



**HUMAN RIGHTS REVIEW PANEL**

**CASE-LAW NOTE ON  
REMEDIES FOR HUMAN RIGHTS VIOLATIONS**

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## **1. Scope and limits on the remedial powers of the Panel**

### **1.1. General considerations**

The Human Rights Review Panel (“the Panel”) was mandated to receive and evaluate complaints placed before it by applicants who alleged that their human rights have been violated through an act or omission attributable to EULEX. Where such a violation is found to have occurred, the Panel is then endowed with the power to make certain recommendations to the Head of Mission (“HoM”). These recommendations are not binding. They carry the force of the Panel’s reasoning and authority as well as the stated commitment of the Mission to uphold minimum standards of international human rights in the performance of its mandate.

### **1.2. No *proprio motu* powers**

The competence and jurisdiction of the Panel to look into allegations of human rights violation depends on a formal complaint having been filed by a claimant before the Panel. In other words, it does not have the authority to initiate an enquiry *proprio motu*. As regards the facts of the case, the Panel is limited to the facts placed before it by the parties. However, the Panel has exercised its own discretion and powers in determining which rights of the complainant were affected in a particular case. It is therefore not bound by the legal characterization given by the complainant to the facts of the case.

“39. It is for the Panel to determine the legal characterisation of the complaints to be examined. The Panel will examine the two cases under the following provisions: the right to respect for private and family life (Article 8 ECHR; Article 17 ICCPR); the right to freedom of thought, conscience and religion (Article 9 ECHR; Articles 18 and 19 ICCPR); the right to freedom of assembly and association (Article 11 ECHR; Articles 21 and 22 ICCPR) and the right to an effective remedy (Article 13 ECHR; Article 2 ICCPR).”<sup>1</sup>

Once seized of a complaint, the Panel is entitled to proceed unless it determines that the complainant does not intend to pursue his or her complaint, or for any other reason establishes it is no longer justified to continue the examination of the

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<sup>1</sup> See e.g. *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 39

complaint.<sup>2</sup> Even in such a case, the Panel may decide, despite the complainant's loss of interest in the matter, to pursue the examination of the case. The Panel has pointed out that

“51.The Panel notes that the complainant failed to reply to the observations by the HOM. The Panel considers that the proper examination of the complaint, in the light of Article 6 of the Convention, would normally require that both parties' arguments are submitted to it in adversarial proceedings.

52.However, the Panel is of the view that respect for human rights require that the examination of the case be continued; the more so as the current complaint is essentially the same and relates to the same set of facts as complaints brought by four other complainants and raising identical legal issues.”<sup>3</sup>

In that sense, the Panel does not perform its function solely or exclusively on behalf of the complainants but serves a limited public function. As pointed out by the Panel in relation to cases of disappearances –

“[...] the thorough and effective investigation of this category of cases is central to building a sense of accountability and care for the rule of law in any post-conflict society. The responsibility to deal with these cases belongs to society as a whole and not just to those most directly affected by them. On that basis, the Panel considers that it is in the interests of justice that it should consider the complaint as regard its admissibility.”<sup>4</sup>

Through its findings and recommendations, the Panel is able, based on information it receives from the parties, to contribute to the process of truth-seeking and to help establish the general circumstances in which rights violation have occurred. Similarly, the ECtHR has established that the right to truth is not limited to protecting the rights and interests of the victims but serves a broader societal purpose:

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<sup>2</sup> Article 29 *bis* of the Rules of Procedure and Evidence. For an illustration, see e.g. *Musli Hyseni against EULEX*, 2014-39, 27 June 2016, paras. 17-18

<sup>3</sup> See e.g. *Mursel Hasani against EULEX*, 2010-05, 14 September 2011, paras. 51-52

<sup>4</sup> *Sadiku-Syla against EULEX*, 2014-34, 29 September 2015, para. 46. See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 97

“[W]here allegations of serious human rights violations are involved in the investigation, the right to the truth regarding the relevant circumstances of the case does not belong solely to the victim of the crime and his or her family but also to other victims of similar violations and the general public, who have the right to know what has happened.”<sup>5</sup>

### **1.3. Recommendation powers only**

As noted above, the Panel was not given the authority to issue binding decisions but only recommendations. In that sense, it may be said to be *quasi-judicial* in character. This also means that, in order to perform an effective accountability function, the Panel relies on the readiness of the authority to which its recommendations are directed (i.e., the HoM of EULEX) to engage with the Panel’s view and recommendations.

As is apparent from the contrasted experience of the Human Rights Advisory Panel of the United Nations Mission in Kosovo (“HRAP”) and the Panel, a recommendations-based accountability mechanism can only ever be credible and effective if and where the authority competent to follow and adopt those recommendations is prepared and capable of doing so.<sup>6</sup>

### **1.4. Statutory exclusion of financial relief**

The decision of the Panel’s creators to deny the Panel the authority to recommend financial relief has negatively affected its ability to provide effective relief for serious violations of human rights attributable to the mission where this would have been a proper and adequate means of relief.<sup>7</sup> Whilst this has not prevented the Mission, *proprio motu*, to offer financial compensation to a victim of rights violation in a limited number of cases,<sup>8</sup> the inability of the Panel to recommend it or, more effectively still, to order financial compensation where appropriate, has limited the Panel’s accountability powers quite significantly. Financial compensation might indeed

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<sup>5</sup> *Al-Nashiri v Poland*, Application no. 28761/11, judgment of 24 July 2014, para.495; *Husayn (Abu Zubaydah) v Poland*, Application no. 7511/13, judgment of 24 July 2014, para.489; see also, *El-Masri v The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, judgment of 12 December 2012, para.191; for judgments of the Inter-American Court of Human Rights, see e.g. *Anzualdo Castro v. Peru*, judgment of 22 September 2009, paras. 119.

<sup>6</sup> See Final Report of the HRAP, pages 9, 19,25, 34-35, 94-95 and 135.

<sup>7</sup> Annual Report 2016 of the HRRP, pages 2 and 48-50.

<sup>8</sup> See, for example, *Zahiti against EULEX*, 2012-14, 11 November 2014, paras. 7, 11-12 and 24-26

provide important redress for the victims and, in some cases, enable the victim to seek particular forms of help or assistance. The financial burden thereby imposed on the Mission would also make it bear the concrete consequence of its actions.

There seems to be little valid reason to assume that an international organization should not be subject to the sort of liability – including financial – that would normally apply to a state in similar circumstances.

#### **1.5. No financial compensation, but....**

As noted above, the Panel can recommend remedial action. A remedial action should, in principle, restore the victim of rights violation to the position he/she was in before the violation, or would have been had the violation not taken place. Under certain circumstances this remedial action can be covered by the comprehensive insurance policy. More specifically, the Panel has noted the following:

“70. If, however, the HoM should consider granting compensation to the complainant, the Panel notes that this would resolve the matter. The Panel itself is not empowered, however, to recommend pecuniary compensation when a finding of a human rights breach is made. It can only make recommendations for a remedial action to be taken by the Mission (Rule 34 of the Panel’s Rules of Procedure)

[...]

71. In this context, the Panel reiterates the Council of Europe’s Venice Commissions’ observation that, “*in principle, restitutio in integrum is the most suitable manner of redress of human rights violations. The possibility for the HRRP to recommend remedial action removing the effects, and the causes, of the violation is therefore crucial. However, in some cases the most effective remedy is financial compensation, which instead the HRRP cannot recommend. In such cases it will be possible to claim monetary compensation, at least for the material damage, under the Third Party Liability Insurance scheme of EULEX. The Venice Commission stresses, however, that the procedure under the insurance scheme should not be unduly lengthy or complex. It notes in this respect that the Head of Mission of EULEX has committed himself to reviewing the insurance procedures to ensure that they remain effective*” (see European Commission for Democracy through Law, Opinion no. 545/2009, 21 December 2010, at par. 67).

