



Human Rights Review Panel

HUMAN RIGHTS REVIEW PANEL

**HUMAN RIGHTS ACCOUNTABILITY IN THE CONTEXT OF
EULEX KOSOVO'S RULE OF LAW MISSION –
INTERIM ASSESSMENT**

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I. EXECUTIVE SUMMARY

The creation of human rights accountability mechanisms within international missions was a major step forward and improvement in the way in which such missions function. This sort of mechanism has the capacity to positively affect the way in which international missions perform and fulfil their responsibilities, setting up basic benchmarks for its staff and officials and creating a sense of accountability around their activities. Human rights accountability mechanisms such as the *Human Rights Review Panel* (“HRRP” or “Panel”) also demonstrate strong commitment to upholding the principles and values that underlie these missions’ mandate. This was particularly true of EULEX Kosovo, which was conceived as a ‘rule of law’ mission.

To be effective, human rights accountability mechanisms must be properly and adequately manned by competent and qualified individuals. Solid human rights competence within the Mission itself is also important and good coordination between the mechanism and the mission is essential to the overall effort to ensure effective protection of rights in such context.

Assessed against the above, the work of the Panel may be said to have been *generally* successful. It has contributed to ensuring compliance with basic human rights standards by the Mission in relation to a variety of aspects of the Mission’s executive mandate. It has sent a message of accountability to both the Mission and its staff whilst at the same time signalling that the Mission was accountable to the rule of law. It has also sent that same message to those affected by the work of the Mission.

In so doing, the Panel may be said to have provided a degree of justice and accountability for victims of human rights violations that might otherwise have had nowhere else to go (for statistics on caseload, see: <http://hrrp.eu/Statistics.php>).

Other positive aspects of the work of the Panel should be highlighted here. First, in fulfilling its mission, the Panel has also developed a valuable and detailed body of jurisprudence, which it hopes will irrigate the efforts of other human rights accountability mechanisms (<http://hrrp.eu/jurisprudence.php>; and http://hrrp.eu/Case-Law_Notes.php). The Panel is one of the first quasi-judicial ventures that seeks to apply universal standards of human rights to a legal entity other than a state; as such, its jurisprudence is ground-breaking and should be of

value to any future venture seeking to hold international missions and international organisations accountability for their violations of human rights (<http://hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf>).

The Panel has also developed its own complaint procedure, which again could provide inspiration for any future such mechanism (<http://hrrp.eu/filing%20complaints.php>; and <http://hrrp.eu/docs/HRRP%20Complaint%20form%20-%20English.pdf>). It has adopted and amended its Rules of Procedure ([http://hrrp.eu/docs/RULES%20OF%20PROCEDURE%20HRRP%20\(15%20January%2019\).pdf](http://hrrp.eu/docs/RULES%20OF%20PROCEDURE%20HRRP%20(15%20January%2019).pdf)), which regulate various aspects of its procedure and which could set an effective model for future accountability mechanisms. These have provided a reliable and flexible regime of procedure adapted to the particular circumstances of an international mission operating in a post-conflict environment. This regime and its procedural practice could serve as example for future such mechanisms.

Over the years, the Panel also engaged in important *Outreach* activities (<http://hrrp.eu/Outreach.php>) with a view to making the Panel's work and existence better known among relevant communities. Its efforts in that regard were not always successful although a growing number of people learnt of the Panel over the years. Limitations upon its mandate and powers meant, however, that its relevance could only go as far as those powers.

Overall, the Panel considers that its structure and mandate were generally adequate to the fulfilment of its responsibilities although consideration should be given to certain improvements, including giving future such mechanisms the authority to issue binding decisions and the ability to order or recommend financial reparation; and expanding its competence beyond the “executive” aspects of the Mission’s mandate to cover all of its activities.

Through its work, the Panel has set important precedents both institutionally and legally. It has demonstrated that a mission with executive authority could live with and benefited from the existence of an accountability mechanism and that this did not have any prejudicial impact over its operational effectiveness. Instead, it is quite apparent from a number of cases – including those pertaining to the annual *Vidovdan* commemorations – that the Panel helped the Mission

act in a manner consistent with expected standards of human rights and thus contributed positively to its overall effectiveness and credibility.

The Panel also helped build or solidify a core competence of human rights *within* the Mission, which collaborated closely with and was instrumental to the effective functioning of the Panel. Finally, the Panel has contributed important human rights precedents that are applicable to non-state actors such as a rule of law mission with executive powers. These are major achievements that should be valued and nurtured.

The work of the Panel has not, however, been all about success and achievements. Firstly, the narrowness of its mandate has limited the extent to which it could make itself relevant to the Mission and affected communities. Secondly, its inability to issue binding orders and order financial compensation when those would have been adequate has limited the Panel's ability to adopt all necessary and adequate means to ensure effective protection and remedying from violations of rights. Thirdly, the effectiveness of the accountability mechanism depends not just on the work of the Panel but on the implementation by the Head of Mission of its recommendations. The Panel has observed that over the course of time the Mission's efforts to comply with all of its recommendations has become increasingly challenging. The Mission has, for instance, refused to recognise the violations it has committed, has failed to engage with complainants, has failed to query with local authorities what was happening with cases that the Mission itself had failed to investigate, and failed to comply with a whole range of recommendations put forth by the Panel. As a result, justice has in many cases been only partial. Finally, the Mission has increasingly sought to use its new, reduced, mandate as justification for its failures to do more to remedy the violations that it had committed at an earlier time. The Panel has given notice of the fact that it does not share the Mission's understanding of the limitations of its current mandate. It has also expressed its concern that the Mission's interpretation of that mandate might not allow the Mission to comply with the human rights obligations that are still binding on the Mission. And from the point of view of complainants, this creates the impression that yet another international mission has failed them and failed to fulfil its promises. This has perhaps been nowhere more apparent than in relation to the 'missing persons/enforced disappearance' cases that have come before the Panel and which, for almost all of them have never been adequately investigated.

The present Interim Report comes at a time when the mandate of the Mission has changed, affecting also the scope of the cases coming to the Panel. It is issued at this point in time so that the Mission is still afforded the opportunity to change its approach to its human rights obligations in such a way as to make it more effective in protecting, guaranteeing and providing adequate remedies for those whose rights have been violated by the Mission.

The Panel hopes that the present Report will create a sense of urgency within the Mission to do better, to do more and to fully exercise what is left of its mandate to fulfil its commitment to human rights standards. The Panel also hopes that States will take notice and demand more and better of the Mission when it comes to the fulfilment of its human rights obligations.

II. INTRODUCTION TO THE REPORT

Objectives of the Report

The objectives of the present Report are principally threefold. Firstly, this Report is intended to provide a snapshot of the work of the Panel thus far so as to leave behind a detailed accounting of its work. This element of ‘memorialisation’ or ‘legacy’ is important to ensuring a degree of transparency and accountability.

Secondly, the present document is intended to serve as guiding for the creation of any future accountability mechanism overseeing the activities of an EU – or UN; OSCE; *etc* – Mission. The value of the Panel’s experience is indeed not limited to Kosovo, or to the EU or to a mission exercising an executive mandate. Instead, human rights accountability should form an integral part of *any* international mission operating on the territory of a state where its activities and those of its organs could negatively impact the fundamental rights of individuals.

Thirdly, as noted above, it is hope that the issuing of such a Report at a time when both the Mission and the Panel are still in existence might afford the former an opportunity to improve upon aspects of its performance that the Panel has found to be wanting.

For that purpose, the Panel will describe here important aspects of its work and highlight some of the most important lessons learnt arising from its activities.

The Report covers many relevant aspects of the Panel’s work, from its legal basis to its inner workings; from specificities of its mandate to the concrete jurisprudential application of human rights standards in the context of a rule of law mission exercising executive functions in a post-conflict situation. As such, the Report provides a snapshot of the life and work of the Panel over more than a decade of existence.

The review has been conducted with a necessarily critical eye in order to ensure that failings and shortcomings and not just successes are duly identified and so that necessary improvements can be made in future such ventures. The Report therefore contains both *positive* and *negative* lessons – both of which are of value to ensuring that any such mechanism that will be created in the future operates as effectively as possible.

This Report also touches upon a number of aspects of the functioning of the Mission itself insofar as those had an impact on the work of the Panel and upon the effective protection of human rights in the particular context in which that Mission operated.

The present Report is intended to be of relevance to a variety of readerships:

1. EULEX management, in particular, the Head of Mission, and the Mission's staff;
2. CPCC and EEAS; Member States and Third Contributing States (in Pristina, capital, and Brussels), which are interested in learning from the Panel's experience with a view to ensure the effectiveness of future such mechanisms.
3. Kosovo authorities; Kosovo civil society; NGOs/INGOs following Kosovo/Western Balkans; IGO (EU) accountability, human rights, transitional justice issues, or specific questions, such as missing persons; other intergovernmental organizations involved in, or contemplating, civilian crisis management or support to rule of law institutions – all of which have an interest in building solid rule of law institutions that are based, *inter alia*, on the effective protection of human rights.
4. Academics and scholars, in particular in the field of human rights, are also likely to find the work and legacy of the Panel of interest to continue developing normative models suited to the effective protection of human rights by non-State actors, including legal entities.

Methodology

The Panel has prepared this Report based on its own collective experience and the various cases that have come before it. Its findings have been further nourished by discussions and meetings with relevant stakeholders.

The Panel also undertook to analysis its performance through consideration of collected data regarding cases that had come before it. A summary of its findings on these issues is distilled all through the present Report.

The Panel also considered that its analysis would be aided and enriched by the views of those with whom it has the most direct contacts, namely, complainants and the Mission. The Panel proceedings are adversarial in nature, and the Panel felt that it was important for the purpose of preparing the following Report to solicit balanced feedback from the parties to the proceedings so as to benefit from the views of all those concerned.

Efforts to reach out to complainants and relevant civil society actors is ongoing and will be part of what the Panel hopes will be its final report.

The Panel also reached out to the Mission to solicit its feedback. For that purpose, the Panel wrote to the Head of Mission on 14 February 2020, and again on 5 June 2020, seeking permission to interview relevant staff members and asking the Head of Mission and to lift confidentiality for that limited purpose. Unfortunately, by letter of 24 June 2020, the Head of Mission declined to authorise staff – present or past – to take part in such a process.

The Panel regrets the position taken, which deprived the Panel of an opportunity to collect precious information from staff regarding the functioning of the Panel and its effect onto the Mission. This was, in the Panel’s view, a missed opportunity for the Mission to provide important insights on a human rights accountability mechanism from the perspective of a rule of law mission. In the Panel’s view, it was also a missed opportunity to demonstrate the Mission’s commitment to transparency in regards to its work and functioning.

III. ESTABLISHMENT OF THE HUMAN RIGHTS REVIEW PANEL

The Human Rights Review Panel was established by the European Union on 29 October 2009 with a mandate to review complaints alleging violations of human rights attributable to EULEX-Kosovo in the conduct of its executive mandate. The Panel was set up as an independent, external, transparent accountability body, which was to perform its functions with impartiality and integrity. In that regard, it complemented the general accountability system of EULEX, which includes the EULEX Internal Investigation Unit and the EULEX Third Party Liability Insurance Scheme.

The Joint Action, in its establishment of the European Union Rule of Law Mission in Kosovo, outlined the EULEX Mission Statement, *inter alia*, with a reference to its executive functions as follows:

“EULEX Kosovo shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police force and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices. EULEX Kosovo, in full cooperation with the European Commission Assistance Programs, shall fulfill its mandate through monitoring, mentoring and advising, while retaining certain executive functions”.¹

In order to fulfil the objectives of the EULEX Mission Statement, the Joint Action made explicit the Mission’s responsibility to ensure that acted in the fulfilment of its executive functions in a manner consistent with internationally recognised standards of human rights.²

Prior to the decision of the European Council to establish the Panel, *Human Rights Watch*, *Amnesty International* and the *Norwegian Helsinki Committee* had recommended in a joint press release of 10 March 2008 that the proposed European Union mission in Kosovo ought to

¹ Council Joint Action 2008/124/CFSP of 4 February 2008, as amended by Council Joint Action 2009/445/CFSP of 9 June 2009, Article 2 (i).

² *ibid*, Article 3 (i).

be subject to much greater scrutiny and accountability than its predecessor, the United Nations Mission in Kosovo (UNMIK):

“If the EU wants to assist in building respect for human rights and the rule of law in Kosovo, it needs to lead by example. That means that its mission accepts serious independent scrutiny of its human rights record from day one”.³

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

“The EU’s Rule of Law Mission, EULEX could also consider the advantages of setting up an independent (human rights) accountability mechanism. EULEX does have the possibility to exert some executive powers, even if they will not be used very often. There are a number of possibilities for accountability mechanisms for EULEX. One possibility is that EULEX could take on the model of the current (UNMIK) Human Rights Advisory Panel; another is that complaints could be dealt with by the Ombudsperson’s Institution. A third option is that EULEX could create its own independent mechanism”.⁴

The Commissioner elaborated on this point in a press release of 8 June 2009:

“No one, especially an international organization, is above the law … when international organizations exercise executive and legislative control as a surrogate state they must be bound by the same checks and balances as we require from a democratic government”.⁵

Ultimately, the European Union created its own independent accountability mechanism for the EULEX Kosovo mission by establishing the Human Rights Review Panel on 29 October 2009. The Accountability Concept, in combination with the Council Joint Action 3, made it clear that EULEX should ensure respect for internationally recognised human right standards in the

³ Joint media release on Kosovo, Human Rights Watch, Amnesty International and the Norwegian Helsinki Committee, Brussels, 10 March, 2008.

⁴ Report of the Council of Europe Commissioner for Human Rights Special Mission to Kosovo 23-27 March, 2009, para 80, also available at the Commissioner’s website at www.commissioner.coe.int.

