote-ref-27)
28. *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, paras. 45-47, and its reference to *Z against EULEX,* 2012-06*,* 10 April 2013, para. 34. See also *Kazagic Djeljalj against EULEX*, 2010-01, 8 April 2011, paras. 45-47; *W.D. against EULEX*, 2015-13, 1 March 2016, para. 17; *E against EULEX*, 2012-17, 30 August 2013, para. 22; *Krasniqi against EULEX*, 2014-33, 21 April 2015, para. 17; [↑](#footnote-ref-28)
29. See e.g. *W.D. against EULEX*, 2015-13, 1 March 2016, paras. 18-19. [↑](#footnote-ref-29)
30. *Kazagic Djeljalj against EULEX*, 2010-01, 8 April 2011, paras. 73 -76. [↑](#footnote-ref-30)
31. See e.g.*Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, para. 20. [↑](#footnote-ref-31)
32. *Goran Becic againt EULEX*, 2013-03, 1 July 2014, para. 46 *et seq*, and it references to *Thaqi v. EULEX*, 2010-02, 14 September 2011, para. 64; *Z against EULEX*, 2012-06, 10 April 2013, para. 33; *Thaqi v. EULEX*, 2010-02, 14 September 2011, para. 93. [↑](#footnote-ref-32)
33. *Goran Becić againt EULEX*, 2013-03, 12 November 2014, paras. 58-60 [↑](#footnote-ref-33)
34. *Mykereme Hoxha against EULEX*, 2011-18 23 November 2011, paras. 23-24. [↑](#footnote-ref-34)
35. *I. against EULEX*, 2013-01, 27 November 2013, paras. 14-15. [↑](#footnote-ref-35)
36. A similar standard would also apply in principle to assessing the conduct of the police. See, e.g., *H and G against EULEX* before the Panel. [↑](#footnote-ref-36)
37. *B.Y. against EULEX*, 2014-06, 27 May 2014, pars 14 et seq [↑](#footnote-ref-37)
38. *Sadiku-Syla against EULEX,* 2014-34, 29 September 2015, para. 61 and its reference to *Becić against EULEX*, 2013-03, 12 November 2014, paras. 58–60. [↑](#footnote-ref-38)
39. See e.g. *Z against EULEX*, 2012-06, 10 April 2013, pars 43-44:

    “43.The Panel observes that the complainant did not specify who, in his view, was responsible for the insufficient access to the case file, the prosecuting authorities or the courts. In its opinion the Panel would have jurisdiction to examine this complaint has it been shown that the prosecuting authorities were responsible for any alleged shortcoming (see paragraphs 31 - 32 above) or that the applicant had raised this complaint expressly before the courts which failed to respond to it (see paragraph 34 above).

    44.However, in the absence of any indication of the evidence which was, in the complainant’s view, essential for challenging effectively the need for his detention, and, crucially, having regard to the fact that the complainant has not shown that he raised this issue in his appeals, expressly or in essence, thus giving the courts an opportunity to address it, the Panel is of the view that it lacks jurisdiction to examine this part of the complaint.” [↑](#footnote-ref-39)
40. *E against EULEX*, 2012-17, 30 August 2013, par 22. Regarding the concrete application of that principle, see, for instance, *E against EULEX, 2012-17*, 30 August 2013, pars 23 *et seq*:

    “23.As regards the present case, the Panel notes that the complainant challenges the decisions given by the courts in respect of his detention and the compatibility of these decisions with relevant human rights standards, in particular a right to personal liberty and security guaranteed by Article 5 of the Convention.

    24.The Panel observes that all decisions regarding the complainant’s detention were rendered by competent judicial authorities at the request of the prosecutor. The courts were given an opportunity to fully examine the prosecutor’s arguments for the complainant’s detention. Moreover, at least on one occasion, the decision was appealed against by the complainant and his appeal was examined by a panel of three judges who dismissed that appeal. The complainant has not identified any human rights issue that he was unable to raise with the court or that the court failed to properly address (see *Z against EULEX*, quoted above, par. 34).

    [...]

    26.Consequently, having regard to the fact that the complainant’s detention was imposed by the court and that its lawfulness was subsequently reviewed on appeal, the Panel lacks jurisdiction to examine complaints pertaining to the manner in which the Pejë/Peć District Court examined its lawfulness.

    27.This aspect of the complaint will, therefore, not be reviewed by the Panel, as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo.”