72.EULEX points to the review of third party claims arising in connection with its operations (see pars. 42 and 67). In this regard, the HoM is insured by a comprehensive policy whose coverage includes third party liability claims. While such a procedure might result in compensation for pecuniary damage, the Panel notes that the Mission has not so far considered offering any compensation to the complainant in this regard (see par. 35 above).”<sup>9</sup>

## **2. Remedial actions by the Panel**

In the exercise of its recommendation powers, the Panel has made a variety of suggestions to the HoM as regard the ways in which he/she could contribute to remedying the wrong done to a complainant whose claim is found to be meritorious. These are, of course, tailored to the specificities of the case in question.

When deciding what recommendations should be made in a given case, the Panel has typically taken into account the nature and seriousness of the prejudice caused to the complainant as a result of the actions of the Mission, the nature of the rights violated, the consequences of the violation to the complainant, the possibility to remedy at least some of the consequences of the violation, if relevant the ongoing nature of the act, the existence of institutionalized contributing factors and the need to prevent further similar conduct.

For the purpose of discussion, the recommendations made by the Panel may be organised in a number of particular categories:

- Recommendations for a formal acknowledgment by the HoM of the status of the complainant as a victim of a violation of rights;
- Dissemination of HRRP decisions and recommendations;
- Recommendations intended to put an end to an ongoing violation and to enable the full enjoyment of the complainant’s rights;
- Recommendations intended to put an end to an ongoing violation;
- Operational recommendations directed at the functioning of the Mission;
- Investigative recommendations; and
- Recommendations for institutional reforms.

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<sup>9</sup> *Zahiti against EULEX*, 2012-14, 4 February 2014, paras. 70-72

## 2.1. Acknowledgement of violation as a remedy for human rights violations

For the Panel to determine that a violation of the complainant's rights has occurred and to formally acknowledge this violation in a decision could be said to provide some form of relief to the complainant, even if this does not make up for the Mission's responsibility to provide relief for the harm it has caused.<sup>10</sup> This has led the Panel on a number of occasions to recommend that the HoM formally acknowledge the violation of the complainant's rights. For example, in one case the Panel recommended

"[...] The HoM should make a declaration acknowledging that the circumstances of the case amounted to a breach of the complainants' rights attributable to the acts [and/or omissions] attributable to EULEX in the performance of its executive mandate; [...]"<sup>11</sup>

The Panel noted in that context that the acknowledgment of human rights violations by states is a well-established practise<sup>12</sup> in the procedures of, *inter alia*, the European Court of Human Rights.<sup>13</sup> The Panel further underlined the importance of such relief in light of the impossibility for the Panel to recommend financial compensation:

"13. Given the fact that the Panel cannot recommend to the HoM that monetary compensation be paid to the victim, it invites the HoM to make use of the remedies available to him. In some cases, the formal acknowledgement of a violation of rights is capable of providing some redress to the victim of a violation. Considering the limitations placed upon the ability of the Panel to recommend financial compensation as stipulated by the in the EULEX Accountability Concept of 29 October 2009 on the establishment of the

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<sup>10</sup> *Valbone Zahiti against EULEX*, 2012-14, 11 November 2014.

<sup>11</sup> *Desanka and Zoran Stanistic against EULEX*, 2012-22, 11 November 2015, Disposition; See also to the same effect: *Blerim Rudi against EULEX*, 2010-07, 8 June 2011, Disposition; *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, Disposition; *Maksutaj against EULEX*, 2014-18, 12 November 2015, Disposition; *L.O. against EULEX*, 2014-32, 11 November 2015, Disposition; *A,B,C,D against EULEX*, 2012-09 to 2012-12, 20 June 2013, Disposition; *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 80.

<sup>12</sup> *H and G against EULEX*, 2012-19 and 2012-20, 27 May 2014, para. 12. The Panel also pointed in that context to the practice of other human rights bodies including the Human Rights Advisory Panel (HRAP) of UNMIK (see for instance, *MITIĆ against UNMIK*, case no. 064/09 of 14 March 2014 at p. 43).

<sup>13</sup> Rule 62 A of the Rules of the Court



Human Rights Review Panel, the formal acknowledgment of a violation by the competent authority becomes all the more important as a form of redress.”<sup>14</sup>

In all but one case, the HoM refrained from doing so.<sup>15</sup> This state of affair may be illustrated with this citation:

“8. On 6 June 2014, the HoM informed the Panel on the exact steps taken regarding each of the recommendations of the Panel. In regard to the recommendation that the HoM should acknowledge that the complainant’s rights had been breached by EULEX and to inform the complainant of his position on that point, the HoM informed that relevant Units and the Civilian Operations Commander have been engaged in discussions regarding the possible implications of the Panel’s findings. In that regard, it is submitted that insurance schemes have been studied and that a comparative research to other international organization’s systems have been made. In addition, an information memorandum was drafted to the Internal Investigation Unit to establish best practices in case there is an external victim to an incident investigated by the Internal Investigation Unit in the future. It is apparent from the HoM’s submissions on that point that the Mission has not adopted this recommendation of the Panel.”

[...]

14. As in previous decisions, the Panel notes that the HoM did not formally acknowledge the violation of the complainants’ human rights and did not formally inform the complainant of his position on that point despite the Panel’s recommendation to that effect.

15. The Panel notes once again [...] that the acknowledgment of human rights violations by authorities responsible for the violation is a well-established practice in the case law of, *inter alia*, the European Court of Human Rights [...] A similar practice of acknowledgment of human rights violations is regularly applied by the Human Rights Advisory Panel (HRAP) of UNMIK [...]

16. Given the fact that the Panel cannot recommend that monetary compensation be paid to the victim, it has invited the HoM to make use of the remedies available to him. In some cases, the formal acknowledgement of a violation of rights is capable of providing some redress to the victim.

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<sup>14</sup> *H and G against EULEX*, 2012-19 & 2012-20, 27 May 2014, para. 13.

<sup>15</sup> See e.g. *H and G against EULEX*, 2012-19 & 2012-20, 27 May 2014, para. 11.

Considering the limitations placed upon the ability of the Panel to recommend financial compensation as stipulated by the in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel, the formal acknowledgment of a violation by the competent authority becomes all the more important as a form of redress.

17. The Panel notes with regret the decision of the HoM not to make use of the possibility to provide some degree of redress to the complainant by acknowledging the violation of rights that she suffered.”<sup>16</sup>

The Mission’s refusal to acknowledge its responsibility appears to be linked to a fear of possible lawsuits. The closest the HoM went to offering an apology and recognition of rights violation was in the *Desanka and Stanisić* case HoM in which he formally expressed his regret for the fact that the complainants were not sufficiently involved in the investigative proceedings and that they were not given reasons for the termination of the investigations.<sup>17</sup> The Panel noted that whilst such a response does not fully embrace the Panel’s recommendation for an acknowledgement of violation, the regrets expressed by the HoM did constitute an implicit acknowledgment of the inadequacies of the investigative process. This, the Panel considered, goes some way towards providing relief to the complainants for the violation of their rights.<sup>18</sup>

In *Blerim Rudi*, the Panel also noted that the HoM requested the Director of the Finance Intelligence Center to take steps which led to the reinstatement of the complainant and the payment of the arrears of salary. By doing so, the Panel noted, the HoM implicitly acknowledged the breach of the complainant’s rights, as recommended by the Panel.<sup>19</sup>

## 2.2. Dissemination of HRRP rulings

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<sup>16</sup> *Zahiti against EULEX*, 2012-14, 11 November 2014, paras. 8 and 14-17, and its references to *H&G against EULEX*, 2012-19 & 20, 27 May 2014, at paras. 11-13), Rule 62 A of the Rules of the Court, HRAPs decision *MITIĆ against UNMIK*, case no. 064/09 of 14 March 2014 at p. 43; See also *A, B, C and D against EULEX*, 2012-09 to 2012-12, 5 February 2014, para. 16; *W against EULEX*, 2011-07, 26 November 2013, para. 17.

<sup>17</sup> *Desanka and Stanisić against EULEX*, 2012-22, 29 February 2016, paras. 5 and 8.

<sup>18</sup> *Ibid*, para. 8.

<sup>19</sup> *Blerim Rudi against EULEX*, 2010-07, 23 November 2011, para. 11.