⁵ Press release-450 (2009), 8 June, 2009, Office of the Commissioner for Human Rights, also available at the Commissioner’s website at www.commissioner.coe.int.

performance of its executive responsibilities and should treat them as a guiding principle for the performance of those responsibilities:

“[...] it is the obligation of EULEX under the Council Joint Action to ensure that its activities should be carried out in compliance with international standards of human rights [...]. EULEX is therefore required to intervene to protect human rights wherever it knows or ought to have known at the time of a real and immediate risk that a violation might occur if it did not intervene [...]. The nature of the response should be appropriate to the circumstances and, in turn, depend on what right or rights were at stake and on the seriousness of the threats to those rights [...].”⁶

The Panel echoed the tenor of this provision in its own case law:

“The Panel accepts that given the limited executive mandate of EULEX it cannot be held responsible for failing to guarantee an effective protection of human rights as such in Kosovo and that an impossible or disproportionate burden as regards policing cannot be imposed on the Mission. The Panel notes, however, that it is the obligation of EULEX under the Council Joint Action to ensure that its activities should be carried out in compliance with international standards of human rights [...]. EULEX would therefore be required to intervene to protect human rights wherever it knows or ought to have known at the time of a real and immediate risk that a violation might occur if it did not intervene [...]. The nature of the response should be appropriate to the circumstances and, in turn, depend on what right or rights were at stake and on the seriousness of the threats to those rights [...].”⁷

The universal human rights standards to which the Joint Action referred include the 1948 Universal Declaration on Human Rights, the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols (also known as the European Convention of Human Rights), the International Covenant on Civil and Political Rights and

⁶ H & G against EULEX, 2012-19 & 2012-20, 30 September 2013, para. 42, and its references to Article 3 (i), Council Joint Action 2008/124/CFSP as well as para. 36 of the cited decision.

⁷ A,B,C,D against EULEX, 2012-09 to 2012-12, 20 June 2013, para. 50, and its references to Article 3 (i), Council Joint Action 2008/124/CFSP as well as para. 36 of the cited decision; Dordević v. Croatia, Application no. 41526/10, Judgment of 24 July 2012, paras. 138-139 and references cited therein; Osman v. the United Kingdom, Application no 87/1997/871/1083, Judgment of 28 October 1998, para. 16; Kahrs against EULEX, 2012-16, 10 April 2013, para. 31.

Protocols, the International Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Racial Discrimination of 21 December 1965, the Convention on Elimination of All Forms of Discrimination Against Women of 17 December 1979, the 1984 Convention Against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment as well as the International Convention on the Rights of the Child of 20 December 1989. Most prominent among those instruments and most relevant to the work of the Panel is the European Convention of Human Rights. The prominence of the European Convention in this particular context is easily comprehensible. First, at the time when the Panel operated, Kosovo was aspiring to join various European legal institutions, including the Council of Europe and its Convention system. Secondly, the European Convention of Human Rights is already an integral part of the Kosovo legal system through the Kosovo Constitution, which expressly recognizes its binding nature as well as its applicability and primacy over other Kosovo laws.⁸

The creation of such a human rights accountability mechanism within and for the purpose of the EULEX Mission was intended to serve a number of goals and purposes :

1. First, and most importantly, this was intended to ensure that the Mission, its organs and its staff would be subject to the same basic, minimum, standards of human rights as would be applicable and relevant to their conduct in any developed democratic state.
2. Second, it was considered that respect for and compliance with such standards would also contribute to the overall effectiveness of the Mission; it would indeed provide a common normative basis that would help neutralise certain differences of approach and understanding regarding the performance of the Mission's responsibilities.
3. Third, the Mission's commitment to uphold those standards, and the Panel's oversight, should have helped the Mission set an example of the importance of the rule of law in the fulfillment of executive function. As such, it should have helped create in Kosovo a culture of respect for and compliance with the rule of law and human rights, in particular inside local institutions. Such a purpose is particularly important in post-conflict situations where respect for the rule of law has often been negatively affected by the conflict and where investigative and judicial institutions are generally weak. This endeavor is far from complete and the Panel (as well as the Mission itself) appear to

⁸ See, Constitution of the Republic of Kosovo, Article 22.

have had only limited success in building a strong culture of respect for the rule of law at institutional level.

4. Fourth, the existence of the Panel would provide a venue in which claimants could seek access to a remedy where no or few alternatives existed. This would in turn make Mission staff aware of the possibility that their actions could become the subject of complaints if they violate the human rights of third parties. Outreach activities directed relevant local communities and training of Mission staff also helped create greater awareness of the Mission's human rights responsibilities among its staff and those affected by the work of the Mission.

The Members of the Panel were formally appointed by the Acting Head of Mission on 4 May 2010. Panel Members were selected based on their expertise in the field of human rights and other relevant fields of law; they generally had significant judicial or quasi-judicial experience.⁹

On 9 June 2010, the Panel adopted its Rules of Procedure and became fully operational on that date. To assist with the performance of the work of the Panel, a Secretariat was set up. Its staff fulfilled a variety of support functions, from legal research to administrative tasks.

⁹ See generally : <https://hrrp.eu/member-of-panel.php>.

IV. MANDATE OF THE PANEL

1. 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.¹⁰

These standards of human rights, which the Mission was expected to abide by, reflect minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.¹¹

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 could 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.

¹⁰ 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.

¹¹ 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.

2.2 *Ratione materiae*

2.2.1 *Acts and omissions attributable to EULEX resulting in or contributing to rights violation*

The Panel was competent only in relation to violations of rights that are attributable to EULEX. The Panel was not competent therefore to rule on conduct attributable to third parties, such as UNMIK,¹² Kosovo authorities¹³ or third parties.

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

The Panel’s mandate did not extend to all activities of the Mission. In particular, the Panel’s jurisdiction was limited by the OPLAN to the “executive” part of EULEX’s mandate.¹⁴ Substantively, the mandate of EULEX therefore pertained to the performance of certain “executive” functions *in the field of justice, police and customs*.¹⁵ This mandate set 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.”¹⁶

¹² 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.

¹³ *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).

¹⁴ 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>).

¹⁵ 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.

¹⁶ *Zahiti against EULEX*, 2012-14, 4 February 2014, pars 52 *et seq.*

This means, for instance, that employment matters, internal disciplinary and tax matters fell beyond the scope of EULEX's executive mandate.¹⁷ For further discussion of this matter, see HRRP's Case-Law Note on Principles of Human Rights Accountability of a Rule of Law Mission.¹⁸

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 did not have executive competence over the activities of the local judiciary – whether judicial or administrative in nature. It followed 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 clarified this issue by referring to the Rule 25 paragraph of its Rules of procedure and noting that:

“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.”¹⁹

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

¹⁷ See Case-Law Note on Principles of Human Rights Accountability of a Rule of Law Mission, pp 16 *et seq.*

¹⁸ See <https://hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf>.

¹⁹ *Avdyl Smajli against EULEX*, 2011-16, 23 November 2011, par 14. See also *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, par 18.

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 [...]”²⁰

In keeping with the above, the Panel noted that it could not evaluate complaints that pertain, for instance, to the length of judicial proceedings.²¹ Nor, the Panel made clear, was it competent to revise or revisit a decision of the judicial authority.²²

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.²³ The same principle was applied even when a particular judicial bench consisted *entirely* of EULEX judges.²⁴ To summarise, the Panel had 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 lacked competence over activities other than those coming within the “executive” actions of the EULEX judges, when it noted that:

“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

²⁰ 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.

²¹ *Slobodan Martinovic against EULEX*, 2011-13, 23 November 2011, par 15.

²² *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.

²³ *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; *Shaban Syla against EULEX*, 2015-10, 1 March 2016, par 14.

²⁴ *Samedin Smajli against EULEX*, 2011-15, 23 November 2011, par 16.

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 [...]”²⁵

The Panel has made it clear, however, that it has interpreted the notion of ‘executive’ mandate broadly and have applied it, for instance, to witness-protection activities which the Mission claimed fell outside its ‘executive mandate’.²⁶

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 [...].”²⁷ 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*, 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

²⁵ *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.

²⁶ See *G.T. against EULEX*, 2019-01, 11 December 2020.

²⁷ *Milica Radunovic against EULEX*, 2014-02, 12 November 2015, par 17. See also *Mazlam Ibrahim against EULEX*, 2014-05, 21 April 2015, par 24.

*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.”*²⁸

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.²⁹

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 fell within the ambit of the Panel’s mandate.³⁰ The Panel 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.”*³¹

²⁸ *Tomë Krasniqi against EULEX*, 2014-04, 27 May 2014, paras. 15-16.

²⁹ For an illustration, see *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, Judgment of 2001, paras. 91-93; and *Kreuz v. Poland*, Application no. 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.

³⁰ *Y. against EULEX*, 2011-28, 15 November 2012, para. 35, and its references to *Lafit Hajan against EULEX*, 2010-06, 14 September 2011.

³¹ *Novica Trajkovic against EULEX*, 2011-12, 23 November 2011, para. 12

The Panel’s jurisdiction covered 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.³²

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 – came within the scope of the Panel’s reviewing authority. As outlined above, the Panel 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.”³³

This is because investigative and initial prosecutorial activities are non-judicial in character.³⁴ In another case, the Panel made a thorough and explicit assessment of the nature of investigations and prosecutorial activities in relation to its mandate.³⁵

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 noted the following:

³² *Ibid.* See also further references below.

³³ *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 against EULEX*, 2013-03, 1 July 2014, para. 45.

³⁴ *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 against EULEX*, 2013-03, 1 July 2014, para. 46; *W.D. against EULEX*, 2015-13, 1 March 2016, para. 18.

³⁵ *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), para 125; *Niedbala 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.

“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.”³⁶

The fact that the investigative or prosecutorial actions were subject to judicial review by the Kosovo judiciary did 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.³⁷ 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.³⁸ 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 clarified this when it stated the following:

³⁶ *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. For an illustration, see also , *Maksutaj against EULEX*, 2014-18, 12 November 2015, paras. 38-40; *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.

³⁷ *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;

³⁸ See e.g. *W.D. against EULEX*, 2015-13, 1 March 2016, paras. 18-19.

“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.”³⁹

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.⁴⁰ 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.⁴¹ Similarly, the refusal of EULEX prosecutor to take over the responsibility of a case could trigger the responsibility of the mission.⁴²

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.⁴³

³⁹ *Kazagic Djeljalj against EULEX*, 2010-01, 8 April 2011, paras. 73 -76.

⁴⁰ See e.g. *Milazim Blakgori against EULEX*, 2011-06, 23 November 2011, para. 20.

⁴¹ *Goran Becic against 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. For an illustration of a case where a failure on the part of the Mission to act involved the violation of the complainant’s rights, see *Goran Becić against EULEX*, 2013-03, 12 November 2014, paras. 58-60.

⁴² *Mykereme Hoxha against EULEX*, 2011-18 23 November 2011, paras. 23-24.

⁴³ *I. against EULEX*, 2013-01, 27 November 2013, paras. 14-15.

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.⁴⁴

“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.”⁴⁵

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:

⁴⁴ 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.

⁴⁵ *B.Y. against EULEX*, 2014-06, 27 May 2014, pars 14 et seq

“[T]he 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.”⁴⁶

For the Panel to be competent to address such a matter, the complainant therefore had to 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.⁴⁷ 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.⁴⁸ 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.⁴⁹

⁴⁶ *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.

⁴⁷ See e.g. *Z against EULEX*, 2012-06, 10 April 2013, pars 43-44.

⁴⁸ *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.* 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. See also *Y.B. against EULEX*, Case no 2014-37, Decision and Findings, 19 October 2016, par 27.

⁴⁹ *Y.B. against EULEX*, Case no 2014-37, Decision and Findings, 19 October 2016, par 29.

2.2.5 Private disputes

The Panel did not have reviewing authority over private disputes.⁵⁰

2.2.6 No competence over violations against EULEX personnel

The Panel was not competent to deal with alleged violations of rights committed against EULEX personnel.⁵¹ Thus, complaints over matters such as recruitment procedures fall beyond the scope of the Panel’s competence.⁵²

2.3 Ratione temporis

2.3.1 Competence starting on 9 December 2008

Ratione temporis, the jurisdiction of the Panel commenced on 9 December 2008, the date when EULEX became operational. Accordingly, the Panel’s temporal jurisdiction commenced at that point and covers its activities since that time.⁵³ Allegations of violations of rights committed prior to that date did not therefore come within the competence of the Panel.⁵⁴

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

This did not mean, however, that events that took place before the inception of the Mission are necessarily of no relevance to the Panel. A determination was made in each case 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.

⁵⁰ 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.

⁵¹ 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.

⁵² 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.

⁵³ 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.

⁵⁴ 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.

Thus, in a number of cases, the Panel 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.⁵⁵ Therefore, the Panel could 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.⁵⁶ 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.⁵⁷ In such a case, there needed to 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.⁵⁸

The Panel was also 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.⁵⁹

This means that the Panel was 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

⁵⁵ 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; Sadiku-Syla against EULEX, 2014-34, Decision and Findings, 19 October 2016, par 35.

⁵⁶ *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, para. 74, referring to Šilih, para. 141.

⁵⁷ See again *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, para. 75. 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.

⁵⁸ 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 against EULEX*, 2010-06, 14 September 2011.

⁵⁹ See e.g., *Sadiku-Syla against EULEX*, Case no 2014-34, Decision and Findings, 19 October 2016, para. 38.

actions or omissions that are attributable to the mission during the time of activity of the Mission.⁶⁰

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 could not in principle prejudice a claimant. Therefore, whilst the Mission could only ever be held responsible for its own actions (and failures), it could not evade that responsibility by pointing to the failures of others. A claimant was fully entitled to seek relief from the Mission in relation to that part of the harm that it was able to pin onto the mission and relief from another entity that might also have contributed to the violation of his rights.⁶¹

2.4 *Ratione personae*

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

The Panel only had jurisdiction over acts and omission of EULEX Kosovo. It was not competent to deal with violations attributable to any third party.⁶² 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 was 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 was the nature of the function performed and whether this function comes within the scope of the "executive" mandate of the Mission. The Mission could not for instance evade its human rights obligations by distinguishing between its executive and

⁶⁰ *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.

⁶¹ *L.O. against EULEX*, 2014-32, 11 November 2015, para. 50.

⁶² 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).

“strengthening” functions.⁶³ Similarly, the fact that the EULEX staff acted as a training advisor to the police rather than as a police officer did not allow the Mission to evade its human rights responsibilities in relation to his actions.⁶⁴

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 had to be shown, however, that the act was sufficiently connected to the performance of an aspect of the Mission’s executive mandate.⁶⁵

2.5 *Ratione loci*

The Panel’s jurisdiction over the acts and conduct of EULEX was not *per se* limited to any territorial area, although as a matter of fact, its competence was 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”.⁶⁶

3. 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 was 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 was a

⁶³ See e.g. *Zahiti against EULEX*, 2012-14, 4 February 2014, pars 53-55. See also *Zahiti against EULEX*, 2012-14, 7 June 2013, pars 35-37.