    See also *Z against EULEX*, 2012-06, 10 April 2013, par. 34; *Krasniqi against EULEX*, 2014-33, 21 April 2015, pars 15 *et seq*, in particulars par 18-21:

    “18.As regards the present case, the Panel notes that the complainant challenges the decisions given by the Basic Court of Pristina and the Constitutional Court in respect of access to his case file compiled by the prosecution and the compatibility of these decisions with relevant human rights standards, in particular the procedural guarantees of the right to liberty guaranteed by Articles 5 par.4 of the Convention.

    19.The Panel observes that all decisions regarding the complainant’s case file were rendered by competent judicial authorities upon his request. The courts were given an opportunity to fully examine both the complainant’s and the prosecutor’s arguments. The complainant has not identified any human rights issue that he was unable to raise with the court or that the court failed to properly address (compare, *mutatis mutandis*, *E* *against EULEX*, cited above, § 24; *Z against EULEX*, cited above, § 34).

    20.The Panel has held on numerous occasions that, according to Rule 25, paragraph 1, of its Rules of Procedure, based on the accountability concept in the OPLAN of EULEX Kosovo, it has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. The fact that EULEX judges sit on the bench does not detract from the courts the character as part of the Kosovo judiciary (see, *inter alia*, *Rifat Kadribasic against EULEX,* no. 2014-09, of 10 November 2014, § 11, *Shaban Kadriu against EULEX*, 2013-27, 27 May 2014, § 17).

    21.Consequently, having regard to the fact that the complainant’s request to be given access to his file was fully reviewed by the courts, the Panel lacks jurisdiction to examine his complaints.”

    See also *Y.B. against EULEX*, Case no 2014-37, Decision and Findings, 19 October 2016, par 27 (“Furthermore, the Panel has found that it cannot be excluded that it might be competent to evaluate the actions of EULEX prosecutors in criminal investigations even if they are subject to judicial review. The Panel would be competent to examine such acts and decisions, for instance, where the subject matter of acts and decisions subject to such review touches on human rights issues. The Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities (see *E against EULEX*, 2012-17, 30 August 2013, § 22; *Z against EULEX*, 2012-06, 10 April 2013, § 34).”). [↑](#footnote-ref-40)
41. *Y.B. against EULEX*, Case no 2014-37, Decision and Findings, 19 October 2016, par 29. [↑](#footnote-ref-41)
42. See e.g. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, 30 September 2015, pars 84 *et seq.* [↑](#footnote-ref-42)
43. On the concept of “extraordinary circumstances”, see for instance, *Rejhane Sadiku-Syla against EULEX, 2014-34*, 29 September 2015, par 62:

    “Lastly, the HoM submits that the new legislation that entered into force on 17 May 2014 has “considerably reduced the possibility for EULEX Prosecutors and Judges to exercise executing functions in new cases” (Response, p 6, referring to the Omnibus Law that amended the Law on Jursidiction). The Panel notes, however, that Article 7(A) provides for “Authority of EULEX prosecutors in extraordinary circumstances”: “In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority.” The HoM has failed to explain why this provision would not provide an adequate legal basis on which EULEX Prosecutors should act, in particular in a case such as the present one where the local authorities do not appear to be investigating. The Panel would invite the parties to address this matter should they wish to make additional submissions in regard to the merit of this case.”

    See also, *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, 30 September 2015, par 90:

    “90.Lastly, the HoM submits that the new legislation that entered into force on 7 May 2014 has “considerably reduced the possibility for EULEX Prosecutors and Judges to exercise executing functions in new cases”. The Panel notes, however, that Article 7(a) of the Law on Jurisdiction provides for “authority of EULEX prosecutors in extraordinary circumstances”: “In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority.” The HoM has failed to explain why this provision would not provide an adequate legal basis on which EULEX Prosecutors should act, in particular in cases of this sort where neither UNMIK nor local authorities conducted effective investigations of the cases.”