On a number of occasions, the Panel recommended that the HoM should provide copies of its Decisions to the relevant organs of the mission. For example, in the *Stanisic* case, the Panel has recommended that

“[...] The HoM should provide copy of the present Decision to the EULEX Prosecutors through the relevant channels. [...]”<sup>20</sup>

In the subsequent decision on the implementation of the Panel’s recommendations, the Panel has noted that

“6. With regard to the second recommendation of the Panel, the HoM indicated that the Panel’s decision of 15 November 2015 had been disseminated to EULEX prosecutors by the Acting Chief EULEX Prosecutor. In particular, EULEX Prosecutors were reminded that decisions on dismissal of criminal reports should include “a brief summary of the reasons for the decision”. Moreover, the need and feasibility of interviewing the person who has submitted the report should be assessed in each case before the decision on dismissal is issued.

[...]

9. In its decision of 15 November 2015, the Panel also recommended that the HoM should provide copies of that decision to the EULEX Prosecutors through the relevant channels. In his letter, the HoM indicated that the Panel’s decision had indeed been disseminated among EULEX Prosecutors by the Acting Chief EULEX Prosecutor. The HoM further indicated that EULEX Prosecutors had been reminded of their obligation to provide a brief summary of their reasons when dismissing a criminal report and that the feasibility of interviewing the person who filed the report should be evaluated in every case. [...]”<sup>21</sup>

This, the Panel noted, was intended to inform the relevant Mission’s organs of the general tenor of the Panel’s findings and the nature of their human rights obligation. This was done, for instance, in relation to EULEX Prosecutors to alert them to the

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<sup>20</sup> See e.g. *Desanka and Zoran Stanisic against EULEX*, 2012-22, 11 November 2015, Disposition.

<sup>21</sup> *Desanka and Stanisic against EULEX*, 2012-22, 29 February 2016, para. 6 and para. 9.

necessity to involve victims into their investigations and to provide adequate reasons for terminating an investigation in a particular case.<sup>22</sup>

Such measure is intended as both a “pedagogical” measure – to ensure that relevant officials are aware of their human rights obligations and the scope thereof – and as a preventive mechanism - to limit the recurrence of similar violations in the future.

### **2.3. Putting an end to violation and enable the full enjoyment of rights by the complainant**

Occasionally the Panel has recommended that the HoM should examine which specific measures he/she could take in order to put an end to a violation.<sup>23</sup> This leaves the HoM with a significant discretion as to the best way to implement the Panel’s recommendation.

In similar vein, the Panel has occasionally called upon the HoM to take steps to remove the source of the risk posed to the rights of the complainant. Thus, in case *W*, the Panel recommended through the HoM that EULEX Prosecutors should be requesting their Serbian counterparts to return or destroy copies of documents which bore the name of a complainant and to redact any information in other documents that could identify him.<sup>24</sup> The Panel has insisted that the recommendations are followed and reasoned its insistence as follows:

“[...] As justification for not implementing this recommendation, the HoM relies on a suggestion that such request would negatively affect cooperation in criminal investigations between EULEX and Serbia. The Panel notes that such cooperation is undoubtedly in the interest of an effective fight against war crimes. However, in such a case where the fundamental rights of a witness or the accused might be affected, the competent authorities are

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<sup>22</sup> See again *Desanka and Zoran Stanisic against EULEX*, 2012-22, 11 November 2015, Disposition.

<sup>23</sup> *Blerim Rudi against EULEX*, 2010-07, 8 June 2011, Disposition. See also *Kazagic Djeljalj against EULEX*, 2010-01, 8 April 2011, Disposition, recommending, inter alia, that the HoM should examine what steps could be taken with the assistance or involvement of EULEX in order to ensure the definitive implementation of the judicial decision of 11 December 2007.

<sup>24</sup> *W against EULEX*, 2011-07, 26 November 2013, para. 18

required to ensure that a fair balance is struck between those rights and the legitimate public interest in pursuing such crimes.

19. The Panel cannot agree, in the present case, that its recommendation would have the detrimental effect alleged on cooperation. Nor has it been established to the Panel's satisfaction that a fair balance was struck between the interests of the prosecutors and those of the complainant so that the rights of the latter may not be said to have been restricted only to the extent necessary and proportionate under the circumstances [...]. Instead, the step recommended by the Panel would underline the importance for the cooperating partners to respond to reasonable requests of witnesses fearing for their safety. Its gist is limited to ensuring that during criminal investigations proper consideration is given to safeguarding the safety and security of witnesses where the circumstances of the cases under investigation suggest that issues may arise in this respect.

20. The HoM also relies on the suggestion by the CEP that compliance with such a request might interfere with the "autonomous position" of the prosecutor. This is considered to be of no merit. The autonomy given to prosecuting authorities to perform their functions cannot be interpreted as an allowance to act without due consideration to procedural safeguards and relevant human rights standards of those concerned by the legal or judicial process [...]. EULEX Prosecutors are part of the mission and, as such, subject to relevant human rights standards and safeguards which have been put in place to guarantee the effective protection of these rights. In that sense, no claim of "autonomy" could warrant actions by the Prosecution taken in violation of those standards. See e.g. UN Guidelines on the Role of Prosecutors, adopted by the Eighth UN Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, par 12 ("Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.").

21. Having regard to the above, the Panel recommends that the HoM should consider anew implementing recommendation No. 2 of the Panel's original Decision. In particular, if the Serbian authorities have decided not to ask the complainant to testify, there seems to be little justification in their retaining

information which, if disclosed, could possibly result in significant prejudice to the complainant. “<sup>25</sup>

The Panel has also made recommendations that were intended to remove certain hurdles standing in the way of the full enjoyment by the complainant of one or more of his fundamental rights. In *Zahiti*, for instance, the Panel recommended that the immunity of a former EULEX staff member who committed the underlying act in relation to which the Mission was held responsible should be lifted by the HoM. This, it was considered, would enable the investigative process to move forward as well as ensure the complainant’s access to justice and to an effective remedy in the form of civil or criminal proceedings against that individual. More specifically, the Panel has found and recommended the following:

“1. *Finds* it appropriate, in the light of its above findings of fact and law, to make the following recommendations to the HoM under Rule 34 of its Rules of Procedure:

- i. The HoM should acknowledge that the complainants’ rights have been breached by EULEX. The Panel invites the HoM to inform the complainant of his position on that point;
- ii. The HoM should consider lifting the former staff’s immunity and informing the local Kosovo prosecutor accordingly; [...]”<sup>26</sup>

In that context, the Panel noted that by lifting the immunity of the official concerned the Mission might provide the incentive for local authorities to decide to open an investigation. Such a course of action would also send a clear message that the Mission does not condone such acts and will not let the Mission’s member’s immunities contribute to creating unaccountability for serious violations of rights.<sup>27</sup> Regrettably, the HoM did not adopt that recommendation.<sup>28</sup>

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<sup>25</sup> *W against EULEX*, 2011-07, 26 November 2013, paras. 18 et seq, and its references to *W against EULEX* of 10 April 2013, para. 45, and International Commission of Jurists’ *International Principles on the Independence and Accountability of Judges, Lawyers and Prosecutors – Practitioners Guide No. 1*.

<sup>26</sup> *Zahiti against EULEX*, 2012-14, 4 February 2014, Disposition .

<sup>27</sup> *Zahiti against EULEX*, 2012-14, 11 November 2014, paras. 9 and 20-21.

<sup>28</sup> *Ibid*, para. 22.

As explained above, in case *W*, the Panel recommended that the HoM should see to it that a risk-assessment be conducted to ensure that the complainant's well-being was not being further endangered as a result of the actions of the Mission. In the decision on the implementation of this recommendation, the Panel expressed its concern regarding the failure of the HoM to implement its recommendation:

“23.The Panel notes with concern that the risk assessment recommended by the Panel has not been carried out. To justify the Mission's inaction, the HoM has relied on the CEP's assurance that “no further risk assessment is necessary”. The Panel has not been provided with evidence that an effective risk assessment was conducted in the first place. Indeed, this finding was at the core of its decision that the complainant's rights guaranteed under Article 8 of the Convention had been breached. The Panel fails to see how the conclusion that no risk exists and that no “further” risk assessment is necessary can be justified.