⁶⁴ *Zahiti against EULEX*, 2012-14, 7 June 2013, par 36.

⁶⁵ For an illustration, see *Zahiti against EULEX*, 2012-14, 7 June 2013, pars 32 *et seq.*

⁶⁶ *Family of Mr. Dede Gecaj against EULEX*, Inadmissibility Decision, 23 November 2011, par 53.

necessary condition for the Panel to be properly seized. The Panel did 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 could be filed by a victim him- or herself or by counsel representing the victim.⁶⁷ The Panel would verify and ensure, in each case, that the complainant qualified as a “victim” of the alleged right violation. The notion of “victim” was defined by the Panel very much in the same way as this concept is understood before the European Court of Human Rights.⁶⁸ The Panel 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.⁶⁹

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.⁷⁰ A complainant could therefore have standing of an “indirect victim” or in respect of the alleged violations of the complainant’s own rights.⁷¹

3.1.3 No *actio popularis* before the Panel

⁶⁷ See Rule 17 (representation of the complainants).

⁶⁸ Regarding the status of victim of the complainant, see, generally, *Mustafa-Sadiku against EULEX*, 15 June 2015, par 14; *I against EULEX*, 27 November 2013, at par. 17-22; *Emerrlahu against EULEX*, 8 April 2013, pars 10-13; *A,B,C & D against EULEX (admissibility decision)*, 10 April 2013, par 52-55; *Ibishi against EULEX*, 15 January 2013, pars 6-8; *Rexhepi against EULEX*, 20 March 2012, pars 43-47; *Smajli against EULEX*, 23 November 2011, par 15.

⁶⁹ *Mustafa-Sadiku against EULEX*, 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.

⁷⁰ *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.

⁷¹ See, again, *Mustafa-Sadiku against EULEX*, 15 June 2015, at par 14. See also *Faik Ibishi against EULEX*, 15 January 2013, par 7.

The Panel 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.⁷²

3.2 No appellate function of the Panel

The Panel was not conceived as an appellate from the decisions of other authorities.⁷³ Instead, it would 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 were limited by reason of the OPLAN which set limits to its authority to grant relief in a particular case. In particular, by reason of these statutory limitations, the Panel could not render binding decisions. Instead, it was only given the power and authority to issue recommendations.⁷⁴

4. 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 started with the filing of a written complaint signed by the complainant (or his/her representative⁷⁵). The Rules of Procedure of the Panel included certain requirements of form and content that must be satisfied.⁷⁶ A complaint would not be rejected

⁷² See, again, *Faik Ibishi against EULEX*, 15 January 2013, par 7.

⁷³ See, e.g., *Halili against EULEX*, 15 January 2013, par 21; *Sharku against EULEX*, 20 March 2012, par 21.

⁷⁴ 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.

⁷⁵ See Rule 17 of the Panel's Rules of Procedure on Representation of the complainants.

⁷⁶ See, in particular, Rules 24-26 of the Panel's Rules of Procedure ([https://hrrp.eu/docs/RULES%20OF%20PROCEDURE%20HRRP%20\(15%20January%202019\).pdf](https://hrrp.eu/docs/RULES%20OF%20PROCEDURE%20HRRP%20(15%20January%202019).pdf)).

in principle, however, merely because it failed to meet these procedural requirements. This was subject to the discretion of the Panel.

4.1.1.2 Anonymous complaints

Anonymous complaint were not in principle entertained by the Panel.⁷⁷ In the exercise of its discretion, however, the Panel could grant a request by the complaint to keep its identity confidential.⁷⁸ Where the circumstances so justify, and with a view to protecting the safety, privacy and identity of the complainant, the Panel could take this decision *proprio motu*.⁷⁹

4.1.1.3 Joinder of complaints

Complaints could 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.⁸⁰

4.1.2 6-month requirement

To be admissible, a complaint had to be submitted to the Panel within six months from the date of the alleged violation.⁸¹ Complaints filed beyond that timeframe were in principle declared inadmissible in accordance with Rule 29(c) of the Panel’s Rules of Procedure.⁸²

In some instances, however, the Panel 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.⁸³ Furthermore, if the violation is ongoing, the 6-month deadline had not lapsed.⁸⁴ The

⁷⁷ 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.

⁷⁸ 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.”).

⁷⁹ See, e.g., *W against EULEX*, Admissibility Decision, par 5.

⁸⁰ See, e.g., *K and others against EULEX*, 21 April 2015, par 7.

⁸¹ Rule 25(3) of the Panel’s Rules of Procedure.

⁸² 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.

⁸³ 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.*

⁸⁴ See, e.g., *Zahiti against EULEX*, 7 June 2013, par 42.

deadline started to run on the date after the impugned action said to have caused or resulted in a right violation.⁸⁵

4.1.3 Requirement of substantiation

In order for the complaint to be admissible, it had to be sufficiently substantiated by the complainant. It would otherwise be declared inadmissible as “ill-founded” in accordance with Rule 29(e) of the Panel’s Rules of Procedure.⁸⁶

4.1.4 Abuse of right

Rule 29(f) of the Panel’s Rules of Procedure provided 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 would 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.⁸⁷ In that sense, *pre-emptive* complaints were not permissible.

4.2 Procedure before the Panel – Select aspects

4.2.1 Written complaints and orality

As noted above, complaints had to be done in writing. Proceedings too generally took place in writing. On a number of occasions, however, complainants 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

⁸⁵ See, e.g., *Y against EULEX*, 15 November 2012, pars 30-31.

⁸⁶ See, e.g., *Qela against EULEX*, 17 October 2017, par 16; *K and others against EULEX*, 21 April 2015, par. 47;

⁸⁷ *Milica Radunovic against EULEX*, Inadmissibility Decision, 12 November 2015, pars 20-22. See also *Mazlam Ibrahim 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).

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 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.⁸⁸

4.2.2 Adversarial nature of proceedings before the Panel

Proceedings before the Panel were adversarial in nature, in the sense of each party having the right in principle to comment upon the other party's submissions.⁸⁹

The Panel 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 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 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 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 would often set time-limits for the parties to provide information or submissions.⁹⁰

4.2.3 Panel sessions and voting

With a view to conducting deliberations,⁹¹ the Panel organised regular (generally bi-monthly) sessions. During those sessions, deliberations took place between Panel members, draft decisions are finalised and voting takes place. Most sessions took place in person. On a limited number of occasions, the Panel made use of the possibility of holding deliberations by electronic means.⁹²

⁸⁸ See *F against EULEX*.

⁸⁹ See, e.g., *F and others against EULEX*, 13 June 2017, par 7.

⁹⁰ See Rule 23 of the Panel's Rules of Procedure.

⁹¹ 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.

⁹² See Rule 13(3) Rules of Procedure.

Decisions of the Panel were taken by majority.⁹³ The Panel has not made use of the possibility of individual opinions.

As a result of the covid-19 pandemic, the Panel has had to organise a number of its sessions remotely in accordance with Rule 13(3) of the Panel's Rules of Procedure. This has required the Panel to conduct a lot more preparation and pre-deliberations before its actual sessions so that the session time was shortened but the overall process of deliberation lengthened over longer periods of time. The work of the Secretariat has been particularly affected, with sometimes severe restrictions affecting their ability to function or to work from the seat of the Panel.

4.2.4 Decision on admissibility

Where the Panel (unanimously or by majority) declared a complaint admissible (in whole or in part), it would render a written decision to that effect in accordance with Rule 32. The Panel's findings were then communicated to the parties. The parties would 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.⁹⁴ A re-examination of an admissibility decision was 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 rendered its decision on admissibility and on the merits at the same time.

⁹³ Rule 15 of the Panel's Rules of Procedure. Abstentions is not allowed (*ibid*).

⁹⁴ Additional evidence could also possibly be tendered at that point in accordance with Rules 36 and 37.

V. THE WORK OF THE PANEL AND LESSONS LEARNT - A PRELIMINARY ASSESSMENT

1. LEGAL STRUCTURE OF THE PANEL

1.1 The legal basis of the Panel should be public

The OPLAN, which provides the legal basis upon which the Panel was created, remains confidential. So does the revised mandate of the Panel following the re-calibrating of the Mission’s mandate on 14 June 2018. This is unfortunate as it interferes with the need of transparency and publicity in the work of the Panel. Such documents – or a redacted version thereof – should have been made public and this should be the case in future such missions. This would have enabled potential claimants to be fully acquainted with the nature and scope of the Panel’s mandate; it would have enabled the Panel to make extensive public references thereto; this would have contributed to creating greater transparency regarding the mandate of the Mission and that of the Panel.

Whilst the Panel is denied the possibility to make the content of that document public, it has referred publicly on repeated occasions to the general tenor of that document insofar as was relevant to its work and decisions. This has provided some degree of guidance to (potential) complainants and enabled the Panel to outline the scope and nature of its competence.

In future cases, the legal basis underlying such an accountability mechanism should be made public.

1.2 The scope of competence of an accountability mechanism should be as broad in principle as the mandate of the mission and not be limited to ‘executive’ responsibilities of the Mission

The Panel’s competence and mandate was limited to the “executive” aspects of the Mission’s activities (in the field of justice, police and custom). There is no good reason why the competence of the Panel should have been thus limited. Instead, the mandate of any such accountability mechanism should be tailored to capture any area of activity of the relevant

mission in which there is a credible risk of rights violations, in particular where those areas of activity are not covered by any other effective mechanism of accountability.

Because of the specific nature of judicial activities, they should not in principle come under the scope of competence of such a mechanism unless there is an absence of alternative accessible means of remedy. The creation of an office of the ombudsperson within the structure of the Kosovo Specialist Chambers provides a valid illustration of the possibility of accountability mechanisms being built with a specific focus onto judicial institutions.⁹⁵

The Panel has been able, however, to reduce the limiting effect of that restriction by giving a liberal interpretation of the notion of “executive mandate”. The Panel has interpreted this notion in a manner generally consistent with its responsibilities and those of the Mission to ensure compliance with relevant human rights standards in those areas of activities in which the Mission exercised functions normally performed by governmental authorities. See, generally, Human Rights Review Panel: Case-Law Note On Principles Of Human Rights Accountability Of A Rule Of Law Mission
[\(http://hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf\)](http://hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf).

Similarly, whilst the Panel was prohibited from overseeing the activities of the Kosovo judiciary, it was able to read that limitation as not excluding its competence over the actions of EULEX prosecutors up until the point of indictment or bringing of charges. See, *ibid*, section 4.4

[\(http://hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf\)](http://hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTER%20ORGANISATION.pdf).

Consideration should be given for future mission to give accountability mechanism jurisdictional competence over all, and not just “executive”, aspects of the Mission’s mandate. It is indeed important that a rule of law mission should comply in all of its activities with relevant human rights standards and not only where it performs executive functions. Furthermore, the notion of “executive mandate” lacks clarity and could result, if interpreted narrowly, in human rights violations not being properly or effectively addressed.

⁹⁵ See art 24(1)(b), 34(9), and 49(5) of the Law of the Kosovo Specialist Chambers (<https://www.scp-ks.org/en/documents/law-specialist-chambers-and-specialist-prosecutors-office>).

1.3 Accountability mechanisms should be granted the authority to issue binding decisions

The Panel is not permitted to render binding decisions. Instead, it is issuing *recommendations* based on its legal and factual findings. The discretion to implement those is with the Head of Mission. This could create difficulties for the Head of Mission as ultimate representative of the Mission itself, which the Panel has found committed human rights violations which the Mission must then address.

The effectiveness and authority of the Panel would have been greatly enhanced had it been granted the authority to issue binding decisions. This could have been limited in some ways (e.g., by setting maximum amount of remedies/compensation that it could order) so as to avoid any excess.

To compensate for this fact, the Panel has granted itself the inherent authority to follow-up on its decisions and recommendations. See Rule 45 *bis* of the Panel's Rules of Procedure (<http://hrrp.eu/docs/Rules%20of%20Procedure%20HRRP%2015%20January%202013.pdf>). This has proved to be an important element in its tool-kit to ensure that due consideration was given by the Mission to its decisions and that genuine efforts were being made to implement its recommendations.

Consideration should be given for future mission to give accountability mechanism the authority to issue binding decisions.

1.4 The Panel should have been granted the authority to order or recommend financial reparation or compensation

The Panel does not have the authority to order or even recommend that financial compensation or reparation should be paid to a complainant where his rights have been violated by the Mission (see, generally: <http://hrrp.eu/docs/Case%20law%20note%20on%20REMEDIES%20FOR%20HR%20VIOLATIONS.pdf>). This is a most unfortunate limitation upon the powers and authority of the Panel.

A number of cases that came before the Panel would have warranted financial compensation and the Panel would have made a recommendation to that effect had it had that power and authority. Instead, the Panel had to recommend less adequate or effective means of remedying those violations that do not necessarily reflect the nature and/or gravity of the rights' violations that were at stake.

Consideration should be given in future missions to give accountability mechanisms the authority to order financial reparations (if necessary within certain limits) and/or, at the very least, to authorise them to make recommendations to that effect.

1.5 The Panel should have been granted *proprio motu* competence

The Panel is only seized of an issue if and where a complaint has been filed. It was not endowed with *proprio motu* competence by which it could have seized itself of an issue or case if and when it becomes aware of a human rights issue affecting the work of the mission. This has limited the scope of matters that came before it and limited the scope of its effect upon the Mission. Such a limitation is regrettable considering that the Panel became aware, through its work, of a number of institutional or systemic problems of human rights that would have warranted its involvement. Absent a complaint pertaining to these, it was not able to do so however.

However, the Panel sought to flag some of these systemic issues by highlighting them in its Annual Reports (<http://hrrp.eu/annual-report.php>) or through conversations with Mission officials. The Panel has also issued a number of "white papers" in relation to this sort of human rights issues (<http://hrrp.eu/publications.php>).

Consideration should be given in future missions to giving – limited – *proprio motu* authority to accountability mechanisms so that they may seize themselves of systemic human rights issues that affect the work of the Mission and that comes to its attention. This would expand the reach of the mechanism and ensure that the Mission is made to comply with relevant human rights standards not only where a complainant files a complaint but in all relevant respects.

