



## **DECISION and FINDINGS**

**Date of adoption: 4 February 2014**

**Case No. 2012-14**

**Valbone Zahiti**

**Against**

**EULEX**

The Human Rights Review Panel sitting on 4 February 2014 with the following members present:

Ms Magda MIERZEWSKA, Presiding Member  
Mr Guénaël METTRAUX, Member  
Ms Katja DOMINIK, Member

Assisted by  
Mr John J. RYAN, Senior Legal Officer  
Ms Joanna MARSZALIK, Legal Officer  
Mr Florian RAZESBERGER, Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel as amended last on 15 January 2013,

Having deliberated, decides as follows:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was registered with the Panel on 27 September 2012.
2. On 8 April 2013, the Panel decided to give notice of the complaint to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaint. The observations of the HoM were received on 10 May 2013. They were subsequently communicated to the complainant for her comments. The complainant provided her comments to HoM's observations on 30 May 2013.

3. On 20 May 2013, the Panel invited the HoM to address further issues on admissibility that had not been addressed by his previous submission. The observations of the HoM were received on 3 June 2013.
4. In its decision of 7 June 2013, the Panel declared the case admissible in regard to alleged violations of Article 8 in conjunction with Article 13 of the European Convention of Human Rights and Fundamental Freedoms and posed further questions to both the HoM and the complainant in order to decide on the merits of the case.
5. On 1 August 2013, the complainant submitted additional comments which were subsequently forwarded to the HoM. The HoM submitted additional observations on 27 September 2013. They were subsequently communicated to the complainant for her comments. She provided final comments on 22 October 2013.

## **II. THE FACTS**

The following facts were established on the basis of information submitted by the parties:

6. The complainant submits that on 7 June 2011 at around 08:25 a.m., while performing her official duties as a Kosovo police (KP) officer providing security for the premises of the Liaison Office of Romania, she was attacked and injured by an „EULEX official”, an international police officer. She claims that he intentionally drove in her direction with his car, hit her with his vehicle and injured her leg.
7. The complainant states that the incident occurred as a consequence of the illegal parking attempt by that EULEX official. He tried to park his vehicle where it was forbidden to do so, namely, at a location reserved for the Liaison Office of Romania.
8. It is alleged that the complainant warned the EULEX official not to park at this location. In reply, the latter proffered verbal insults.
9. The situation deteriorated so much that the EULEX official drove his vehicle towards the complainant and hit her on her right leg. She ordered him to stop the vehicle whilst holding her service weapon and threatening to use it in self-defence.
10. The complainant submits that the incident caused injuries, which resulted in adverse long-term consequences to her health. She was unable to return to work for almost three months. Further, it is submitted that she still suffers from continuous medical problems caused by this incident. As the nature of her employment requires physical fitness, her current condition compromises her professional performance. She consequently had to take sick leave and other types of leave at various times which put her employment at risk.

11. The complainant submitted her medical records to the Panel. She stated that the Kosovo Police does not provide health insurance so that she had to cover all related expenses. She also submits a report drawn up by the KP which includes an internal EULEX report, written by the EULEX official concerned, contradicting the complainant's version of events. According to that report, the complainant had behaved aggressively towards him. As a consequence, he drove away from the scene of the incident. No reference to the physical assault is made by him in his report.
12. Immediately after the incident the complainant was accompanied by her work colleagues to the Central Police Station in Pristina where she received first-aid treatment. Thereafter, she received medical attention at the hospital in Pristina. When she was at the hospital an EULEX police officer expressed the wish to interview her in connection with the incident. The complainant declined to be interviewed at this stage as she did not feel well enough. She was not contacted again by EULEX.
13. Information provided by the complainant is corroborated by the EULEX reports submitted to the Panel. It transpires therefrom that on 7 June 2011 an EULEX police officer came to the hospital where the Regional Crime Unit (RCU) investigators were due to take a statement from the complainant. Upon her arrival at the hospital, that officer was informed that the complainant had to undergo further medical tests and that she would not be able to make a statement until later in the afternoon. In the afternoon of the same day, the EULEX police officer attended the Regional Investigation Unit, where she was informed that the complainant was on her way to make a statement. After approximately 45 minutes, the EULEX police officer was informed that the complainant would not be coming to the station as she still felt unwell. The EULEX police officer was informed by the RCU investigators that she would be contacted as soon as the complainant was in a position to make her statement, which was planned for the 8 June 2011.
14. EULEX submits that the complainant made a statement to the Kosovo authorities on 8 June 2011. However, as the EULEX Police was not contacted by the Kosovo investigators, no EULEX representative was in attendance while the complainant's statement was being taken. A copy of that statement was delivered to the Unit for Security of Diplomatic Missions and was thereafter obtained by the EULEX police officer (referred to above, par. 13) when she was contacted by KP investigators approximately three weeks later.
15. On 7 June 2011, EULEX Internal Investigation Unit (IIU) launched an internal investigation into the incident.
16. On 8 June 2011, in accordance with the EULEX Code of Conduct, the Contingent Leader of the EULEX official involved in the incident was informed that an internal investigation had been launched. On 30 June 2011, in view that the result of the internal investigation was that concerned staff member breached the EULEX Code of Conduct, the na-