24.In those circumstances, the Panel remains concerned that EULEX has failed to conduct a sufficient evaluation of the risk posed to the complainant and his family, despite the Panel's recommendation to this effect. The Panel, therefore, invites the HoM to consider instructing the competent authorities to carry a thorough assessment of this matter. The Panel further recommends that the HoM should seek necessary guidance from EULEX's organs specifically tasked with the responsibility of protecting witnesses in sensitive criminal cases.”<sup>29</sup>

#### **2.4. Operational recommendations**

In a number of instances, the Panel has made recommendations intended to improve upon the operational functioning of the mission.

The Panel's decisions in the *Vidovdan* case provide the clearest illustration of such efforts. In this case, the Panel determined that the resources and planning that had gone into preparing for the monitoring of this important religious event had been inadequate when compared to the risk of violence that existed at the time. In light of those findings, the Panel made a number of recommendations intended to improve the way in which the mission carries out its mandate in similar circumstances in the future. In particular, it made the following recommendations:

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<sup>29</sup> *W against EULEX*, 2011-07, 26 November 2013, paras. 23-24

“iv. Should EULEX play any part in the 2014 Vidovdan celebrations, that the HoM ensures that, the competent authorities of EULEX–

- a) conduct a risk assessment with a view to the establishment and identification of possible sources of risks to the effective protection of the human rights of participants in the said Vidovdan celebrations. For that purpose, that competent EULEX authorities refer to and learn lessons from the shortcomings identified in the Vidovdan operation in June 2012 and as are recorded in the present decision;
- b) submit to HoM a detailed plan with regard to the involvement of EULEX in the forthcoming Vidovdan celebrations on 28 June, 2013. Such a plan to include a detailed description of the means and resources required to ensure that EULEX officers perform their executive mandate responsibilities effectively, in particular with regard to the protection and preservation of the human rights of the participants in these events. This will include, if necessary, the option for EULEX officers to call for reinforcements. This plan to also include adequate means of communication and transportation to ensure that prompt intervention is possible where necessary in order to pre-empt or put an end to human rights violations;
- c) ensure adequate coordination between the EULEX Mission on the one hand and KP and competent Kosovo authorities on the other so that there is effective protection of the participants in these celebrations. That EULEX also ensure that KP officials involved in such matters are made fully aware that the perpetration of violence upon participants will not be tolerated and that mechanisms of accountability will be in place to punish wrongdoers;
- d) in line with the resources reasonably available for such purposes, assign a sufficient number of EULEX officers to this task, commensurate with the importance of those Vidovdan events and in accordance with the potential risk of human rights violations;
- e) provide clear guidelines and instructions to all EULEX police officers involved in this operation, in particular with regard to the



circumstances under which they would be obliged to intervene to protect the human rights of participants.

v. Regarding potential investigation and reporting of misconduct, that the HoM also ensures that EULEX officers involved in the Vidovdan operation carefully record any instance of human rights violations which they may witness or which are reported to them. That EULEX, in turn, investigate each of these alleged incidents and/or transmit this information to the competent Kosovo investigative authorities with a view to ensure effective investigation of any such cases.”<sup>30</sup>

Similar recommendations were made in the context of a case pertaining to the same *Vidovdan* events.<sup>31</sup> These operational recommendations were generally implemented by the Mission. In its decision on implementation of its recommendations, the Panel noted the following:

“19. [...] EULEX conducted a risk assessment with a view to establishing and identifying possible sources of risks to the effective protection of the human rights of participants prior to the *Vidovdan* celebrations of 28 June 2013. In that context, the Panel notes that the shortcomings in planning that affected the 2012 celebrations were fully addressed.

20. A detailed operational plan regarding the involvement of EULEX in the *Vidovdan* celebrations of 2013 was drafted. Adequate means of communication to ensure prompt intervention were put in place.

21. It also appears from information provided to the Panel that adequate coordination between the Mission and competent Kosovo authorities was established to ensure the effective protection of the participants in these events. Also, KP officials were properly briefed about their responsibilities and EULEX recommendations were implemented by Kosovo authorities.

22. While the HoM did not provide numbers, it is apparent from the information available to the Panel that a much higher number of EULEX police were deployed for the *Vidovdan* celebrations of 2013.

23. The Panel is satisfied that EULEX provided clear guidelines and instructions to all EULEX police officers involved in the 2013 *Vidovdan*

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<sup>30</sup> *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, Disposition.

<sup>31</sup> See, in particular, *A, B, C and D against EULEX*, 2012-09 to 2012-12, 5 February 2014.

operation, in particular with regard to the circumstances under which they would be required to intervene in order to protect the human rights of participants.

24. Finally, the HoM also instructed that EULEX police officers involved in the operation should carefully record any instance of human rights violations they may witness or which were reported to them.”<sup>32</sup>

In a subsequent decision of 27 May 2014, the Panel returned to its findings and invited the HoM in the light of the upcoming *Vidovdan* celebrations on 28 June 2014 to review once again the Panel’s *operational* recommendations. This was said by the Panel to be intended to assist the HoM in determining EULEX’s concrete human rights obligations related to upcoming *Vidovdan* celebrations. In following and adopting its recommendations, the Panel said, EULEX would demonstrate its commitment to ensuring that the risk of human rights violations of individuals is taken seriously and that steps are taken to prevent the realisation of these risks.<sup>33</sup>

## **2.5. Investigative recommendations**

The careful and diligent investigation of allegations of rights violations is fundamental to the general effectiveness of these rights and their genuine enjoyment.

The Panel has therefore made a number of recommendations to the HoM which must be understood as invitations to guarantee and ensure that rights violations are not left unaddressed but are instead subject to an effective investigation if and where the possibility exists. Thus, in relation to the *Vidovdan* case, the Panel recommended and later took notice of investigative steps taken by the Mission to identify those responsible for violations of rights committed during the said events:

“25. The Panel notes that the HoM took a number of steps to ensure that instances of human rights violations were being investigated.

26. In relation to complainants B, C and D, the Panel commends the actions undertaken by the Chief Prosecutor of EULEX to review those cases. In relation to complainant A, the Panel notes that the Chief State Prosecutor of Kosovo has taken the view that the complaints should not be dealt with by his office because there was insufficient evidence / information justifying the

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<sup>32</sup> *A, B, C and D against EULEX*, 2012-09 to 2012-12, 5 February 2014, paras. 19 - 24

<sup>33</sup> See *H and G against EULEX*, 2012-19 & 2012-20, 27 May 2014, paras. 14-15.

initiation of a criminal case. In this regard, the Panel notes that EULEX has not indicated whether the case could or should be investigated by EULEX.

27. The Panel has not been informed whether the HoM notified the complainants, directly or through the competent investigative organs of EULEX, of the result of these enquiries, as recommended by the Panel. The Panel invites the HoM to consider doing so if this has not yet been undertaken.”<sup>34</sup>

In *X and 115 other complainants*, the Panel recommended that the HoM should enquire with the local (Kosovo) authorities whether the investigation in the case was ongoing. Later the Panel followed up on the matter once it became apparent that the investigations by local authorities were not proceeding efficiently. More specifically, the Panel said the following:

“16. The Panel is satisfied that the HoM implemented its recommendation to enquire with the local authorities whether the investigation in the case was ongoing. It is noted in this context that the case was first brought to the attention of the Kosovo prosecuting authorities almost two years ago, in November 2013. No information has been provided to the Panel by the Head of Mission as to whether there was any evidence taken during the investigation conducted by the Kosovo prosecuting authorities, including questioning of witnesses. Likewise, no information has been provided as to the possible timeframe within which the case may be finalised. Nor has it been established that victims were involved meaningfully in the ongoing process of investigation. It has not therefore been shown to the Panel’s satisfaction that there has been real progress in the investigation. In those circumstances, the complainant’s right to an effective remedy pursuant to Article 13 of the Convention still appears to be affected by the absence of a demonstrable effort to promptly and effectively investigate this case.