1.6 Competence *ratione personae*

The Panel is not permitted to entertain complaints filed by EULEX Mission staff. This could create a potential gap of accountability and remedial means for – potentially serious – human rights violations.

Consideration should be given to the possibility of giving future accountability mechanisms the power and authority to consider human rights complaints – if necessary with certain restrictions where existing internal mechanisms provide for an effective avenue.

1.7 Composition of the Panel

The Panel is composed of external members and EULEX staff members. Initially, staff members were required to be judges; this changed with the change of mission although most successful candidates continued to have extensive judicial experience (although this was by then not formally a requirement). Judicial experience has been a major asset to the Panel. It is indeed essential that, as a quasi-judicial body, the Panel should have a majority of its members with actual judicial experience or significant experience as legal practitioners involved in litigation.

A balance has also been found to ensure that successful candidates had human rights expertise combined various other sorts of relevant expertise (e.g., in international law, in civil law, in criminal law, etc). Considering the variety of types of cases, this has been most welcome and an asset to the Panel.

It was also important to ensure that some of the Panel members are staff of the Mission. This ensured that some Panel members had an in-depth knowledge and understanding of the nature and mandate of the mission and the way it works in practice. Issues arising from this regarding the appearance of independence and impartiality of the Panel did not arise and the independence of those members of the Panel that were mission staff was duly respected by the Mission.

In choosing candidates and setting up requirements for hiring of panel members in future mechanisms, considerations should be given to the need to ensure, *inter alia*, a) strong expertise in human rights law, b) judicial experience or significant experience in judicial litigation, c) gender balance, d) different legal backgrounds, culture and experiences. Familiarity with the

region and with post-conflict situations was also an asset. A variety of different legal expertise among Panel members also broadened the scope of its expertise to the benefit of the institution.

In regards to the substitution of Panel member, it has been the practice that an EULEX Panel member could only replace a EULEX Panel member and vice-versa for non-EULEX Panel member. This has ensured that the majority would always remain, in case of a tie, with non-EULEX members so as to preserve the impartiality and appearance of impartiality of the Panel vis-à-vis the Mission itself.

Delays have been encountered in the process of replacing departing members. This has caused certain delays in the handling of cases. The possibility of drawing up a pool of potential candidates to be nominated at short notice to replace a departing member could and should be considered in the future.

1.8 Secretarial support

Secretarial support has been essential to the effective functioning of the Panel. It is therefore essential to have qualified staff manning the Secretariat. Ideally, they should be people with a) significant expertise in human rights law and with b) experience in the judicial context. Drafting skills and research skills are essential to the legal staff of the secretariat. Managerial competencies are also important. It is also important that staff members are senior enough and with the right kind of experience.

Also important is the administrative staff of the Secretariat; they are essential to the good functioning, logistical needs and administration of the Panel. Local staff has been particularly precious in order to ensure that all relevant skills and knowledge are available to the Panel.

Career prospects and promotions are important incentives to keep and maintain staff; unfortunately, due to the successive changes in the mandate of the mission and uncertainties associated therewith, it has proved difficult for the Panel to maintain staff. The limited ability for staff to be promoted has also been an issue.

Particularly important are the following functions of the Secretariat:

- i. Legal research;

- ii. Organising of case-files;
- iii. Archiving of records;
- iv. Translation and interpretation of case-file and communications;
- v. Outreach activities;
- vi. Interface with complainants and with the Mission.

Consideration should be given to the above factors when hiring staff for accountability mechanism and to the possibility of facilitating promotions for qualified staff as a way to retain them for longer periods of time.

Also, in order to ensure the full independence of secretarial staff, they should work under the exclusive authority and administrative responsibility of the Panel (or its Presiding member) rather than having split connections and lines of authority (to the Panel and the Mission) which could confuse responsibilities and expectations.

1.9 Sessions of the Panel

The Panel held session every 2 or 3 months. This enabled the Panel to keep cases moving. Regular meetings is important for stock-taking and in order to keep all relevant parties up to date on relevant developments.

Before meeting at sessions, the Panel members would prepare and circulate drafts of the decisions, thus enabling other Panel members to comment on those in preliminary fashion. Drafts were edited and then sent to the Secretariat to be printed and prepared for consideration at the Panel's sessions.

An agenda for the session was prepared in advance with the list of issues and topic to be discussed; any associated material was circulated at the same time to enable Panel members and staff to prepare adequately.

Deliberations would then take place (generally in person; more rarely electronically) to finalise the draft and vote on it.

Sessions generally lasted 2-4 days at a time, thus enabling the Panel to adopt and render its decisions, to deliberate, to discuss outstanding cases, to review case file and new communications, to organise meetings with relevant authorities and to prepare drafts as the case may be.

Secretarial support was particularly important in this context in order to ensure the smooth preparation of each session.

Over time, greater use was made of the time in between sessions in order to perform various functions and preparations so as to shorten and render sessions more effective and expeditious. Close communication between Panel members in advance of sessions was important.

Budgetary allowance must be made to enable the Panel to meet at regular interval and so as to ensure that it can deliberate effectively and promptly.

During the covid-19 pandemic, sessions have taken place by electronic means, consistent with Rule 13(3) of the Panel's Rules of Procedure. This has required greater coordination between Panel members and the Secretariat and more preparation before sessions so as to limit the time necessary for deliberation and finalisation of decisions.

1.10 Costs of proceedings

Rule 24 of the Panel's Rules of Procedure provides that there will be no financial charge arising in connection with the filing or processing of a complaint. It is indeed extremely important that applicants should not be dissuaded to file a complaint with the Panel because of associated costs. Costs for translation of documents has been born by the Mission.

1.11 Time limits

Rule 23 of the Panel's Rules of Procedure provides that time limits for information, observations or comments requested from the complainant and the HOM will be set by the Panel. Rule 25(3) provides, in particular, that complaints must be submitted to the Panel within six months from the date of the alleged violation. This requirement has been interpreted quite flexibly, in particular in cases of "enforced disappearance". Considering the nature of the

Panel's mandate and the absence of other accountability mechanisms for many of the applicants, the Panel has taken the informed approach of not restricting its jurisdiction unduly based on formalities, technicalities or too strict a reading of its competence *ratione temporis*. Compliance with general time limits is important however to ensure the expeditiousness of proceedings and to maintain the effectiveness of protected rights. See also Human Rights Review Panel: Case-Law Note On Conditions Of Admissibility Of Complaints Before The Panel And Related Jurisdictional Issues, section 4.1.2 (http://hrrp.eu/Case-Law_Notes.php).

1.12 Requirement of forms

Rules 25-26 of the Panel's Rules of Procedure provide for certain basic requirements of form that the complaint must satisfy. These are intended to streamline the process of consideration of the complaints; it is not intended to create an undue hurdle to the process of complaint, in particular in light of the fact that many of the complainant are not legally trained and are not represented. Formal requirements for complaints should therefore remain simple and relatively easy to satisfy, in particular for unrepresented individuals.

1.13 Admissibility stage

Proceedings before the Panel are, like those before the ECtHR, split in two parts: there is first and “admissibility” stage where the Panel verifies that the complaints meets the basic jurisdictional requirements – *ratione materiae*, *temporis* and *personae* – applicable before the Panel and reviews the conditions of form and time. This phase is important to weed out complaints that clearly do not come within the purview of the Panel. In case of doubt, the Panel has generally let the matter go to the merit stage to decide at this stage of the proceedings the merit of the case. See again: http://hrrp.eu/Case-Law_Notes.php.

In some cases, the Panel has decided issues of admissibility and merit at the same stage although it has general decided one issue (merit) after the other (admissibility).

Generally, it has been the practice of the Panel to communicate the complaint to the Head of Mission prior to deciding the issue of admissibility; however, in those cases that are, on their face, not coming within the scope of the Panel's competence, it has sometimes declared those inadmissible without first seeking the views of the Mission.

Rule 29 *bis* of the Panel provides for the procedural possibility to strike out a complaint striking a complaint out of its list of cases where the circumstances lead to the conclusion where a) The complainant does not intend to pursue his or her complaint; or b) For any other reason established by the Panel, it is no longer justified to continue the examination of the complaint. Pursuant to paragraph 2 of that provision, the Panel shall continue the examination of the complaint if respect for human rights so requires.

Admissibility decisions have sometimes been helpful to ‘set the stage’ for the merit stage of the proceedings and also to raise questions with the parties that they can address before the Panel takes a decision on the merit of the case. The Panel has often used admissibility decisions to ‘hint’ at those issues it wished the parties to address and it has in some instances submitted express questions for the parties to address at the merit stage.

The Panel has consciously refrained from being too strict in enforcing admissibility requirements as a way to make sure that cases that did not on their face lack merit and came within the scope of the Panel’s jurisdiction could be considered on their merit. This has also contributed in expanding the Panel’s caselaw and has made it a genuine accountability venue for complainants with an arguable human rights claim.

Regarding the conditions of admissibility of complaints before the Panel, see also: [CASE-LAW NOTE ON CONDITIONS OF ADMISSIBILITY OF COMPLAINTS BEFORE THE PANEL AND RELATED JURISDICTIONAL ISSUES.](#)

1.14 Written and oral procedure

Rule 33 makes it clear that proceedings before the Panel are primarily done in writing. Oral submissions have only been made rarely; when this occurred, the record was kept and provided to the opposing side.

Consideration could be given in future endeavour to have greater use being made of orality to ensure greater publicity of proceedings and so that questions may be asked directly of complainant in the presence of panel members. This could also contribute to the complainant’s sense that their case is being effectively addressed. Absence of representation might however

complicate such process so that careful attention should be paid to decide if and when oral proceedings might be in order.

1.15 Evidence

The Panel has adopted a liberal approach to the issue of evidence. Rule 26(2) of the Panel's Rules of Procedure provides that the Complainant must attach documentary evidence, if any, to support the complaint, in particular to show that the admissibility criteria have been satisfied. Evidence has taken various forms. Complainants sometimes produced documents and records. In other cases, they simply recounted the relevant events. The Panel did not set specific conditions to the admissibility of proposed evidence.

Rule 36 of the Panel's Rules of Procedure further provides that the Panel will base its decisions and findings only on evidence that it considers to be relevant to the complaint, including evidence it has collected on its own initiative. Rule 37 in turn provides that submission of additional evidence by the Complainant. The complainant may submit additional evidence at any stage during the proceedings. However, the Panel may, when necessary for the proper performance of its duties, set a time limit for the submission of such evidence.

The Mission has also sometimes produced documents or relevant records; it has also sometimes made it clear in its submissions what records it has of relevance to a case. The Mission has generally carried out all necessary efforts to ensure that all relevant records were placed at the disposal of the Panel. This has been an important element of the Panel's ability to carry out its mandate.

The Panel was prepared at times to draw certain inferences from the fact that the submissions of the complainants were not disputed by the Mission or where the Mission failed to provide information in its possession. The latter situation was a rare occurrence, in particular in latter years when the Mission's cooperation with the Panel significantly improved.

The Panel has not systematically applied the ECtHR's doctrine of the margin of appreciation. It has in fact in some cases taken a position on the interpretation of relevant laws and taken its own view of operational requirements and decisions of the Mission.

It is recommended that future accountability bodies should likewise adopt a relaxed approach to what evidence may be admitted and to treat that evidence in such a way as to best serve the ultimate purpose of the mechanism. Technical rules on admission/exclusion of evidence are thought unnecessary for such a mechanism.

1.16 Follow-up procedure

The Panel has adopted Rule 45bis of its Rules of Procedure which empowers it to follow up on its recommendations. This provision says that where the Panel has made recommendations for remedial action, the Panel shall follow up on the implementation of such recommendations by the HOM. It adds, at paragraph 2, that the Panel's decision on the implementation of the recommendations by the HOM will be promptly published on www.hrrp.eu in English, Albanian and Serbian.

This procedural possibility for the Panel to follow-up on its decisions and recommendations has been most important to ensure that the Panel's recommendations are followed to the maximum possible extent. The Panel has thus used this possibility to query with the Mission what was done about them. In some cases, it has rendered multiple follow up decisions until that point when it was satisfied that either a) the Mission had done enough and/or b) where all possibilities of relief had been exhausted.⁹⁶

Such powers are important and are in fact inherent to the functioning of any judicial or quasi-judicial entity. Future human rights mechanisms should possess that authority.

The Panel's record on that front has been mixed. Many of its basic recommendations (e.g., circulating its decisions within the Mission or passing them along to relevant authorities) have been complied with in full. Others, however, have not been. In particular, the Mission has systematically refused to implement the Panel's repeated recommendation that it should acknowledge the violation of rights committed by the Mission. This is a traditional means of reparation of human rights violations. It is particularly pertinent in the context of the Panel's work as the Panel has no authority to issue binding decisions, nor to recommend financial reparation (even when it would have been justified to do so). The Mission has also refrained

⁹⁶ See Annex 2 (table of follow-up decisions).

from taking meaningful steps to effectively repair many of those violations. It has, for instance, failed to initiate contacts with complainants, failed to ensure that cases it had failed to investigate were being duly pursued by local authorities.

The Panel has also noted that the level of compliance with its recommendations has decreased over time. Particularly worrisome has been the level of compliance following the drawing down of the Mission's mandate in June 2018.⁹⁷ This new, reduced, mandate has effectively been used systematically before the Panel has justification for the Mission's inability (or unwillingness) to provide meaningful remedies for violations of rights attributable to it. When invited to suggest what measures should be taken, the Mission balked. When asked to disclose information pertaining to the extent of its investigative failure, the Head of Mission failed to respond. When asked to take meaningful steps with local authorities to ensure that they would fulfil their obligations to investigate cases involving allegations of serious violations of rights (which the Mission itself had failed to investigate), the Mission hide behind its new mandate to try to explain its inability to do so.

Such a situation is grossly unsatisfactory and it raises questions about the Mission's ongoing ability to fulfil its human rights obligations. Such an approach is also likely to affect very negatively its legacy, in particular among local actors.

These concerns have been brought to the attention of the Head of Mission in the hope that he will take meaningful steps to address these.

⁹⁷ For an illustration of the problems associated with this new mandate from the point of view of human rights compliance, see, e.g.: *Vesko Kandic against EULEX*, Case no. 2-16-24, Admissibility Decision and Decision and Findings, 11 December 2020, paras 117-119 (<https://hrrp.eu/docs/decisions/2020-12-11-Admissibility-Decision-and-Findings-2016-24.pdf>).