    See also *Rejhane Sadiku-Syla against EULEX, 2014-34*, 19 October 2016, paras. 23 *et seq*. [↑](#footnote-ref-43)
44. See, e.g., *Mufail Halili against EULEX*, 2012-08, 15 January 2013, par 28:

    “28. The Panel further notes that the procedural obligation for EULEX to investigate alleged violations of Article 3 of the Convention may arise in certain circumstances. Namely, article 3.3. of the Law no. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (the Law on Jurisdiction) enumerates criminal offences triggering the competence of EULEX prosecutors, among them torture (as defined in Article 165 of the Provisional Criminal Code of Kosovo (PCCK)). The Panel reiterates that, under Article 12 of the Law on Jurisdiction, EULEX prosecutors have the authority to take over an investigation or prosecution of any criminal offences, in case Kosovo prosecutors are unwilling or unable to perform their duties and this unwillingness or inability might endanger the proper investigation or prosecution. For that possibility to arise, however, the case would have to be first referred to a local public prosecutor. If then a local prosecutor was unwilling or unable to deal with the case, the complainant could notify the Chief EULEX Prosecutor, who would then decide whether to assign the case to another Kosovo public prosecutor or to an EULEX prosecutor. The Panel observes that the complainant has not shown that he brought his grievances to the attention of the Kosovo prosecuting authorities.”

    See also *X. and 115 other complainants*, no. 2011-20, 22 April 2015, Disposition, where the Panel recommended that the Head of Mission should instruct competent EULEX officials to make enquiries with Kosovo authorities whether an investigation in this matter is ongoing and, if so, at what stage of the process the matter stands. [↑](#footnote-ref-44)
45. See above. See, in particular, *Taraku against EULEX*, 27 May 2014, par 13; *Sogojeva against EULEX*, 6 June 2012, pars 6-8; *Gashi against EULEX*, 20 March 2012, pars 8-9; *Rudi against EULEX*, par 6. [↑](#footnote-ref-45)
46. See, e.g., *Mustafa-Sadiku against EULEX*, 15 June 2015, par 16; *Beka against EULEX*, 10 November 2014, par 6; *An EULEX employee against EULEX*, par 6. See also Rule 25(1) of the Panel’s Rules of Procedure, which provides that a complaint may be filed by any person other than EULEX Kosovo personnel. [↑](#footnote-ref-46)
47. See, e.g., *Luizim Gashi against EULEX*, 7 December 2010, par 7; *Pasuli against EULEX*, 14 September 2010, par 7; *Proetel against EULEX*, 14 September 2010, par 6. [↑](#footnote-ref-47)
48. See e.g. *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, paras. 72-73. See also Rule 25, paragraph 2 of the Panel’s Rules of Procedure and Evidence. [↑](#footnote-ref-48)
49. See, e.g., *L.O. against EULEX*, 11 November 2015, pars 48-52; *Sadiku-Syla against EULEX*, 29 September 2015, pars 49-52; *D.W. et al against EULEX*, 30 September 2015, pars 77-81; *Berisha against EULEX*, 1 March 2016, par 14; *Thaqi against EULEX*, 14 September 2011, pars 71-77. [↑](#footnote-ref-49)
50. See, in particular, cases of enforced disappearance (as discussed and summarized here: <http://www.hrrp.eu/docs/Case%20law%20Note%20on%20Disappearance.pdf>). See, for an illustration, L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, par 71 (“Whilst the involvement of the SITF may ultimately assist the complainant’s search for answers and justice, the Panel is of the view that, up to the present point, the involvement of the SITF has not demonstrably contributed to securing effective protection for her rights. Absent clearer and more detailed information about the SITF’s actions and contribution to investigating this case, the Panel must draw the necessary inference that the complainant’s rights have been and continue to be violated. This is true, in particular, of her (procedural) rights under Articles 2 and 3 of the Convention as well as her rights to have access to a remedy and to the full enjoyment of her family rights (Article 13 and 8 of the Convention, respectively).”); Sadiku-Syla against EULEX, 2014-34, Decision and Findings, 19 October 2016, par 35. [↑](#footnote-ref-50)
51. *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, para. 74, referring to *Šilih*, para. 141. [↑](#footnote-ref-51)
52. See again *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, para. 75:

    “75.In this connection, the Court has observed that the procedural obligation to carry out an effective investigation under Article 2 constitutes a separate and autonomous duty. It can therefore be considered an independent obligation arising out of Article 2, capable of binding the authorities even when the death took place before the critical date (see, *inter alia*, *Šilih*, § 159; *Varnava and Others*, § 147; and *Velcea and Mazăre*, § 81, all cited above). The procedural obligation under Article 2 binds the public authorities throughout the period in which they can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it (see *Šilih*, cited above, § 157).”