17. Furthermore, the Panel notes the decision of the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor not to assign the case to a EULEX

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<sup>34</sup> *A, B, C and D against EULEX*, 2012-09 to 2012-12, 5 February 2014, paras. 25-27. See also *H and G against EULEX*, 2012-19 and 2012-20, 27 May 2014, para. 16: “16. The Panel notes that the HoM took a number of steps to ensure that instances of human rights violations found by the Panel in its decision of 30 September 2013 were being investigated, and that the local authorities including the Basic Prosecution Office in Pristina as well as the PIK have been informed accordingly. In these circumstances, the Panel considers these steps to constitute an adequate and sufficient implementation of the Panel’s recommendation.”

Prosecutor. The Panel considers that the effectiveness of the investigation would have been greatly increased if it could have drawn upon EULEX's expertise and resources." <sup>35</sup>

In *Kazagic Djeljalj*, the Panel also sought to ensure that a proper and effective investigation of the case was carried out. It did so by making the following recommendations to the HoM:

"The HoM should undertake all necessary measures for the removal of the state of uncertainty affecting the complainant's peaceful enjoyment of his possessions, by, in particular,

- undertaking an examination as to whether the conditions for the complainant's civil case being taken over by EULEX judges, specified in Article 5 paragraph 1 (c) (ii) or (iii) of the Law on Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo have been fulfilled;
- establishing reasons for which there seems to have been no progress in the investigation opened before the EULEX prosecutor as a result of the complainant's request of 25 June 2009;
- furthermore, examining whether in the circumstances of the complainant's case the conditions necessary for the EULEX prosecutor's subsidiary competence to arise have been met; and [...]" <sup>36</sup>

In *Zahiti*, the Panel likewise made two distinct recommendations intended to further the possibility of an investigation into the alleged violations of the complainant's rights. In particular, the Panel recommended that the HoM should consider lifting the immunity of a former staff member so as to make an investigation (and possible prosecution) of his conduct would be theoretically and legally possible.<sup>37</sup>

In *H & G against EULEX*, the Panel recommended that the HoM should ensure that all relevant information pertaining to the case should be centralized in his hands and, as the case may be, communicated onwards to the competent investigative authorities. It was also suggested that the HoM should enquire with competent

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<sup>35</sup> *X and 115 other complainants against EULEX*, 2011-20, 11 November 2015, paras. 16-17

<sup>36</sup> *Kazagic Djeljalj against EULEX*, 2010-01, 8 April 2011, Disposition.

<sup>37</sup> *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 80.

investigative and prosecutorial authorities in EULEX whether investigative steps could be taken in relation to the incident involving the complainants. In the disposition the Panel concluded with a series of recommendations all intended to see to it that the circumstances of the complainant's rights violations would be fully investigated:

"2. [The Panel] [f]inds it appropriate, in the light of its above findings and to the extent that the HoM has not already done so in compliance of the recommendations made by the Panel in the cases 2012-09 A., 2012-10 B., 2012-11 C., 2012-12 D., to make the following recommendations to the HoM under Rule 34 of its Rules of Procedure:

[...]

- ii. That HoM requests all relevant branches and organs of EULEX, which possess information regarding last year's Vidovdan events, to provide him with a full and complete overview of EULEX's actions during these events. On that basis, that the HoM ensures that any information in EULEX's possession regarding possible human rights violations committed in this context (including any violation attributable to KP officers) is provided to the competent Kosovo authorities for follow-up action and investigation. Should EULEX later determine that such cases were not fully and adequately investigated, that EULEX consider taking over the responsibility of investigating these cases.
- iii. The HoM is invited to enquire with competent investigative and prosecutorial authorities in EULEX whether investigative steps could be taken in relation to the incident involving complainants H and G.

The Panel invites the HoM to inform the complainants, directly or through the competent investigative organs of EULEX, of the result of these enquiries. The complainants are at liberty to report to the Panel in relation to any outstanding matter when they are contacted by EULEX." <sup>38</sup>

In *L.O.*, the Panel recommended clarification of investigative competences and better coordination as follows:

- "d. The HoM should seek to clarify the relationship between the Mission and the SITF with a view to ensure the effective protection of rights and guarantee that whichever entity is in charge of the matter provides adequate and

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<sup>38</sup> *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, Disposition.

sufficient information to the complainant. If necessary, authorisation should be sought from the EU to make public the legal basis regulating the work of the SITF. This would also greatly contribute to bringing increased transparency and accountability to this mechanism.

e. The HoM should impress upon the SITF and the States supporting its activities the importance of such cases being fully and effectively investigated and that wherever suspects are identified that they are being brought to justice promptly and fairly.”<sup>39</sup>

In that same context, the Panel reiterated the importance for the investigative organs to engage proactively with victims of the crimes that are being investigated:

“f. The HoM should impress upon the competent officials of the SITF the importance and necessity to inform victims of the general aspects of their investigation so as to make them aware of their efforts and commitment to obtaining justice on their behalf.”<sup>40</sup>

In *A,B,C,D against EULEX*, the Panel recommended that the HoM should gather all relevant information in EULEX’s possession regarding possible human rights violations committed in the context of the events in question with a view to providing this information to the competent Kosovo authorities for follow-up and investigation. It also invited the HoM to enquire with competent investigative and prosecutorial elements in EULEX whether further investigative steps could be taken in relation to the incident involving some of the complainants and whether the case related to one of them was being investigated by competent Kosovo authorities and, if not, whether it should be investigated by EULEX. Finally, regarding potential investigation and reporting of misconduct, it was recommended that the HoM should also demand that EULEX officers involved in the operation carefully record any instance of human rights violations which they may witness or which are reported to them and that EULEX, in turn, investigate each of these incidents and/or pass on this information to the competent Kosovo investigative authorities with a view to ensure effective investigation of any such case:

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<sup>39</sup> *L.O. against EULEX*, 2014-32, 11 November 2015, Disposition.

<sup>40</sup> *L.O. against EULEX*, 2014-32, 11 November 2015, Disposition.

“2. [The Panel] [f]inds it appropriate, in the light of its above findings of fact and law, to make the following recommendations to the HoM under Rule 34 of its Rules of Procedure:

ii. That HoM requests all relevant branches and organs of EULEX, which possess information regarding last year’s Vidovdan events, to provide him with a full and complete overview of EULEX’s actions during these events. On that basis, that the HoM ensures that any information in EULEX’s possession regarding possible human rights violations committed in this context (including any violation attributable to KP officers) is provided to the competent Kosovo authorities for follow-up and investigation. Should EULEX later determine that such cases are not being fully and adequately investigated, that EULEX consider taking over the responsibility of investigating these cases.

iii. The HoM is invited to enquire with competent investigative and prosecutorial elements in EULEX

a) whether further investigative steps could be taken in relation to the incident involving complainants B, C and -D; and

b) whether the case related to complainant A is being investigated by competent Kosovo authorities and, if not, whether it should be investigated by EULEX.

The Panel invites the HoM to inform the complainants, directly or through the competent investigative organs of EULEX, of the result of these enquiries.

The complainants are at liberty to report to the Panel in relation to any outstanding matter when they are contacted by EULEX.

[...]

v. Regarding potential investigation and reporting of misconduct, that the HoM also demands that EULEX officers involved in the operation carefully record any instance of human rights violations which they may witness or which are reported to them. That EULEX, in turn, investigate each of these incidents and/or pass on this information to the competent Kosovo investigative authorities with a view to ensure effective investigation of any such case.”<sup>41</sup>

## **2.6. Reparatory means**

As noted above, the Panel has been denied the authority to make or recommend financial payments. In the *Zahiti* case, however, the Panel made it clear that a

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<sup>41</sup> *A,B,C,D against EULEX*, 2012-09 to 2012-12, 20 June 2013, Disposition.

financial compensation would have been justified in that case which had resulted in physical injury of the complainant and subsequent inability to work. It did so by recommending that the HoM should explore the possibility to subject the case of the complainant to the third liability insurance scheme. The Panel found appropriate to recommend that

“[...] Considering the HoM's submissions regarding the availability of third party claims to the complainant and should the HoM consider that this case might warrant having recourse to that scheme, the Panel recommends that the HoM should invite the complainant to submit an application under that scheme.”<sup>42</sup>

In the following decision on the implementation in the case *Zahiti*-case the Panel further noted the following:

“11. In relation to the recommendation to invite the complainant to submit an application to the third liability insurance, the HoM stated noted the following: the incident took place in 2011 and the time-limit to submit an insurance claim is set for two years; the insurance at the time of the incident was in the name of the previous HoM and it appears that the complainant has not suffered any pecuniary damage which could be compensated from the insurance. On that basis, the HoM found it impossible to implement the Panel's recommendation. [...]