2. RELATIONSHIP TO THE MISSION AND LINES OF REPORTING

2.1 The responsiveness of the Mission and the willingness to engage with the Panel has been critical to the Panel's effective functioning

In its early days, the Panel found it difficult at times to obtain the full, effective and timely cooperation of the Mission. There was evident reluctance on the part of some in the mission to fully cooperate and enable the Panel to perform its function. This changed over time; confidence was built on both *sides* and new leadership in the Mission greatly helped improve the situation. As noted above, however, the effectiveness of the Panel's collaboration with the Mission decreased again with time, in particular following the re-drawing and narrowing down of the Mission's mandate.

The quality of the Mission's legal staff also made an important contribution to the work of the Panel. Efforts were clearly made to provide timely and sound submissions in relation to cases.

Consideration should be given to ways to "de-personalise" the findings of the Panel so that the institution and/or its staff do not feel that decisions of the Panel are personal criticism of their individual performance. Adequate training of staff, including as regards the mandate of accountability mechanism, could greatly help that process. In parallel, consideration should be given to ensure;, however, that individuals who have committed serious violations of someone's fundamental rights should not be able to evade their own responsibilities. In that regard, the Panel to one case where a staff of the Mission was able to evade any sort of responsibility and accountability by being promptly allowed to leave before his actions could be fully investigated.⁹⁸

It would also be important at the very early stages of the Mission that compliance with human rights standards be made a stated priority of the Mission and that full cooperation with the

⁹⁸ Case 2012-14 *Valbone Zahiti against EULEX*:

- Merit Decision:
<https://hrrp.eu/docs/decisions/Decision%20and%20findings%202012-14.pdf>
- Follow-up Decision:
<https://hrrp.eu/docs/decisions/Follow%20up%20decision%202012-14.pdf>.

Panel should form a central part of that commitment. This should appear in the foundational documents of the Mission, be a priority of the management of the Mission and a matter of constant institutional interest by the Mission. Necessary safeguards should be put in place at the beginning of the Mission to ensure that all organs and staff are operating under that understanding (including through training and adequate monitoring of activities).

Particularly important in that regard is the responsibility of senior staff at management and decision-making level to provide clear guidance of their section's overall responsibilities and priorities. Cases before the Panel have highlighted the fact that such guidance has often been missing and that the mission's organs were sometimes left to act without clear priorities. For instance, war crimes and enforced disappearance cases, which should have been a clear Mission investigative priority, do not appear to have been treated in that way. Only a small fraction of such cases were investigated and even less brought to trial when they should have been the focus of intense interest by the Mission. This has resulted in large quantities of such cases being left un-addressed with resulting human rights violations of those concerned. A Mission level sense of priorities – and the allocation of necessary resources – should therefore be expected, implemented and subject to on-going oversight by the Mission senior management.

It should be noted in that respect that the primary responsibility to ensure human rights accountability of such a mission should not be with an accountability mechanism, but with the Mission itself. In other words, the existence of such an accountability mechanism should not diminish the responsibility of the Mission and its senior staff to ensure that the activities of the Mission are at all times conducted with due regards for human rights.

2.2 Human rights training and transmission of the Panel's decisions through the Mission have helped 'smooth' relations between the Panel and the Mission and spread awareness of relevant human rights standards all through the Mission

One of the factors that helped improve the relationship between the Mission and the Panel has been training events at which members of the Panel and/or Secretariat staff have participated. This has enabled the Panel to inform new staff members regarding human rights expectations within the Mission and made the mandate of the Panel known to them. Such training should be done by duly qualified staff or experts and be conducted regularly to ensure continued training

in relevant matters. Tailor-made training to relevant groups of professionals (e.g., police; military; legal staff) should be organised to ensure that they are made aware of the human rights standards and practices relevant to the lawful exercise of their functions. Indeed, continued human rights training, focused on the practical operationalization of human rights norms in each Mission role, is paramount to ensuring human rights compliance in practice, beyond human rights references in official statements and knowledge by staff of the overarching human rights integration in the Mission’s work. Many of the cases that have come before the Panel point precisely to challenges in the operationalization of human rights norms in different areas of the Mission’s work.

In a number of decisions, the Panel recommended that its decision be circulated with the relevant officials of the mission. This was a precious pedagogical tool that served the goal of educating staff of the mission what standards of human rights was relevant to the performance of their mandate. The Head of Mission’s support for such measures was critical to its effectiveness.

2.3 The qualification of the Mission’s staff, in particular their familiarity with relevant standards of human rights is essential to ensuring effective protection of human rights standards in the performance of the Mission’s mandate

In order for the Panel to work effectively and for its proceedings to be run smoothly, it is important that the staff of the Mission with which it interacts has the requisite competencies and knowledge, in particular as regards human rights law. It is equally important that said staff has the full support of the Head of Mission so that she/he can collect and transmit all relevant information in timely fashion.

It is recommended that such staff who are designated to collaborate with an accountability mechanism should have excellent qualification in human rights law and, ideally, some judicial experience (as a judge, prosecutor, counsel or in another comparable capacity).

2.4 The fact that the staff of the Mission comes from a variety of – professional, national and cultural – backgrounds has meant that their understanding of

relevant human rights standards and expectations has not always been uniform

The national diversity of the staff of the mission has meant that not all staff came with the same understanding, knowledge and expertise of human rights. Training has helped neutralise some of these differences. It is suggested that attention should be paid to ensuring that the staff of EU missions have a strong understanding and knowledge of relevant human rights standards, as it is a prerequisite for a Mission to be able to respect the central role of human rights in the mandate. Continued training and availability of technical human rights advice should be considered as a means to prop up knowledge and understanding of the matter among staff.

2.5 It is essential to protect the independence and impartiality of Panel members, including from the Mission itself

Half of the members of the Panel are also staff of the Mission. In order to ensure the effectiveness, independence and impartiality of the Panel, it is essential to ensure that they are not subject to any threat or pressure associated with their work on the Panel; experience suggests that unfortunate remarks by senior staff cannot be entirely avoided. It is imperative, however, that the staff of the Mission should be made to understand that Panel members should not be criticised for performing their oversight function as members of the Panel.

Panel members who are EULEX staff should not be subject to staff review/assessment insofar as it relates to their role as members of the Panel. They must maintain at all times the confidentiality of their deliberations on the Panel.

2.6 The Panel should have its own budget to fulfil its mandate and outreach activities

It is important that the Panel should have its own budget to perform its duties, in particular its outreach activities. It is a guarantee of its independence and impartiality. This has not been the case entirely, however, although the Mission has for the most part been supportive of the Panel's efforts and demands (in particular as regards outreach and maintaining of the Panel's website).

3. ORGANISATION

3.1 The Panel should have drawn up a protocol regarding its method of work earlier in its existence to ensure greater expeditiousness of proceedings

The Panel learnt to function organically as there were no immediate precedent to offer a model. With hindsight, it could have adopted internal policies and practices as a way to ensure a more effective performance of its work. In particular, greater attention should have been paid by the Panel to the need to organise and record its archives. This should have been the case for the purpose of a) general methods of work, b) archiving of records, c) communication and scheduling. These shortcomings have, in some respects, been addressed as a matter of practice or through the (later) adoption of internal working documents.

3.2 The Presiding member plays an important role in coordinating the work of the Panel

Consistent with its Rules, the Panel has elected a presiding member or chairperson (Rule 6). According to Rule 7, the Chairperson is to direct the work of the Panel on behalf of its members. In practice, the Presiding member/chairperson has played an important coordinating function – between panel members, between the Panel and the Mission, and in directing the Panel’s Secretariat. He/she also has played a part in representing the Panel at events or meetings.

Consideration should be given to ways to increase his/her profile as a way to promote awareness of the work of the Panel.

3.3 Greater efforts could have been made to keep stricter time-table on cases so as to ensure greater expeditiousness in proceedings

Some of the Panel’s cases have remained on the book for too long. The Secretariat and the Panel should have played a more active role in ‘pushing’ cases forward so as to reduce the amount of time when there was no activity in a particular case.

The Mission has generally sought to act promptly with one major exception during the transition phase to the new mission when significant delays occurred by reason of the shrinking in staffing, change of mandate and lull in activity of the Panel.

More proactive management of cases by the Panel and Secretariat would have been desirable. The Panel has sought to accelerate the process of resolution of cases by sending more regular reminders to the Mission regarding pending cases and submissions.

3.4 Lack or belated visibility over the future of the Mission negatively affected the work of the Panel and delayed completion of cases

Greater efforts should be made for the sake of the effective functioning of such missions to ensure more timely and prompt decisions regarding the continuation and amendment of the terms of a Mission

The future of the Mission has always been quite uncertain and changes in the nature of the Mission have always been notified to staff at the last minute. This has had negative consequences all through the mission not least for its staff. The Panel has also suffered much delays as a result of these changes and has struggled to keep its staff. This is regrettable and has been detrimental to the work of the Panel. This has been due, in no small part, to the last-minute nature of political decisions affecting the mission.

In the future, it is recommended that much greater efforts be made at political level to ensure that the Mission has at all times a clear mandate and that decisions affecting that mission are given in timely fashion.

4. STAFFING

4.1 The qualification of the staff of the Panel is essential to its effective functioning

The Panel has a limited staff. From three legal officers, it has gone down to two and then to one. It also has two administrative staff (down from three) who perform various tasks, including translation of the Panel’s decisions and communications with complainants, and functions (which go far beyond their job description).

Considering the limited number of staff at its disposal, it is essential that the Panel should have adequately trained and experienced staff. In particular, for legal staff, they should have a) deep knowledge of relevant human rights standards, b) research and drafting experience and c) ideally experience working for a judicial institution.

In order to keep the staff, it is essential that they should have a sufficient degree of job security and relevant professional development prospects. Such prospects have been limited within the Mission.

The work of the Panel is not typical of (EU or UN) missions. It is more akin to judicial work. As such, preference should be given to individuals with experience in judicial settings over “mission” experience.

4.2 A greater management role could have been played by the Presiding member over the staff

The Presiding member or chairperson plays an important coordinating function within the Panel. That function requires, inter alia, to ensure coordination among Panel members and with the Secretariat; representation of the Panel with relevant authorities; review and preparation of official correspondence and documentations; ensuring the prompt management of cases and caseload. Responsiveness by all is a condition of its effectiveness.

Consideration should also be given to giving the Chairperson overall administrative responsibility over the staff of the Secretariat. In particular, the Chairperson should have been

given overall authority over issues such as leave and organisation of internal workings of the Secretariat. This would have ensured greater effectiveness of the functioning of the Secretariat and guaranteed its independence vis-à-vis the Mission.

4.3 Because of uncertainties associated with the Mission, it has proved difficult for the Panel to keep its staff in place for relatively long periods of time

Greater stability of staff is desirable although the mission, including in the Panel. Constant changes of staff have caused delays and loss of institutional memory.

The Mission should contribute to this purpose by, *inter alia*, a) giving more timely notice of the future of the Mission, b) avoiding very last minute contract, c) avoiding as much as possible short-term contracts, d) organise recruitment in timely fashion so as to avoid delays. Attractive packages should also be offered for candidates with relevant skills.

For reasons outlined above, keeping staff over time has proved challenging all through the mission. The process of recruitment has also sometimes been lengthy and cumbersome. Future missions should ensure that they put in place a more effective system of recruitment and take steps to seek to keep staff for longer periods of time (including through financial acknowledgment of services; promotions; increasing training opportunities; career development advise; etc).

4.4 A relatively ‘flat’ structure is desirable within the Secretariat

The Secretariat should not be overly hierarchical. Staff each have their role and function so that a pyramidal structure is not necessarily desirable. It has resulted in creating undesirable concentration of power in some parts of the mission that are not necessarily conducive to the good functioning of the institution (or to that of the Panel).

A flat(er) structure does not mean that a hierarchy should not exist as it is essential that Panel members should direct the work of the Panel that pertains to the complaints. The Panel and its individual members should therefore take charge of cases and give clear and timely instructions to the Staff of the Secretariat so that the latter can perform their functions.

4.5 Staff should have access to external mechanisms of complaints or advise in case of internal working issues

Whilst the staff of the Panel should remain independent of the mission in the performance of their duties they should be able to have recourse to all mechanism of protection and advise available to staff of the mission.

4.6 The independence of the staff of the Panel must imperatively be maintained and preserved

The independence of the staff of the Panel should be preserved and protected from any attempt to interfere with it. The mission was respectful of this and did not seek to pressure, embarrass or otherwise interfere with the proceedings. This enabled the Panel and the Mission to create a relationship of mutual trust.

Independence should not, however, mean unaccountability however and provision should be made for staff of accountability mechanism to themselves be made accountable for the work they perform. This should be done in such a way as to preserve the independence of the institution itself.

4.7 Adequate and qualified administrative staff (in particular, in regards to translation) is important to the good functioning of the Panel

As noted above, Secretarial staff is important to the effective functioning of the Panel. In particular, it is essential that the Panel should have at its disposal necessary translation and interpretation facilities as well as the necessary logistical assistance. In some cases, the Panel has relied on the resources of the Mission itself for those purposes.

Adequate security – including of its archives – is also important to such mechanisms as they deal with sensitive information.

4.8 Secondments do not necessarily and in all cases generate the best possible candidates

Secondment should be a second-best and candidates should in principle be chosen on merit; secondment-only calls for contribution should be avoided in principle as it might not yield the best possible candidates.

The mission has often had recourse to secondment in place of contracted staff. This makes sense from a financial point of view as the financial burden associated with said staff is upon a state rather than the mission itself. This sort of support from states is important and a positive indication of state support for the mission. However, secondment has not necessarily led to the best candidates being selected in all cases; there is a real risk in some cases that the ‘least bad’ seconded candidates is selected ‘by default’. This should not be the case so that the accountability mechanism should be able to refuse candidates until offered candidates that are fully qualified for the relevant position. Contributing states should in turn do their best to identify and put forth suitable candidates.

Considering the nature of its mandate and the limited number of its staff, the Panel should have the possibility to refuse proposed seconded candidates considered not adequate and to ask that the position be advertised for contracted personnel. This should apply to Panel members and to staff.