    See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, 30 September 2015, para. 80 (“80.Thirdly, the Panel notes that, even though no investigations in the cases at issue are pending at the moment and the competence of EULEX Prosecutors to investigate may have been limited under the amended Law on Jurisdiction, EULEX was involved in the investigations of this matter (see pars 13 and 27 above). Such conduct indisputably comes within the competence, *ratione temporis*, of the Panel. For the purpose of guaranteeing the effective protection of the complainant’s rights, this period cannot meaningfully be separated from the investigation that has been conducted up to this point (compare *Thaqi against EULEX*, no. 2010-02, 14 September 2011, § 85-89). It was therefore for the Mission to ensure that, whilst competent over these cases, they made diligent and timely use of their resources to investigate these.”). [↑](#footnote-ref-52)
53. See *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, paras. 76-77. See also *Mursel Hasani against EULEX*, 2010-05, 14 September 2011, paras. 72 *et seq*; and Latif Fanaj againt EULEX, 2010-06, 14 September 2011. [↑](#footnote-ref-53)
54. See e.g., *Sadiku-Syla against EULEX*, Case no 2014-34, Decision and Findings, 19 October 2016, para. 38. [↑](#footnote-ref-54)
55. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, Case No. 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, Decision and Findings, 19 October 2016, para. 55. [↑](#footnote-ref-55)
56. *L.O. against EULEX*, 2014-32, 11 November 2015, para. 50. [↑](#footnote-ref-56)
57. See references above. See also, for illustrations: Susaj against EULEX, Inadmissibility Decision, 30 August 2013, par 9 (regarding the acts of local, Kosovo, prison authorities); *Family of Mr. Dede Gecaj against EULEX*, Inadmissibility Decision, 23 November 2011, par 53 (regarding the alleged conduct of Swiss authorities). [↑](#footnote-ref-57)
58. See e.g. *Zahiti against EULEX*, 2012-14, 4 February 2014, pars 53-55:

    “53.The Panel notes EULEX’s general submissions regarding its understanding of what its executive mandate might involve (see par. 46). As it was argued in other cases before the Panel, EULEX submits that its police officers, in particular those working within the Mission’s Strengthening Division, do not generally exercise any executive powers.

    54.In this respect, the Panel reiterates that it has already held in its admissibility decision that “*it is irrelevant whether* [concerned EULEX staff member] *worked for one particular department within EULEX or another. This is a matter of internal organization that cannot affect third party claimants*” (compare [*Zahiti v EULEX*](http://www.hrrp.eu/docs/decisions/Admissibility%20decision%202012-14%20pdf.pdf), 7 June 2013, at par. 35).

    55.The Panel notes that EULEX did not provide a legal basis for its suggestion that “modalities as established by the Head of Mission” (see paragraph 46 above) refer to those set out by the OPLAN dividing EULEX into an Executive Division and a Strengthening Division. The Panel is not aware of any stipulations in the OPLAN that would support such an argument.”

    See also *Zahiti against EULEX*, 2012-14, 7 June 2013, pars 35-37:

    “36.In so far as EULEX argued that the officer concerned could not be regarded as being vested with executive powers because he had been working as a training advisor, the Panel is of the view that it is irrelevant whether he worked for one particular department of within EULEX or another. This is a matter of internal organization that cannot affect third party claimants.

    37.The Panel notes in this connection that, pursuant to Article 17 of the Law on jurisdiction, “[f]*or the duration of the EULEX Kosovo in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX Kosovo”.* Therefore, EULEX police as such is in principle vested with the same executive powers as Kosovo police unless otherwise qualified by the modalities set out by the HoM. The Panel is unaware of any such modalities which would have the effect of restricting EULEX’s responsibility for the actions of its police officers merely on the strength of the fact that there were charged with training activities.” [↑](#footnote-ref-58)
59. *Zahiti against EULEX*, 2012-14, 7 June 2013, par 36 (“In so far as EULEX argued that the officer concerned could not be regarded as being vested with executive powers because he had been working as a training advisor, the Panel is of the view that it is irrelevant whether he worked for one particular department of within EULEX or another. This is a matter of internal organization that cannot affect third party claimants.”). [↑](#footnote-ref-59)
60. *Zahiti against EULEX*, 2012-14, 7 June 2013, pars 32 *et seq*. [↑](#footnote-ref-60)
61. *Ibid*, paras. 38-39. [↑](#footnote-ref-61)
62. *Ibid*, paras. 40-41

    “40.The Panel will consider whether the circumstances of the case are such as to be covered by the notion of EULEX’s executive mandate. The Panel emphasizes that its task in this case is not to consider whether the officer’s misconduct may be imputed to EULEX. Rather, it is called upon to determine whether, in the circumstances of the case and for the purposes of the effective exercise of its executive mandate, EULEX was obliged to provide adequate legal avenues with a view to ensuring adequate redress for the complainant and thus to comply with its human rights obligations under Articles 8 and 13 of the ECHR.