24. The Panel notes the HoM's submissions regarding the unavailability of a third party claims insurance in regard to the current case.

25. The Panel accepts that, at this point in time, the HoM, is not any longer in a position to invite the complainant to submit an application to a third party liability insurance. The Panel notes, however, that in the course of its submissions, EULEX had referred to the third party claims insurance as a possible avenue for the complainant to seek relief for the harm done to her. Considering that this remedy was not in fact available to her, the Panel would have preferred that the Mission not refer to that mechanism as it was not in fact applicable to the present case.

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<sup>42</sup> *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 80.



26. Finally, the Panel commends the HoM's efforts to further engage with the complainant in order to seek to address her grievances although these efforts turned out to be unsuccessful in this particular case."<sup>43</sup>

## 2.7. Institutional reforms

Where the Panel found that institutional shortcomings had played a part in or contributed to the violation of a complainant's rights, it made a number of recommendations intended to see to the improvement of the structuring, organising or functioning of the mission. This sort of recommendations was primarily intended to reduce the risk of similar violations occurring again in the future.

In *Maksutaj*, for instance, the Panel recommended that the HoM should undertake all necessary measures to conduct an examination of what steps could be taken by the Office of the Chief EULEX Prosecutor (OCEP) to ensure that cases under the authority of that Office are dealt with in accordance with the provisions of Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and that an effective review mechanism is put in place to ensure that all such cases are dealt with within a reasonable time.<sup>44</sup>

In *Becic*, the Panel recommended that the HoM should ensure that the existing registration and initial assessment procedures for incoming complaints submitted to EULEX, in so far as they can arguably impinge on the exercise of the Mission's executive mandate, are assessed by staff with legal as well as human rights expertise and consequently communicated to relevant units.<sup>45</sup> In the subsequent decision on the implementation on its recommendations, the Panel noted the following:

“3. On 6 January 2015, the Head of Mission (HOM) informed the Panel that he had given due consideration to its recommendations and will implement them. In particular, he indicated that the internal procedures for registration and assessing of incoming complaints and letters would be reviewed and, where necessary, changes would be implemented accordingly.  
[...]

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<sup>43</sup> *Zahiti against EULEX*, 2012-14, 11 November 2014, paras. 11 and 24-26

<sup>44</sup> *Maksutaj against EULEX*, 2014-18, 12 November 2015, Disposition.

<sup>45</sup> *Becić against EULEX*, 2013-03, 12 November 2014, Disposition.

5.He submitted that a central registry of incoming complaints had been established at the early stage of the Missions existence. EULEX also adopted a Standard Operating Procedure (SOP) on communication, EULEX correspondence, internal memoranda and use of e-mail. The SOP was last amended on 29 July 2014.

6.According to the SOP as amended, the Office of the Chief of Staff (CoS) is, as a rule, an entry point for EULEX correspondence, and the Office of CoS is responsible for its processing and coordination with other organisational units as required. All EULEX correspondence warranting processing is registered by the Office of the CoS. When the expertise of other organisational units is required in order to reply to the correspondent, the Office of the CoS is responsible for the processing of the correspondence and will task the unit concerned. Where relevant, other organisational units will be copied in the tasking. The tasked unit will be given a timeframe for completing the input requested.

7.The expertise of the Human Rights and Legal Office is always available for the Office of the CoS when assessing incoming complaints.”

[...]

8.The Panel records its satisfaction that the procedures for handling complaints and other correspondence by EULEX are in place and in line with the Panel’s recommendations.

9.In particular, the Panel notes that the Office of the CoS is obliged to ask for input from other Mission units, whenever their expertise is required for the assessment of incoming complaints, including the Human Rights and Legal Office.

[...]

11.The Panel reiterates further that the Office of the CoS should ensure that, whenever complaints and other correspondence submitted can arguably relate to the exercise of the Mission’s executive mandate, they should in principle be assessed by staff with the requisite legal as well as human rights expertise, as per the Panel’s recommendation.”<sup>46</sup>

In *L.O.*, the Panel made a series of recommendations all intended to improve upon the quality and effectiveness of investigations carried out by organs of the mission

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<sup>46</sup> *Becić against EULEX*, 2013-03, 11 November 2015, para. 3 et seq.

and underlined the need to ensure adequate institutional coordination between the partly-overlapping mandates of these various organs:

“b. The HoM should instruct all organs of the Mission who are in contact with alleged victims of rights violation (or their close relatives) to ensure that in all communications with them, they communicate with the necessary amount of expeditiousness, diligence and care necessary to account for the emotional distress of their interlocutor. If necessary, the HoM should consider adopting guidelines laying down in more details what this general instruction might imply in concrete circumstances.

c. The HoM should ensure that all investigative bodies within the Mission (the SITF and the EULEX Prosecutors) have at their disposal the necessary resources and support to accomplish their mission effectively and in a manner consistent with the effective protection of human rights of all those involved. For that purpose, and if considered necessary, the HoM should request additional resources for these organs so that they may perform their functions promptly, diligently and effectively in all cases.

d. The HoM should seek to clarify the relationship between the Mission and the SITF with a view to ensure the effective protection of rights and guarantee that whichever entity is in charge of the matter provides adequate and sufficient information to the complainant. If necessary, authorisation should be sought from the EU to make public the legal basis regulating the work of the SITF. This would also greatly contribute to bringing increased transparency and accountability to this mechanism.

e. The HoM should impress upon the SITF and the States supporting its activities the importance of such cases being fully and effectively investigated and that wherever suspects are identified that they are being brought to justice promptly and fairly.

f. The HoM should impress upon the competent officials of the SITF the importance and necessity to inform victims of the general aspects of their investigation so as to make them aware of their efforts and commitment to obtaining justice on their behalf.”<sup>47</sup>

In *A,B,C,D against EULEX*, the Panel recommended a variety of measures to improve the manner in which the mission planned and organised its involvement in

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<sup>47</sup> See *L.O. against EULEX*, 2014-32, 11 November 2015, Disposition.

large demonstrations where the risk of violence existed. More specifically, the Panel recommended that :

“iv. Regarding the planning of EULEX’s involvement in the forthcoming celebrations on 28 June 2013, that the HoM ensures that, the competent organs of EULEX–

- a) conduct a risk assessment with a view to establishing and identifying possible sources of risks to the effective protection of the human rights of participants in the forthcoming Vidovdan celebrations on 28 June 2013. For that purpose, that competent EULEX organs refer to and learn lessons from the shortcomings in the Vidovdan operation in June 2012 as recorded in the present decision;
- b) submit to HoM a detailed plan regarding EULEX’s involvement in the forthcoming Vidovdan celebrations on 28 June 2013. Such a plan to include a detailed description of the means and resources necessary to ensure that EULEX officers perform their executive mandate and tasks effectively, in particular as regards the protection and preservation of human rights of participants in these events. This will include, if necessary, the option for them to call upon reinforcements. This plan to also include adequate means of communication to ensure that prompt intervention is possible where necessary to pre-empt or put an end to human rights violations;
- c) ensure adequate coordination between the Mission on the one hand and KP and competent Kosovo authorities on the other so that there is effective protection of the participants in these events. That EULEX also insist that any KP official involved in this matter be made aware that violence towards participants will not be tolerated and that mechanisms of accountability will be in place to punish wrongdoers;
- d) assign a sufficient and adequate number of EULEX officers to this task, commensurate with the importance of those events and in accordance with the likely risk of human rights violations;
- e) provide clear guidelines and instructions to all EULEX police officers involved in this operation, in particular with regard to the circumstances

under which they would be required to intervene to protect the human rights of participants.”<sup>48</sup>

### 3. Follow-up power of the Panel

Article 45*bis* of the Panel’s Rules of Procedure and Evidence provide for the possibility of the Panel following-up on the implementation of its recommendations.<sup>49</sup>

Such a possibility which is provided for under the Rules of the Panel constitutes an important piece of the Panel’s accountability arsenal. In the *Stanisić* case, for example, the Panel has explicitly pointed this out:

“The power and authority of the Panel to follow-up on its decisions and recommendations is provided for in Rule 45 bis of the Panel’s Rules of Procedure [...].”<sup>50</sup>

The ability of the Panel to follow up on the implementation of its own recommendations effectively enables the Panel to keep applying a degree of pressure on the HoM to see to it that established violations of rights are addressed adequately and effectively. A good example of this is the Panel’s conclusions in the case *W*:

“18. As regard the present case, the Panel notes that the HoM has implemented most of its recommendations. In particular, he has requested

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<sup>48</sup> See, in particular, *A,B,C,D against EULEX*, 2012-09 to 2012-12, 20 June 2013, Disposition, point iv.