5. PROCEDURE BEFORE THE PANEL

5.1 The ability of the Panel to adopt and amend its own rules of procedure has been a precious tool in order to ensure that those rules were best adapted to the demands of its mandate

This legislative competence of the Panel to adopt its rules of procedure has enabled the Panel to adopt procedural tools best suited to the performance of its mandate and to adapt it to the changing nature of the Mission's mandate. This is an important tool, which gave the Panel flexibility to perform its functions. The Panel has not sought to over-regulate itself so as to be able to adapt to new situations and challenges. Regulatory flexibility and incrementalism is recommended.

5.2 Some cases have taken too long to be resolved

As outlined above, the length of cases could and should have been shortened with greater time management by the Panel and Secretariat. The rights and interests of complainant to have their case dealt with without unnecessary delay is an important element of the Panel's process. Tables of pending cases with proposed scheduling of each procedural aspects of the case should be prepared to move the cases along. Stricter management of cases by rapporteur and Secretariat staff could also have gone towards better and more timely management of the caseload.

Steps have been taken over time to accelerate the work of the Panel. In particular, stricter adherence to deadlines set to the Mission, greater use of *Rapporteur*, the folding of admissibility and merit decisions into one, as well as greatest time-pressure within the Panel itself have all been used to try and shorten the time necessary to process cases. The use of tables and statistics have also been put in place with a view to evaluating the causes of delays.

5.3 It has been valuable for the Panel to provide for liberal procedural requirements and requirements of form to file complaints in order not to exclude from consideration matters on the basis of technicalities

Such an approach has proved particularly important in a context where a large number of complainants have appeared before the Panel un-represented. It has also enabled the Panel to address the substance of the complaints rather than approaching its mandate in an overly technical fashion.

5.4 The quality of submissions before the Panel has varied greatly

Because many complainants are not legally educated and are often unrepresented, the quality and specificity of their submissions can be quite poor in some instances; it has been important in that respect that the Panel should try to understand the parties' submissions and to adopt a *generous* approach to submissions in some cases to ensure that the rights of the complainants are not rendered ineffective by reason of the fact that complainants are not legally qualified.

The quality of submissions from the Mission has improved over time and reached a satisfactory level of quality; the continuity of staff and the good cooperation between the Panel and the Mission under recent leadership has greatly contributed to this state of affair. Familiarity with the Panel's caselaw, which the Mission has taken on board, also helped narrow down contentious issues to a limited set of facts in each case.

6. DRAFTING AND DELIBERATIONS

6.1 The experience of Panel members as legal practitioners, in particular as judges, has been extremely valuable and an important element of its overall effectiveness

Deliberations have in general been quite effective and short. An attachment to precedents and the *house-style* of decisions – short and focused on core issues – has facilitated that process.

Experience by members of the Panel of other judicial settings has facilitated their exchange of views and deliberations. Different legal cultures have been made to work together in the context of a common commitment to upholding human rights standards. The familiarity of Panel members with relevant international law standards is important and candidate without the requisite knowledge of competence in that regard should not be considered for appointment as Panel member.

Electronic communication prior to deliberations has been increasingly frequent and has enabled the Panel to narrow down the scope of issues to discuss and resolve during deliberations in person.

6.2 The practice of ‘rapporteur’ designated to ‘take charge’ and lead in individual cases has proved important to ensuring the timely and expeditious resolution of cases

As discussed above, the designation of a ‘rapporteur’ for each case has been a useful improvement in the practice of the Panel. This puts one member of the Panel ‘in charge’ of moving the case forward and taking charge of it up until the point of deliberations.

Gentle nudging by the Secretariat has sometimes proved helpful to ensure that all cases moved along and that ‘rapporteurs’ are responsive to the need to move their cases forward.

6.3 The manner of deliberations changed over time to ensure that deliberations in persons should be as short and effective as possible

A rather cumbersome and time-consuming in person editorial process was replaced by a two-phased process: i) issues of form and content were first discussed electronically (by email) based on drafts prepared by a Panel member (or a staff); ii) in person deliberations then took place to resolve any outstanding matters in dispute, finalise the draft and vote on it; this mechanism is more effective and place a greater onus upon the ‘rapporteur’ (see above).

6.4 Voting is by qualified majority with the vote of the external (i.e., non-EULEX Panel member) decisive in case of a split

Dissenting views have been rare as Panel members have generally sought to work towards compromise and drafts that accommodate the concerns of other members; this has limited the scope of disagreement and ensured the credibility and legitimacy of its decisions.

The fact that the vote of the external member carries more weight than the vote of the EULEX members in case of a tie is unfortunate but the necessary consequence of the need to obtain a majority in case of a tie. It also preserves the appearance of impartiality that is of importance to the work of the Panel.

Consideration could be given to the need to allow individual Panel members to prepare individual (dissenting; separate; or concurring) opinions as is the case with tribunals in a number of national jurisdictions. Where decisions were taken by majority, Panel members opted not to append their individual opinion to the decision. Furthermore, the fact that a single unified decision is rendered for all members contributes to the authority of that decision.

6.5 The Panel has sought to guarantee the adversarial nature of its proceedings at all stages and afforded the parties adequate time to make informed submissions

The adversarial character of the process has been an important guiding light of the way. In which the Panel has sought to conduct its proceedings. The Panel has insisted in every case that information and submissions of one side should be made available to the other in principle so that the latter could determine itself and make submissions in response. In the limited number of situation where issues of confidentiality/security prevented the communication of

certain information to the other side the Panel has a) ensured that this did not cause prejudice to the other party, b) sought to minimise any consequences thereof (for instance by providing redacted versions) and c) where information could have been material to the case, declined to rely on that information unless provided to the other side.

6.6 In order to guarantee the publicity of its proceedings to the maximum extent possible and in order to ensure the adversarial character of its proceedings (see above), the Panel has generally resisted efforts to confidentialise any particular aspects of the proceedings

Exceptions have been made in case of a) overwhelming public interest and b) where doing so did not materially prejudice the opposing party.

The publicity of the Panel's work is being further increased by a) the publication of decisions on its website; b) the publication of a regular newsletter outlining the activities of the Panel; c) yearly Annual reports outlining the activities of the Panel over the previous year.

6.7 Use of electronic deliberations on a limited number of occasions has enabled the Panel to act more expeditiously and not be delayed by the inability of one of its members to attend a session

In a number of cases where a Panel member could not attend a session, deliberations took place by electronic means. Draft of decisions were circulated well in advance so that an initial exchange would take place ahead of deliberations and draft decisions could be amended. A short electronic deliberation would follow with a view to finalise the draft and vote on it.

Such a practice, whilst welcome in exceptional circumstances, should not become the norm as deliberations in person is critical to the timely and effective resolution of cases.

Recourse to such process – pursuant to Rule 13(3) of the Panel's Rules of Procedure – has been used during the covid-19 pandemic so as to ensure that disturbances caused by the pandemic did not affect the ability of the Panel to fulfil its mandate (although it has made its work more complicated).

7. ADEQUATE REMEDIES

The ability of a victim of a human rights violation to seek and obtain a remedy for it is a crucial aspect of the protection afforded by human rights law. This element is particularly important and particularly challenging to secure in a post-conflict environment where victims are many and remedial means few. The availability of adequate remedy in such a situation is also critical to enabling society to move back towards the rule of law, with victims being acknowledged as such and being able to obtain reparation for the harm done to them and some form of truth regarding what happened to them.

7.1 The setting up and work of the Panel has filled an important accountability gap that exists in many other international missions (and international organisations)

The problem of making international organisations and missions accountable has become increasingly pressing. As a result, academic discussion is intense and political winds have turned towards making international organisations more accountable.

Until the creation of UNMIK's *Human Rights Advisory Panel* and, subsequently, the Human Rights Review Panel, there was no mechanism specifically set up to pass judgment on allegations of human rights violations attributed to international organisations/missions. The creation of such mechanisms is a major advance. It should be replicated in order to ensure that all international organisations and missions should comply with these basic norms of human rights. There is no good reason why they should be exempt from such standards and from accountability, which can only serve to make an institution function better, more fairly and more responsibly.

The two Panels (HRAP and HRRP) have shown that this can be done a) effectively, b) at a relatively limited cost, c) credibly and d) without disturbing the good functioning of the institution/mission being overseen. The principal difference between the two institutions is the level of cooperation that they respectively received from the Mission to which they were attached: whilst the HRRP received cooperation from EULEX Mission that was generally

adequate and in most cases timely and effective, the HRAP recorded great difficulties in its relationship to the United Nations.⁹⁹

The Mission's commitment to upholding human rights standards and the Panel's oversight of that commitment are important advances to make international organisations and international missions more accountable to the rule of law.

No international mission should be created in the future without a similarly endowed or more powerful accountability mechanism that ensures, at the very least, that such mission complies with basic requirements of human rights in the accomplishment of its mission. This would feel an important and worrying accountability gap that exists in many missions and international organisations.

Regarding the issue of remedies in the context of the Panel's work, see also:
<http://hrrp.eu/docs/Case%20law%20note%20on%20REMEDIES%20FOR%20HR%20VIOLATIONS.pdf>.

7.2 The fact that the Panel was prohibited to grant financial reparation or to even recommend financial reparation or compensation has negatively affected its ability to order/recommend adequate remedies in some cases

In some cases where violations were found, the Panel would have wished to make recommendations for financial reparation but was forbidden from doing so by OPLAN. Its inability to do so negatively impacted the effectiveness of its remedial powers. Future such bodies should have no such restriction (see above).

7.3 The acknowledgment of violation by the mission when found responsible for the violation of the complainant's rights is an important means to remedy a right violation

The Mission has systematically resisted calls by the Panel to acknowledge the violations of rights identified by the Panel. The Panel was informed that was the case because of concerns

⁹⁹https://unmik.unmissions.org/sites/default/files/hrap_final_report_final_version_30_june_2016.pdf.

that such an acknowledgment could result in lawsuit and civil responsibility for the Mission.¹⁰⁰ Such resistance is unfortunate and has negatively affected the credibility of the Mission’s commitment to upholding relevant human rights standards.

Due consideration should be given in the future to issuing guidance to future mission regarding the need to acknowledge its responsibility in cases where it has been determined by a competent accountability body that it has violated the fundamental rights of victims. This is an important element of the process of justice and reparation of harm in cases involving human rights violations.

7.4 The fact that the Panel has recommendation powers only has reduced its effectiveness in terms of remedying rights violations

The reluctance of the Mission (in particular in its early years) to implement all of the Panel’s recommendation negatively affected the effect of the Panel’s work. The situation improved greatly with the appointment of a new (and current) Head of Mission who demonstrated much greater commitment to ensuring compliance with human rights standards and to implement (for the most part) the Panel’s recommendations. The power of the Panel to follow up on its decisions and recommendations has also been useful in spurring and nudging the Mission where there might have been a degree of institutional reluctance to taking certain steps (see above).

The limitations caused by the Panel’s recommendatory powers became particularly apparent when the new, reduced, mandate of the Mission came into force. Following this change in the nature of the Mission’s mandate, the Head of Mission systematically referred to that new mandate as justification for his failure or inability to implement the Panel’s recommendations.

It is regrettable that the Mission’s mandate was not drawn or interpreted in such a way as to ensure that it would, at all times, be able to fully and effectively remedy the violations of rights attributed to it. Those responsible for drawing or interpreting the mandate of future rule of law missions should ensure that they are at all times able to comply with these basic expectation of compliance with human rights obligations and remedial duties.

¹⁰⁰ The Panel is aware of one such effort, which resulted in a British tribunal declaring the complaint inadmissible based on the Mission’s immunities.

7.5 Where violations of rights were established, the Panel has recommended on a number of occasions that its decisions be circulated with the relevant individuals and staff within the Mission

This practice has ensured dissemination of the Panel’s decisions and associated standards. This played an important educational and accountability function within the Mission.

7.6 The Panel was empowered to follow up on its decisions and recommendations

As discussed above, such power has enabled the Panel to ensure that the Mission was being responsive to its decisions and recommendations and enabled it to verify that its recommendations had been duly implemented or to conduct an ‘investigation’ of the reasons why they were not.

This is an important tool and has enabled the Panel to ‘keep cases alive’ as a means to ensure that the Mission continued to pursue its efforts to remedy rights violations in some cases where human rights problems were ongoing.¹⁰¹ This has enabled the Panel to continue to engage with the Mission in regards to its efforts to implement the Panel’s recommendations and to ensure that violations are being addressed appropriately (within the limits of the Panel and Mission’s powers).

Particularly worrying in that regard are situations where the violation of rights commenced during the United Nations era, continued under the EULEX mandate and was ‘passed along’ to local authorities. These situations constitute an affront to the effective protection of human rights and have led to situations where one institution simply waits to pass along the issue to another. Such practices should be absolutely forbidden and prevented.

Also worrying from this point of view, as outlined above, has been the fact that the new, reduced, mandate of the Mission has been used in many cases to justify the Mission’s failure or inability to fully and meaningfully remedy violations of rights attributed to it.

¹⁰¹ See Annex 2.

7.7 *Ratione personae*, the Panel is not competent to receive and address complaints coming from staff of the Mission

Under the terms of its mandate, the Panel was not authorised to receive complaints from staff of the Mission. This *ratione personae* limitation to its mandate prevented the Panel from giving consideration to alleged violations of human rights where the alleged victim was a staff of the Mission.

It would have been desirable for this exception not to be included so that the Panel could have addressed this sort of complaint and so as to send a clear message that all those who are connected with the Mission can come to the Panel where they consider that their rights have been violated by the Mission.

Instead, complaints by staff members are subject to other mechanisms and procedures that have been put in place specifically to address their grievances. Whilst not specifically focuses on issues of human right, such mechanisms and procedure could, if effective and easily accessible, provide welcome remedies for the violation of a staff's rights and interests. Considering that these did not come within the scope of the Panel's mandate and in the absence of detailed public information regarding these mechanisms, the Panel has only been able to conduct a superficial review of these.

In summary, the following may be said. Apart from the HRRP which provides a non-compensatory remedy for HR violations there is no other effective accountability mechanism that provides a sufficient level of protection for breaches of Fundamental Rights except in the case of Personal Data Base Protection. There is no central EU court dealing with reparation for contested damages incurred during EU missions and operations since the CJEU has no jurisdiction over CSDP.¹⁰² However, the EULEX Mission possesses an insurance to cover compensation for claims of fraud, employer's liability, Professional Liability and Public Liability. Finally, acts of discrimination could amount to misconduct and could rise to the level of harassment or bullying, which could amount to a disciplinary offence.¹⁰³ However none of

¹⁰² Articles 24(2) TEU, 275 TFEU.