    41.The Panel has taken the view that, based on the material before it, the manner in which EULEX has dealt with the disciplinary process concerning one of its police officer might raise an issue regarding the right of the complainant to obtain an adequate remedy pursuant to Article 13 of the ECHR and in relation to the rights guaranteed under Article 8 of the Convention.  The Panel notes, in particular, that the information disclosed so far to the Panel does not provide clear indications of what steps, if any, were taken by EULEX to ensure that its actions did not result in a denial of complainant’s right to seek and obtain an adequate remedy. The complaint therefore raises serious issues pertaining to Articles 8 and 13 of the ECHR and is not manifestly ill-founded. No other grounds to declare it inadmissible has been established.” [↑](#footnote-ref-62)
63. *Family of Mr. Dede Gecaj against EULEX*, Inadmissibility Decision, 23 November 2011, par 53. [↑](#footnote-ref-63)
64. See Rule 17 (representation of the complainants). [↑](#footnote-ref-64)
65. Regarding the status of victim of the complainant, see, generally, *[Mustafa-Sadiku against EULEX](http://www.hrrp.eu/docs/decisions/Inadmissibility%20decision%202014-41%20pdf.pdf" \t "_blank)*,  15 June 2015, par 14; *[I against EULEX](http://www.hrrp.eu/docs/decisions/Inadmissibility%20decision%202013-01.pdf)*, 27 November 2013, at par. 17-22; [*Emërllahu against EULEX*](http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202012-15.pdf), 8 April 2013, pars 10-13; [*A,B,C & D against EULEX (admissibility decision)*](http://www.hrrp.eu/docs/decisions/Admissibility%20Decision%202012-09;%202012-10;%202012-11%20&%202012-12.pdf),10 April 2013, par 52-55; [*Ibishi against EULEX*](http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202012-07.pdf),  15 January 2013, pars 6-8; [*Rexhepi against EULEX*](http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202011-23.pdf),  20 March 2012, pars 43-47; [*Smajli against EULEX*](http://www.hrrp.eu/docs/decisions/Inadmissibility%20Decision%202011-15.pdf),  23 November 2011, par 15. [↑](#footnote-ref-65)
66. [*Mustafa-Sadiku against EULEX*](http://www.hrrp.eu/docs/decisions/Inadmissibility%20decision%202014-41%20pdf.pdf),  15 June 2015, at par 14, referring to: Velikova v. Bulgaria (dec.), no. 41488/98, 18 May 2005; Keenan v. the United Kingdom, no. 27229/95, ECHR 2001‑III; Lambert and others v. France, no. 46043/14, 5 June 2015, §§ 89-90; Mezhiyeva v. Russia, no. 44297/06, 16 April 2015, § 55. [↑](#footnote-ref-66)
67. *Faik Ibishi against EULEX*, 15 January 2013, par 7, referring to: see, *mutatis mutandis*, *Kurt v. Turkey*, judgment of 25 May 1998, Reports 1998-III, §§ 130-134; *Yaşa v. Turkey,* judgment of 2 September 1998, Reports on Judgments and Decisions 1998-VI, § 71; and conversely, *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 98-99, ECHR 1999-IV. [↑](#footnote-ref-67)
68. See, again, [*Mustafa-Sadiku against EULEX*](http://www.hrrp.eu/docs/decisions/Inadmissibility%20decision%202014-41%20pdf.pdf),  15 June 2015, at par 14. See also *Faik Ibishi against EULEX*, 15 January 2013, par 7. [↑](#footnote-ref-68)
69. See, again, *Faik Ibishi against EULEX*, 15 January 2013, par 7. [↑](#footnote-ref-69)
70. See, e.g., *Halili against EULEX*, 15 January 2013, par 21; *Sharku against EULEX*, 20 March 2012, par 21. [↑](#footnote-ref-70)
71. See, e.g., *L.O. against EULEX*, 11 November 2015, conclusion; *Maksutaj against EULEX*, 12 November 2015, conclusion; *X and 115 Others against EULEX*, 22 April 2015, conclusion; *Zahiti against EULEX*, 4 February 2014, conclusion. See also Rule 34 of the Panel’s Rules of Procedure.   
     [↑](#footnote-ref-71)
72. See Rule 17 of the Panel’s Rules of Procedure on Representation of the complainants. [↑](#footnote-ref-72)
73. See, in particular, Rules 24-25 of the Panel’s Rules of Procedure. Rule 26 requires that a complaint must set out the following:

    “1. A complaint must set out:

    1. The identity of  the Complainant, including, as appropriate, the name, date of birth, occupation and the address of the person concerned;
    2. The name, occupation and address of the representative, if any;
    3. A statement of the relevant facts; and
    4. A succinct statement of the alleged violations of the relevant human rights instruments.

    2. The Complainant must attach documentary evidence, if any, to support the complaint, in particular to show that the admissibility criteria have been satisfied.

    3. The Complainant may use the standard complaint format available from the Panel.”

    Once filed with the Panel, and unless the complaint is unmeritorious on its face, it will be communicated to the Head of Mission pursuant to Rule 27. The Panel has exercised its discretion on a number of occasion, in accordance with Rule 29, to declare cases inadmissible without such communication where they evidently lacked merit or fell beyond the scope of its jurisdiction. Pursuant to Rule 29bis, the Panel also has the power to strike out a complaint, in particular where it is determined that a complainant does not intend to pursue his or her complain (par 1) or where for other reason, the Panel is no longer justified to continue the examination of the complaint (par 2). [↑](#footnote-ref-73)
74. See Rule 29(a) of the Panel’s Rules of Procedure. This provision gives however some discretion to the Panel in relation to anonymous complaints. [↑](#footnote-ref-74)
75. See, e.g., *T.G. against EULEX*, 17 October 2017, par 2 (“The Complainant requested that the Panel withhold the details of his identity for personal reasons and the Panel acceded to this request.”). [↑](#footnote-ref-75)
76. See, e.g., *W against EULEX*, Admissibility Decision, par 5. [↑](#footnote-ref-76)
77. See, e.g., *K and others against EULEX*, 21 April 2015, par 7. [↑](#footnote-ref-77)
78. Rule 25(3) of the Panel’s Rules of Procedure. [↑](#footnote-ref-78)
79. See, e.g., *Mikic against EULEX*, 15 June 2015, pars 8-9; *K.P. against EULEX*, 21 April 2015, par 15; *Martinovic against EULEX*, 23 November 2011, pars 17-18. [↑](#footnote-ref-79)
80. See, e.g, *Sadiku-Syla against EULEX*, 29 September 2015, pars 44 *et seq*.; D.W. and others against EULEX, 30 September 2015, pars 91 *et seq*. [↑](#footnote-ref-80)
81. See, e.g., *Zahiti against EULEX*, 7 June 2013, par 42. [↑](#footnote-ref-81)
82. See, e.g., *Y against EULEX*, 15 November 2012, pars 30-31. [↑](#footnote-ref-82)
83. See, e.g., *Qela against EULEX*, 17 October 2017, par 16; *K and others against EULEX*, 21 April 2015, par. 47; [↑](#footnote-ref-83)
84. *Milica Radunovic against EULEX*, Inadmissibility Decision, 12 November 2015, pars 20-22. See also *Mazlam Ibrahimi against EULEX*, Inadmissibility Decision, 21 April 2015, pars 28-29 (regarding pending proceedings and the payment of a fee and translation cost as alleged impediment to access to justice and to a remedy). [↑](#footnote-ref-84)
85. See *F against EULEX*. [↑](#footnote-ref-85)
86. See, e.g., *F and others against EULEX*, 13 June 2017, par 7. [↑](#footnote-ref-86)
87. See Rule 23 of the Panel’s Rules of Procedure. [↑](#footnote-ref-87)
88. Regarding deliberations of the Panel, see Rule 13 of the Panel’s Rules of Procedure. See also Rule 14 on quorum. For the purpose of preparation of draft decisions, the Panel will designate a Rapporteur for each case, in accordance with Rule 28 of the Panel’s Rules of Procedure. [↑](#footnote-ref-88)
89. See Rule 13(3) Rules of Procedure. [↑](#footnote-ref-89)
90. Rule 15 of the Panel’s Rules of Procedure. Abstentions is not allowed (ibid). [↑](#footnote-ref-90)
91. Additional evidence could also possibly be tendered at that point in accordance with Rules 36 and 37. [↑](#footnote-ref-91)