<sup>49</sup> Panel’s Rules of Procedure and Evidence, Rule 45 *bis*

1. Where the Panel has made recommendations for remedial action, the Panel shall follow up on the implementation of such recommendations by the HOM.
2. The Panel’s decision on the implementation of the recommendations by the HOM will be promptly published on [www.hrrp.eu](http://www.hrrp.eu) in English, Albanian and Serbian.

<sup>50</sup> *Desanka and Stanisić against EULEX*, 2012-22, 29 February 2016, para. 3, and its references to *W against EULEX*, 2011-07, 26 August 2014 and *Becić against EULEX*, 2013-03, 11 November 2015. For further illustration of its application, see *inter alia*, *X and 115 other complainants against EULEX*, 2011-20, 11 November 2015, para. 3; *H&G against EULEX*, 2012-19 & 2012-20, 27 May 2014; *Zahiti against EULEX*, 2012-14, 11 November 2014, para. 4; *H&G against EULEX*, 2012-19 & 2012-20, 27 May 2014; *A,B,C&D against EULEX*, 2012-09 to 2012-12, 5 February 2014; *W. against EULEX*, 2011-07, 25 November 2013, para. 2; *Djeljalj Kazagic v. EULEX*, 2010-01, 23 November 2011 and *Blerim Rudi v. EULEX*, 2010-07, 23 November 2011.

that a risk-assessment be conducted and has taken steps to ensure the dissemination of the Panel's previous decisions in this matter. The HoM has also carefully reviewed the basis and reasons for those decisions and has conducted further relevant consultations. He has consequently taken the view that, on balance, the need for cooperation with Serbian authorities outweighs the implementation of the measures the Panel recommended. On that basis, the HoM has taken the view that he would not follow the Panel's recommendation to request the return and destruction of material provided to the Serbian authorities.

19. The Panel has given careful consideration to the difficulties associated with the fulfilment of the HoM's duties and responsibilities and the challenge that these may cause to meeting the Mission's human rights responsibilities. Having regards thereto and considering the limitations placed upon the Panel's jurisdiction, the Panel concludes that the violation of the complainant's rights has not been entirely remedied by the Mission in this case."<sup>51</sup>

The responsibility to ensure compliance with Panel's recommendations is with the Mission and lies ultimately with the HoM. The HoM cannot therefore delegate this responsibility to others:

"The Panel wishes to observe that, contrary to what the above statement of the HoM appears to suggest, the responsibility to enforce and implement the recommendations of the Panel falls entirely and exclusively to the HoM, not the CPCC nor to Member States. In that sense, whilst the HoM might decide, in a particular case, to seek the assistance of others to implement the recommendations of the Panel, the responsibility for their implementation ultimately remains with the HoM."<sup>52</sup>

The authority of the Panel to seek information from the HoM for that purpose and to issue decisions on implementation of its recommendations is an important aspect of the Panel's efforts to ensure transparency and public scrutiny of the activities of the Mission and of the Panel itself. Although it is the HoM that provides the information on the implementation of the Panel's recommendations, it is the Panel's exclusive

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<sup>51</sup> *W against EULEX*, 2011-07, 26 August 2014, paras. 18-19.

<sup>52</sup> *L.O. against EULEX*, 2014-32, 19 October 2016, para. 8

responsibility and competence to determine whether the HoM's response is in compliance with the Panel's recommendations:

“[C]ontrary to the apparent assumption of the HoM the responsibility to decide whether the recommendations of the Panel have been implemented or not rests with the Panel. The Panel must note in this context that whilst its recommendations are not legally binding, it is essential to the credibility and legitimacy of EULEX, as a rule of law mission, that it should decisively and credibly demonstrate its commitment to the effective enforcement of human rights by ensuring that its actions are at all times consistent with those standards. In each case, the recommendations of the Panel are intended to ensure that this is the case, in the context and with due regard being given to the circumstances of each individual case, so that the adoption of those recommendations by the HoM would in all cases make a positive contribution to the effective protection of human rights by the Mission.”<sup>53</sup>

If satisfied by the response provided by the HoM, the Panel can close the examination of the case.<sup>54</sup> Where, in contrast, the Panel is not satisfied with the response it has received to its follow-up enquiry, it has the power to follow-up on its follow-up. The Panel has, for example, decided to “[...] invite HoM to once again consider implementing the recommendations of the Panel in light of the present decision by issuing the necessary instructions and to inform the Panel accordingly by 30 December 2013.”<sup>55</sup>

In some instances, the Panel has determined that implementation of its recommendations had been partial only. This is what the Panel did in the case H and G.<sup>56</sup> In such cases, the Panel could either close the examination of the case or decide to keep the matter open for further follow-up in relation to the non-implemented part of its recommendations. If the Panel chooses to keep the matter

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<sup>53</sup> *L.O. against EULEX*, 2014-32, 19 October 2016, para. 10.

<sup>54</sup> See e.g. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 7 March 2017, Disposition; *L.O. against EULEX*, 2014-32, 7 March 2017, Disposition; *Blerim Rudi against EULEX*, 2010-07, 8 June 2011, Disposition.

<sup>55</sup> *W against EULEX*, 2011-07, 26 November 2013, Disposition.

<sup>56</sup> *H & G against EULEX*, 2012-19 & 2012-20, 27 May 2014, Disposition: “[The Panel] [d]eclares that the HoM has exercised his functions diligently and effectively in the implementation of a majority of the Panel's recommendations. The Panel further invites the Head of Mission to reconsider his position as regards the possibility of acknowledging violations of the complainants' rights where the Panel makes recommendations to that effect.”

open, it can effectively keep the matter alive for as long as is considered necessary to secure a satisfactory response from the HoM and to guarantee a sufficient level of accountability on the part of the Mission. This is exactly what the Panel chose to do in the case of *X and 115 other complainants* when it said the following:

“18. In view of the above, the Panel considers that the steps taken so far by the Mission have not been such as to ensure that the right of the complainants to an effective remedy is being effectively protected. Whilst the Panel needs not decide the matter at this point, it notes that the apparent failure of the Kosovo authorities to diligently and effectively investigate the matter might be regarded, for the purpose of Article 13 of the Convention, as “extraordinary circumstances” (Article 7A) justifying the Mission taking over the responsibility over that case.

19. The Panel therefore invites the Mission to continue liaising with the competent Kosovo authorities with a view to following up on the progress of this case.

20. The Panel further invites the Head of the Mission to provide information on the manner in which the notion of “extraordinary circumstances” within the meaning of the said Article 7 A as a decisive criterion for cases being taken over by EULEX prosecuting authorities is interpreted in practice.”<sup>57</sup>

In its evaluation of the HoM’s compliance with the Panel’s recommendations, the Panel’s task is limited to assessing the compatibility of the HoM’s decision with relevant human rights standards. The Panel does not have the power or competence to assess the political and/or diplomatic merit of the HoM’s decision.<sup>58</sup>

#### **4. Power to recommend interim or provisional measures**

Pursuant to Rule 22 of its Rules of Procedure, the Panel is permitted to propose to the HoM that he/she adopt interim measures where this is considered necessary in

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<sup>57</sup> *X and 115 other complainants against EULEX*, 2011-20, 11 November 2015, paras. 18-20. See also *Zahiti against EULEX*, 2012-14, 11 November 2014, Disposition:

“Regarding those recommendations that have not been implemented, the Panel *invites* the Head of Mission once again to reconsider his position as regard the possibility of acknowledging the violation of the complainants’ rights by the Mission and consider lifting the EULEX staff member’s immunity.”