¹⁰³ The following instruments could be of relevance:

- a. Code of Conduct and Discipline for EU Civilian CSDP Missions (Ref. Ares(2016)4089459 - 03/08/2016);
- b. EULEX Kosovo Guidelines on Staff Ethics and Conduct;
- c. EULEX Kosovo SOP on Disciplinary Procedure;
- d. EULEX Kosovo SOP on Harassment, Sexual Harassment, Abuse of Authority, Bullying and Discrimination;
- e. EULEX Kosovo SOP on Personal Data Protection; and
- f. EULEX Kosovo SOP on Whistleblowing.

these mechanisms provide for the recovery of damages. Nor are they intended to address situations where fundamental rights have been violated by the Mission. The Panel observes in that regard that in none of the cases that have come before it have meritorious complaints been remedied through any of these mechanisms or procedures.

8. CASELAW

8.1 The Panel has made a significant contribution to a small but expanding body of jurisprudence regarding human rights accountability of legal persons other than states

This is one of its most important contribution that the Panel has made to the possibility of future accountability mechanisms. Its caselaw sets out the outline of a law of human rights applicable to international organisations and missions in the performance of quasi-governmental functions. The caselaw of the HRAP has similar value.

The Panel's jurisprudential output covers a variety of topics relevant to the work of the EULEX Kosovo Mission. Particularly interesting have been cases pertaining to a) enforced disappearances, b) anti-riot operations, c) detention, d) protection of witnesses in criminal cases and e) access to an effective remedy.

All of the Panel's decisions are public and are placed on its website (<http://hrrp.eu/cases.php>) and are also organised by subject to be easily searchable (<http://hrrp.eu/jurisprudence.php>). In one case, the Mission requested that the public version of the Panel's decisions be redacted to remove certain information; having considered the matter, the Panel declined to do so in light of the fact that this information was in the public interest and did not affect the operational effectiveness of the Mission. The Head of Mission disagreed and effectively took steps to redact the impugned decisions. They appear on the Panel's website in redacted version, the redactions having been made by the Mission itself.

The Panel has also developed a set of standards and procedural tools to perform its functions. It has done so as part of its decision-making process and also by drafting and adopting its Rules of Procedure, which outline many of these practices ([http://hrrp.eu/docs/RULES%20OF%20PROCEDURE%20HRRP%20\(15%20January%2019\).pdf](http://hrrp.eu/docs/RULES%20OF%20PROCEDURE%20HRRP%20(15%20January%2019).pdf)).

In addition to its jurisprudential output, the Panel has drawn a number of tools – including, case-law notes – and has organised its decisions in a way that they could be easily searched

and retrieved. This should help future policy makers, scholars and practitioners make use of the Panel’s caselaw where relevant to their work.

8.2 There remains a regrettable lack of awareness of the existence, work and jurisprudence of the Panel outside of the Mission

The rather limited awareness of the existence and work of the Panel has reduced and diminished the value of its work at a macro-level. Greater efforts should have been made – by the Panel, by the Mission and by States – to ensure broader awareness of the existence and work of the Panel. This should be part of any legacy strategy, in particular within the EU.

As part of the legacy/post-Mission, it will be important to keep the jurisprudential legacy of the Panel alive and to preserve it by securing maintenance and hosting of its website. The Panel also plans to take step to ensure that its jurisprudential legacy is fully maintained.

More recently, the Panel has prepared short videos that explain some aspects of the work of the Panel. These have proved to be quite successful in drawing attention to the Panel (and traffic on its website). Short, pedagogical, videos of that sort should be considered for use in future mechanisms.

8.3 It is difficult to ascertain whether the amount of cases that have come before the Panel reflect its true importance and the extent of the Mission’s deviations from relevant standards or whether other factors have negatively impacted the amount of cases coming its way

One factor that has contributed to keeping the caseload relatively low is the fact that the Panel did not have *proprio motu* competence to seize itself of human rights issues that it had identified but which did not give rise to a complaint.¹⁰⁴ Giving future accountability bodies the power to act *proprio motu* where there are credible indications of rights violations by a mission should be duly considered.

¹⁰⁴ See Annex 1.

The fact that its mandate was limited to the ‘executive’ aspects of the Mission’s mandate in the custom, justice and police field and that the activities of the Kosovo judiciary were excluded also impacted the amount of cases that could come to the Panel.

Outreach efforts were made – sometimes successfully – to *attract* more cases to the Panel. A certain reluctance to have dealing with the Panel appears to be due in part to the fact that there was a good deal of distrust of the Mission among certain local communities. Outreach efforts *by the Mission* on that front should have been considered as a way to promote the image of the Mission and to support the work of the Panel.

Decisions of the Panel finding violations of rights by the Panel have also contributed to giving credibility to the Panel as an accountability mechanism.

9. OUTREACH

9.1 Outreach carried out by the Panel to relevant communities – in the form of information campaign describing the Panel’s work and mandate – was important to increase awareness of the Panel and contributed to complaints being filed

To promote knowledge and awareness of the work of the Panel, Panel members and staff of the Secretariat have engaged in a number of outreach events. These were opportunities to make the Panel known to potentially interested communities. This included private meetings; official meetings; conferences; lectures; and informal contacts. A newsletter was also created and a website set up to publicise the work of the Panel and make its decisions available to a broader audience.

9.2 Early in its existence, the Panel should have drawn up a clear outreach plan with clear goals and targets, which it should have updated over time

Greater efforts should have been made in the early days of the Panel to try to measure the effectiveness of various outreach efforts and to devise a clear outreach strategy adequate for such a body. The coherence of outreach strategies pursued by the Panel was in some respects uncertain.

It is clear, however, that contacts with NGOs (in particular victims-support groups) have been important to the work of the Panel and generated a significant amount of complaints. Contacts with other stakeholders, whilst relevant to ‘put the Panel on the map’ do not appear to have resulted in increased visibility towards potential claimants or to have resulted in additional cases coming before the Panel.

9.3 Whilst the Mission was generally supportive of the Panel’s outreach efforts, it would have been advisable for the Panel to have its own, allocated, budget to carry out its outreach activities

Budgetary dependency for outreach activities has had a constraining effect on the steps that the Panel could take outreach-wise. The Mission has, however, been generally supportive of those efforts. Requirements of independence and impartiality militated strongly in favour of a solution where the Panel would have had an independent budget to carry those out.

9.4 Outreach should have been more focused on its target audience(s), which was never fully and properly defined and identified

The Mission could also have done more to ensure broader knowledge of the existence, work and mandate of the Panel with relevant communities. It left that task mostly to the Panel itself, which had only limited resources and time for that purpose.

9.5 The Panel creatively took steps to broaden its focus and sought to impact the work of the Mission outside of its cases

In particular, the Panel –

- a) published annual reports in which it outlined some of the relevant human rights trends affecting the mission;
- b) published ‘white papers’ that were circulated with relevant officials of the mission to try to broaden awareness of particular human rights issues (e.g., enforced disappearance cases);
- c) produced analytical material based on its caselaw (see above); and
- d) held many meetings with relevant representatives of civil society, the mission and other international organisations.

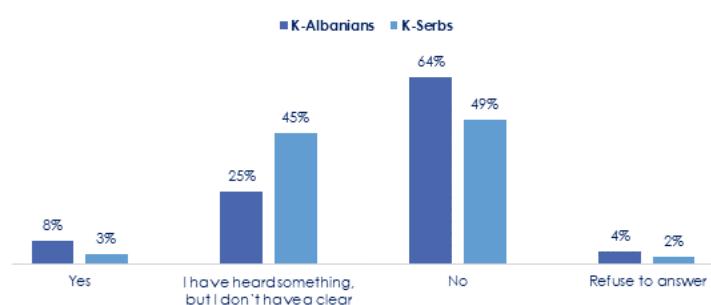
9.6 The Panel’s website and newsletter have been a successful instrument of outreach

These contain a great deal of information of value to future accountability mechanisms. They should be kept as part of the legacy of the Mission and closely studied when devising future missions.

Videos prepared by the Panel and put online, which explain certain aspects of the work of the Panel, have drawn much traffic to the Panel’s website. This initiative should have been taken at an earlier time.

9.7 Limited awareness of the existence and mandate of the Panel

Despite the Panel's efforts, the public awareness of its existence and mandate remained relatively limited. In a survey conducted by EULEX Kosovo Press Office at the end of 2020, the following findings were made in response to the question '*Are you aware of the work of the Human Rights Review Panel, an independent body which reviews complaints against EULEX?*':



The sample size for this poll is representative of the two main ethnic groups living in Kosovo, K-Albanians and K-Serb. Since the aim of the study was to understand the differences in opinion of K-Albanians and K-Serbs that live in different municipalities in Kosovo, the sample size was divided into three main sub-samples:

- 300 interviews with K-Albanians
- 100 interviews with K-Serbs who live in South Kosovo
- 100 interviews with K-Serbs who live in North Kosovo

The sample size is based on the 2011 Kosovo population census data, conducted by Statistical Agency of Kosovo. In order for the sample to be representative of the population, it went under three main stratifying layers, described below:

- The first stratification used is determining sub-samples by ethnicity. Considering that K-Albanians and K-Serbs were the subject of this study, two main sub-samples were determined: K-Albanians and K-Serbs, with the main purpose of obtaining a representative sample for the two ethnic groups.
- The second stratification used is by municipality. Kosovo is organized in 38 municipalities as local government units, and so municipality-based quotas were determined based on the population size according to Probability

Proportionate to Size technique, for the three sub-groups that are subject of the study.

- The third stratification used is by type of settlement, where for each municipality, urban and rural quotas have been determined based on the Probability Proportionate to Size technique.

The interviewee selection process is based on Random Walk process. The enumerator chooses a starting point, usually a street with most residential units (i.e. the longest or the densest street), and selects randomly every third house/apartment building on the left. Within the household, the respondent asks for all residents older than 18 years old and interviews the person with most recent birthday. The survey fieldwork has been conducted in the late December 2020. The interviews for this study were completed through CAPI technique (Computer Assisted Personal Interviewing). The sample size included 500 respondents, from different locations and municipalities.

10. THE PANEL, EULEX AND UNMIK

10.1 Transmission of files from UNMIK to EULEX has been entirely inadequate, causing difficulties in resolving cases involving serious violations of human rights

UNMIK's recording, organising and transmitting of its files to EULEX Kosovo was inadequate. Many of these were duplicates; they were poorly organised; many did not record what had been done in individual cases by the UN. These shortcomings and others required that EULEX invest time and resources to review casefiles and assess their content. This has caused delays, duplication of resources and has meant that a great deal less cases could be dealt with than might otherwise have been possible to address had better coordination been guaranteed.

Greater coordination between successive missions is urgently called for. Careful planning of the transition process should be carried out well in advance of any such process. Human rights considerations should form a core aspect of such planning.

10.2 UNMIK's failure to fully and effectively investigate and prosecute the vast majority of cases of human rights violations that fell under its competence increased the burden upon EULEX and contributed to stretching EULEX's capabilities and resources

A number of cases that came before the Panel started life as cases during the UN period. The core, primary, violations of rights were often committed during that period whilst violation might have continued during the EULEX period (as in the case of ongoing violations such as “enforced disappearance) or resulted in other violation of rights of the victims (e.g., because of a continued failure to properly and effectively investigate allegations of violations of rights under Articles 2 and/or 3 of the European Convention of Human Rights).

The failure of UNMIK to fully and effectively guarantee the rights of certain individuals (e.g., as in the *Roma* case¹⁰⁵) has meant that EULEX Kosovo was faced with more cases than it might otherwise have had to deal with; it also meant that some violations of rights continued for over a decade. The failure of the United Nations to address these fully and effectively is, to say the least, unfortunate and has contributed to some of the difficulties subsequently faced by EULEX Kosovo.

Any international mission must ensure that it conducts its activities in a manner consistent with relevant international human rights standards and that human rights considerations are at the forefronts of its priorities.

However, while the EULEX Mission had to spend a lot of time addressing the legacy of UNMIK, it also added to UNMIK's failures and shortcomings. Indeed, a great many cases that were not investigated by UNMIK were left un-investigated by the Mission (despite its obligation to investigate those), including in some instances based on the preliminary and insufficient evaluation conducted at the time by UNMIK of the cases.

As a result, failures to investigate traversed two decades and two international missions and many of the most sensitive cases involving allegations of human rights violations (including, missing persons/enforced disappearance cases) remain untouched and un-investigated after all that time and all these resources having been used up by these missions.

10.3 The HRRP benefited from the work of its sister Panel, the *Human Rights Advisory Panel (HRAP)*, which operated under the umbrella of UNMIK

Several cases that had gone before the HRAP in relation to violations of human rights by the United Nations mission in Kosovo before also coming before the HRRP in relation to violations

¹⁰⁵ See *X and 115 others against EULEX*, Case no. 2011-20. Regarding the HRAP's decisions and findings in relation to this case, see also:

- http://www.unmikonline.org/hrap/Eng/Cases%20Eng/DC_No_26-08.pdf
- <http://www.unmikonline.org/hrap/Eng/Cases%20Eng/26-08%20NM%20etal%20Opinion%20FINAL%2026feb16.pdf>
- [http://www.unmikonline.org/PublishingImages/2016/HRAP%20Final%20Report/HRAP%20Final%20Report%20\(final%20version%2030%20June%202016\).pdf](http://www.unmikonline.org/PublishingImages/2016/HRAP%20Final%20Report/HRAP%20Final%20Report%20(final%20version%2030%20June%202016).pdf)
- https://unmik.unmissions.org/sites/default/files/hrap_final_report_final_version_30_june_2016.pdf

of human rights attributable to EULEX Kosovo. This reflected in some cases the fact that the United Nations had failed in a number of cases to fully and effectively address and remedy the violation of fundamental human rights that had taken place during UNMIK’s mandate.

Unfortunately, in a number of cases – in particular, *X and 115 others against EULEX*; and a series of cases pertaining to “enforced disappearance” – EULEX Kosovo also failed to fully address and remedy serious violations of fundamental rights for which it was found to be responsible. Following the change in the mandate of the Mission on 14 June 2018, its ability to address these violations and to provide an effective remedy for these was all but abolished. It fell to the local authorities to take over that responsibility. The fact that the Mission failed to prioritise some of these cases – in particular, those pertaining to ‘enforced disappearances’ – and to successfully address those will diminish its legacy. The fact that some of these violations occurred during UNMIK’s mandate, continued during EULEX’s mission and are ongoing will negatively affect the credibility and legacy of both international missions.

VI. RECOMMENDATIONS FOR FUTURE HUMAN RIGHTS ACCOUNTABILITY MECHANISMS

Based on the above, the Panel would make the following recommendations should new human rights accountability mechanisms be created:

MANDATE OF THE MISSION

1. Any future EU mission – rule of law or otherwise; with executive mandate or otherwise – should be required to comply with basic standards of human rights.
2. No mandate should put it in a position of not being able to address and remedy those violations of human rights that have been attributed to it.
3. Heads of mission should make it a priority of such Mission to demonstrate their actual commitment to human rights.

LEGAL STRUCTURE AND FOUNDING INSTRUMENT OF THE ACCOUNTABILITY MECHANISM

1. The legal basis of any such accountability mechanism should be made public.
2. The scope of its mission and competence should not be limited to the ‘executive’ aspects of the mandate but should apply to all aspects of the Mission’s activities where the possibility exists of interference with protected human rights. An exception should be made for judicial activities over which such a mechanism should not in principle have competence.
3. A human rights accountability mechanism should be granted the authority to issue binding decisions, even if the scope of what it is authorised to order is limited in scope or nature.
4. It should have been granted the authority to order or recommend financial reparation or compensation;
5. It should also be granted *proprio motu* competence. This would enable it a) not to be dependent on any formal complaint to act and b) would enable it to act in relation to observed institutional human rights issues where there might be no obvious victim or complainant competent to seize the mechanism.
6. Its competence should in principle be as broad as the powers of the Mission in question so that there should be no human rights accountability gaps between those activities and the responsibility of the Mission.

7. As was the case with the Panel, such a mechanism should have normative competence to adopt and amend its own rules of procedure.

RELATIONSHIP TO THE MISSION AND LINES OF REPORTING

1. The responsiveness of the Mission and the willingness to engage with the Panel was critical to the Panel's effective functioning. The regime applicable to any future mission should make it clear that the mission, its organs and staff members are all expected to comply with relevant standards of human rights. Such compliance should be made a mission priority; this would involve clear normative guidance, adequate staff and training as well as internal mechanism of assessment of the mission's actions and priorities.
2. Human rights training should be organised for all incoming staff members to ensure a common understanding of the importance and tenor of human rights obligations and to help spread awareness of relevant human rights standards all through the mission. Further human rights training, tailored to specific roles or areas of the Mission's work, should be organized periodically, to strengthen staff understanding of human rights in the Mission context.
3. The qualification of the Mission's staff, in particular their familiarity with relevant standards of human rights is essential to ensuring effective protection of human rights standards in the performance of the Mission's mandate; such knowledge and competence should form part of the required qualification of relevant staff.
4. It is essential to preserve the independence and impartiality of the members of such a mechanism and that of its staff.
5. Such a mechanism should have its own budget to fulfil its mandate and outreach activities and to guarantee its independence from the mission.

ORGANISATION

1. Any such mechanism should promptly adopt its rules of procedure and draw up a protocol regarding its method of work earlier in its existence to ensure greater expeditiousness of proceedings
2. The Presiding member should play an important role in coordinating the work of the Panel and in overseeing the activities of the mechanism (including outreach activities).
3. Such a mechanism should ensure that its proceedings are expeditious and conducted without unjustified delays.

4. The visibility of the mechanism should be promoted so as to make it known to potential claimants and relevant communities.

STAFFING

1. The qualification of the staff of the mechanism is essential to its effective functioning. Contributing states and the mission itself should ensure that only adequately qualified staff are hired to work for the mechanism.
2. A significant management role should be played by the Presiding member over the staff.
3. Adequate staffing and job security should not be at the mercy of uncertainties regarding the future of the mission.
4. A relatively ‘flat’ structure is desirable within the Secretariat.
5. Staff should have access to external mechanisms of complaints or advise in case of internal working issues.
6. The independence of the staff must imperatively be maintained and preserved.
7. Secondments do not necessarily and in all cases generate the best possible candidates. Contributing states should therefore ensure that only adequately qualified staff are put forth.

PROCEDURE BEFORE THE PANEL

1. The ability of such a mechanism to adopt and amend its own rules of procedure is an important tool to ensure that those rules were best adapted to the demands of its mandate.
2. The procedure before such a mechanism should be simple and as un-technical as possible so as not to require the assistance of counsel.
3. Simple prepared complaint forms should be available to potential claimants in relevant languages.
4. Time-limits should not be too strict.
5. Panel sessions should be held regularly. Considerations pertaining to the workload and preparedness of cases for deliberations should dictate the frequency of those sessions.
6. The mechanism – including its staff and members – are to be expected to remain actively involved with the activities of the Panel sessions and to work towards ensuring the prompt and effective resolution of all complaints.

7. The cost of proceedings should not be born by complainants but by the budget of the mechanism (if one is allocated) or that of the mission.
8. A filtering mechanism – or admissibility process – should be put in place to ensure that the mechanism can focus primarily on *prima facie* meritorious case. The standard of admissibility should not be too strict so as to ensure that complaints are generally considered on their merit.
9. Proceedings should in principle be in writing with the possibility of oral hearings and/or submissions being possible where appropriate.
10. Evidence should in principle be easily admissible.
11. The possibility of follow-up to its decision should be foreseen as an important instrument to ensure and guarantee the effective functioning of the mechanism.

DRAFTING AND DELIBERATIONS

1. The experience of members of the mechanism as legal practitioners, in particular as judges, is extremely valuable and an important element of its overall effectiveness.
2. The practice of ‘rapporteur’ designated to ‘take charge’ and lead in individual cases is important to ensuring the timely and expeditious resolution of cases.
3. Voting should be by qualified majority with the vote of the external (i.e., non-EULEX Panel member) decisive in case of a split.
4. Such a mechanism should guarantee the adversarial nature of its proceedings at all stages and afford the parties adequate time to make informed submissions.
5. In order to guarantee the publicity of proceedings and in order to ensure the adversarial character of its proceedings (see above), the mechanism should resist efforts to *confidentialise* any particular aspects of the proceedings.
6. Use of electronic deliberations should be considered where needs to act more expeditiously and in order not to delay the process where one of its members is unable to attend a session.

ADEQUATE REMEDIES

1. Such a mechanism should have broad competence to decide the nature of the remedy best suited to correct a wrong.
2. It should have the ability to either order financial reparation and/or to recommend financial reparation or compensation, even if the amount that could be granted is capped.

3. Careful consideration should be given to the possibility for the mission to acknowledge and recognise its responsibility for the rights violations as a way to remedy the wrong done. The acknowledgment of violation by the mission when found responsible for the violation of the complainant's rights is an important means to remedy a right violation
4. Decisions of the mechanism should be binding. The fact that the Panel had *only* recommendation powers only has reduced its effectiveness in terms of remedying rights violations.
5. Decisions of the mechanism should be circulated to all relevant organs and officials of the mission. Adequate efforts to publicise them, in particular where violations of rights have been found, should be carried out.
6. The ability to follow up on one's decisions and recommendations should be guaranteed (see above).

CASELAW

1. The caselaw of any such mechanism should be publicised and publically available.
2. Efforts should be made to organise it and present it in a palatable fashion so as to ensure broad awareness of its jurisprudential contribution.
3. References and citations to other human rights bodies should be promoted where this helps identify general principles or customary principles relevant to the international law of human rights.

OUTREACH

1. Outreach carried out by such a mechanism and directed towards relevant communities – in the form of information campaign describing the Panel's work and mandate – is important to increase awareness of the Panel and contribute to complaints being filed.
2. A clear outreach plan should be drawn up with core constituencies and activities, which it should have updated over time.
3. The mechanism should have its own budget to conduct such activities.
4. A well-organised website and newsletter could be valuable instruments of outreach.
5. Pedagogical videos pertaining to the work of the mechanism should be prepared and placed online.

COORDINATION BETWEEN SUCCESSIVE MISSIONS AND AUTHORITIES

1. Adequate safekeeping and transfer of files and records should be guaranteed at the end of a mission.
2. The protection of the fundamental rights of those concerned by such transfer (in particular, as regards issues of security or privacy) should be guaranteed. Such transfer should be conducted in a manner consistent with the protection and promotion of relevant fundamental rights.
3. In particular, in relation to criminal investigations and prosecutions, the transfer should ensure that the effectiveness of the process is not negatively affected by the transfer of such files or the manner in which transfer of information has been organised.

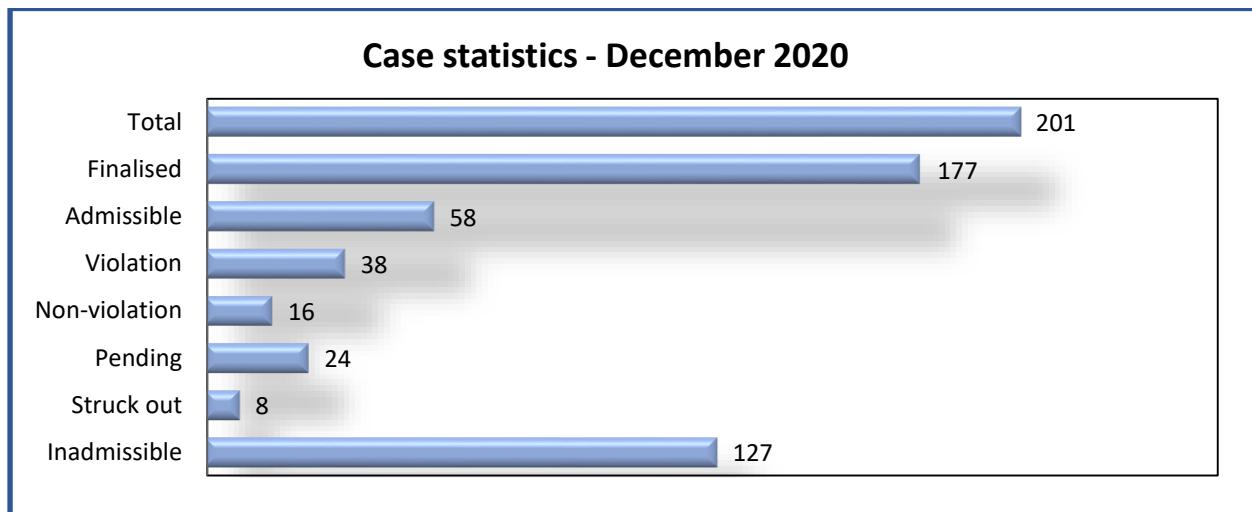
ANNEXES

ANNEX 1: LIST OF CASES THAT CAME BEFORE THE PANEL

Statistics 2010 – December 2020

	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019	2020	Total
Registered cases in total	16	28	23	27	42	16	35	7	4	2	1	201
Finalized cases in total	6	30	10	20	28	27	19	25	6	4	2	177
Admissible	0	7	2	7	2	21	2	2	0	10	5	58
Inadmissible	6	22	10	13	21	12	9	23	6	3	2	127
Violation	0	2	0	7	2	4	9	2	0	4	8	38
No violation	0	5	0	0	1	10	0	0	0	0	0	16
Struck out	0	1	0	0	3	1	1	2	0	0	0	8

As of 31 December 2020	
Pending	24
Communicated to HoM	24



ANNEX 2: LIST OF FOLLOW-UP DECISIONS – February 2021

	Case	Admissibility	Findings	Follow up	Second	Third & More	Status
1	2010-01	8 APR 2011	8 APR 2011	23 NOV 2011			Closed
2	2010-07	8 JUN 2011	8 JUN 2011	23 NOV 2011			Closed
3	2011-07	5 OCT 2012	10 APR 2013	26 NOV 2013	26 AUG 2014		Closed
4	2011-20	5 OCT 2012	22 APR 2015	11 NOV 2015	10 JAN 2017	27 MAR 2019; 11 DEC 2019	Pending
5	2011-27	13 JUN 2017	5 DEC 2017	19 JUN 2019			Closed
6	2012-09 et al	10 APR 2013	20 JUN 2013	5 FEB 2014			Closed
7	2012-14	7 JUN 2013	4 FEB 2014	11 NOV 2014			Closed
8	2012-19 & 20	see 2012-09	30 SEP 2013	27 MAY 2014			Closed
9	2012-22	---	11 NOV 2015	29 FEB 2016			Closed
10	2013-03	1 JUL 2014	12 NOV 2014	11 NOV 2015			Closed
11	2013-21	11 JAN 2017	11 JAN 2017	13 JUN 2017			Closed
12	2014-11 et al	30 SEP 2015	19 OCT 2016	7 MAR 2017			Closed
13	2014-18	12 NOV 2015	12 NOV 2015	11 JAN 2017			Closed
14	2014-32	11 NOV 2015	11 NOV 2015	19 OCT 2016	7 MAR 2017		Closed
15	2014-34	29 SEP 2015	19 OCT 2016	7 MAR 2017			Closed
16	2014-37	19 OCT 2016	19 OCT 2016	10 JAN 2017			Closed
17	2016-09	19 JUN 2019	11 DEC 2019				Pending
18	2016-10	19 JUN 2019	13 FEB 2020				Pending
19	2016-11	11 SEP 2019	11 DEC 2020				Pending
20	2016-12	11 SEP 2019	12 FEB 2020				Pending
21	2016-13	11 SEP 2019	12 FEB 2020	12 FEB 2021			Pending
22	2016-14	19 JUN 2019	11 DEC 2019	12 FEB 2021			Pending
23	2016-17	11 DEC 2019	4 JUN 2020	11 DEC 2020			Pending
24	2016-23	4 JUN 2020	11 DEC 2020				Pending
25	2016-24	11 DEC 2020	11 DEC 2020				Pending
26	2016-28	28 MAR 2019	11 SEP 2019	11 DEC 2020			Pending
27	2017-02	27 MAR 2019	19 JUN 2019	11 DEC 2019			Pending
28	2019-01	4 JUN 2020	11 DEC 2020				Pending