<sup>58</sup> *W against EULEX*, 2011-07, 26 August 2014, para. 17.



the interests of the proper conduct of the proceedings before it, in particular to preserve the rights of a complainant where they are thought to be at risk.<sup>59</sup> This legal basis is adopted by the Panel in the exercise of its regulatory authority. In that sense, the power to recommend interim or provisional measures is self-granted. However, it is also essential to the effective functioning of the Panel. An example of this is the recommendations for provisional measures in the case *W*, there the Panel –

“PROPOSES TO THE HEAD OF MISSION THAT THE FOLLOWING INTERIM MEASURES BE TAKEN PURSUANT TO RULE 22 OF THE PANEL’S RULES OF PROCEDURE:

1. EULEX Prosecutors in charge of this case should be invited to request their Serbian counterparts to return copies of any document provided to them which bears the name or refers to the complainant. This would include the two statements given by the complainant to EULEX.
2. EULEX Prosecutors in charge of the case should be invited to request their Serbian counterparts –
  - i. To destroy any copy made of the above-mentioned documents and to redact the name and any information in other documents that could identify the complainant; and
  - ii. To give notice to EULEX Prosecutors that this has been done, and
  - iii. To not disclose to any suspect or defendant any information provided by the complainant to EULEX.”<sup>60</sup>

Like the other powers of the Panel, its authority to issue interim measures comes in the form of recommendations. These measures are therefore not binding on the HoM. Using his discretionary power, as in the *W* case, the HoM can opt to ignore the Panel’s recommendations for interim measures. This might in turn lead the Panel to address such a failure where it impacts or prejudices the effective protection of rights by the Mission:

“22.As noted above, in its Admissibility Decision, the Panel had invited the HoM to adopt a number of interim measures pursuant to Article 22 of the Rules. In his submissions of 8 January 2013, the HoM indicated that, in

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<sup>59</sup> Panel’s Rules of Procedure and Evidence, Rule 22. Interim measures:

1. The Panel or, where appropriate, its Chairperson may, at the request of a complainant, or at its own discretion, propose to the HOM that an interim measure it considers necessary be adopted in the interests of the proper conduct of the proceedings before it. The HOM will take a decision.
2. The Panel may request information from the complainant or other persons on any matter connected with the implementation of any interim measure decided by the HOM.

<sup>60</sup> *W against EULEX*, 2011-07, 5 October 2012, Disposition

EULEX's view, the interim measures would have no practical effect as any harm done by the disclosure of this information had already occurred and he declined on that basis to adopt the proposed interim measures.

23. In doing so, EULEX appears to have misunderstood the nature and gravity of the interference caused to the complainant's rights and might have underestimated the need to act urgently to prevent greater harm. As discussed further below, the prejudice caused to the complainant by the disclosure of sensitive information is real, serious and ongoing. Every copy of his statements made and distributed could find its way into the "wrong hands". The Panel's decision to invite the HoM to adopt interim measures should have provided a clear indication of the need to act promptly to avoid harm materializing. Interim measures have a protective purpose, they aim to prevent the emergence of potential human rights violations or, alternatively, address existing situations that are likely to have a negative impact on the human rights of the complainant. Based on the OPLAN and its accountability concept, which obliges the Mission to ensure that internationally recognized standards in regard of human rights are respected, the Panel has a responsibility to recommend such measures, when deemed essential. EULEX's failure to act decisively and expeditiously to reduce the risk caused to the complainant by the disclosure of this information will be taken into consideration in relation to the Panel's findings."<sup>61</sup>

## **5. Power of the Panel to re-examine one of its decisions**

Pursuant to its Rules of Procedure, the Panel also has the power to re-examine a decision "in the event of the discovery of a fact, which might by its nature have a decisive influence on the admissibility of a complaint and which, when the decision on the inadmissibility was delivered, was unknown to the Panel and could not reasonably have been known to the Complainant".<sup>62</sup> The Panel has explained this:

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<sup>61</sup> *W against EULEX*, 2011-07, 10 April 2013, paras. 22-23.

<sup>62</sup> Article 42 of the Panel's Rules of Procedure and Evidence. The ability of a complainant to request such a review is limited to a period of one month after the Complainant became aware of the fact (Article 42(1)). Pursuant to Article 42(2), such an application will specify the decision on the inadmissibility concerned and it must contain the necessary information to show that the conditions laid down in paragraph 1 have been complied with. The request must also be accompanied by copies of all supporting documentation. For illustrations of the application of this rule, see e.g., *Shaban Kadriu against EULEX*, 2013-27, 10 November 2014; *Y against EULEX*, 2011-28, 15 January 2013, paras. 5-10.

“The Panel notes that the re-examination procedure provided for in Rule 42 is intended to provide a procedural mechanism whereby a complainant can seek re-examination of an inadmissibility decision only where a new fact which he or she could not reasonably have known of at the time of the initial complaint would have had a decisive influence on the Panel’s findings [...]”.<sup>63</sup>

To meet the requisite threshold, an applicant requesting re-examination would have to establish that the new fact would have had a material impact on the Panel’s initial decision.<sup>64</sup> A mere disagreement with the Panel’s view does not suffice:

“5.The Panel notes that the re-examination procedure provided for in Rule 42 is intended to provide a procedural mechanism whereby a complainant can seek re-examination of an inadmissibility decision only where a new fact which he or she could not reasonably have known of at the time of the initial complaint would have had a decisive influence on the Panel’s findings [...]”.

6.In the present case, the complainant does not present any new evidence as the documents presented by the complainant were sent by her together with her initial complaint. She merely disagrees with the Panel’s qualification of her complaint and its decision. The documents attached to the request were duly examined by the Panel and taken into consideration in its decision on inadmissibility.

7.The Panel notes in passing that, in any event, the documents in question did not have decisive influence on the admissibility of the complaint. The complaint, relating to the conduct of courts during judicial proceedings before Kosovo courts, was outside of the Panel’s jurisdiction as formulated in Rule 25 of its Rules of Procedure and the OPLAN of EULEX Kosovo. It has no competence to evaluate either administrative (e.g. handling of documents) or judicial aspects of the work of Kosovo courts [...]”<sup>65</sup>

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<sup>63</sup> *Tomë Krasniqi against EULEX*, 2014-04, 10 November 2014, para. 10, and its reference to *Y against EULEX*, 2011-28, paras. 7-8

<sup>64</sup> *Y against EULEX*, 2011-28, 15 January 2013, para. 13. At paragraph 9 of the same decision, the Panel referred to a “new fact which could have had a *decisive influence* on the Panel’s decision”.

<sup>65</sup> See e.g. *J. against EULEX*, 2013-04, 7 April 2014, paras. 5-7, and its references to *Y against EULEX*, 2011-28, 15 January 2013, paras. 7-8; *Gani Zeka against EULEX*, 2012-02; 4 October 2012, para. 21; *Z against EULEX*, 2012-06, 10 April 2013, para. 31.

This procedure is therefore not an opportunity for an unsuccessful complainant to re-litigate the case or a mechanism to advance new arguments that were not part of his initial complaint.<sup>66</sup>

New evidence going to prove the same facts as were relevant to the Panel's original decision would not in principle provide a sufficient basis for a re-examination. The Panel reserved its position regarding a case where new evidence would demonstrate that the Panel committed a factual error which impacted upon its decision.<sup>67</sup>

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<sup>66</sup> *Y against EULEX*, 2011-28, 15 January 2013, para. 7.

<sup>67</sup> *Y against EULEX*, 2011-28, 15 January 2013, para. 9.

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