tional authorities of the staff member requested to finalize his mission and to repatriate him.

17. On 13 July 2011, the IIU concluded its Final Investigation report and submitted it to the Head of the Mission (HoM). The HoM decided to close the case, having regard to the national authorities' decision to repatriate the official concerned. On 15 July 2011, he completed his check-out procedures and was repatriated.
18. On an unspecified date in October 2011, the complainant met with the Municipal Public Prosecutor of Pristina to obtain information about her case. On 3 November 2011, the Public Prosecutor sent a letter to the HoM, "with the request to decide about the immunity" of the EULEX official concerned.
19. In reply, on 22 November 2011, the HoM informed the prosecutor of the repatriation of the official concerned and that the Mission had closed its case. The HoM also requested clarification as to whether the prosecutor's letter was to be construed as a request for the waiver of that official's immunity.
20. On 4 May 2012, EULEX received a response. The prosecutor requested the waiver of immunity as the EULEX Official was suspected of having committed the offence of "attacking persons performing official duties" punishable under Article 317 of the Kosovo Criminal Code then in force.
21. In his reply of 12 June 2012, the HoM advised the prosecutor that the national authorities of the staff member concerned had requested a copy of EULEX's internal file for the purposes of their consideration. The HoM invited the prosecutor to contact those authorities through the official channels to establish whether there was an on-going investigation by the national authorities. It was further stated that until this point was clarified, the HoM was unable to take any further action regarding a waiver of immunity. No further information or communications were sent by Kosovo authorities to EULEX in respect to this case.

#### **RELEVANT APPLICABLE LAW**

22. The Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Of particular importance to the work of the Panel are the European Convention on the Protection of Human Rights and Fundamental Freedoms (ECHR) and the International Covenant on Civil and Political Rights (ICCPR) which set out minimum standards for the protection of human rights that must be guaranteed by public authorities in all democratic legal systems.

## **Joint Action**

23. Relevant extracts of Articles 2, 3 and 10 par. 2 of European Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (hereafter: Joint Action), read as follows:

### **Article 2 Mission Statement**

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 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 responsibilities.

### **Article 3 Tasks**

In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall:

- (a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;
- (i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming.

### **Article 10 Status of EULEX KOSOVO and of its staff**

The State or EU institution having seconded a member of staff shall be responsible for answering any claims linked to the secondment, from or concerning the member of staff. The State or EU institution in question shall be responsible for bringing any action against the seconded person.

## **Law on Jurisdiction**

24. The Law on Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo (No. 03/L-053, hereinafter: the Law on Jurisdiction), and more specifically its Article 17, regulates the executive powers of the EULEX Police:

### **Article 17**

17.1 For the duration of the EULEX KOSOVO in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX KOSOVO.

25. The Panel also relies on Annexes G and J of the Operational Plan of EULEX, the Code of Conduct and Discipline as well as the Standard Operating Procedures “on Investigating Alleged Breaches of the Code of Conduct”.

## **Draft articles on the responsibility of international organizations**

26. For the purposes of this decision, reference is made to the draft articles on the responsibility of international organizations, as adopted by the International Law Commission at its sixty-third session, in 2011.

### **III. COMPLAINTS**

27. The complainant requests information about the status of her case within EULEX and before the courts of the officer's home country. She submits that due to the immunity of the EULEX Mission personnel she has had no access to a court that was competent to determine her rights in respect of the injury which she suffered nor was any other legal remedy available to her. Further, she demands monetary compensation for the damage as a result of the incident.

### **IV. THE LAW**

28. The Panel reiterates that in its decision of the admissibility of the application it had held that the case should be examined under Article 8 of the ECHR taken together with Article 13 of the same Convention (see 2012-14, *Zahiti v EULEX*, 7 June 2013, at par. 30).

#### **Submissions by the parties**

29. In its submission of 27 September 2013 EULEX elaborates on the questions posed by the Panel and submits observations concerning the merits of the complaint.

#### **EULEX's relation to the complainant**

30. As to whether the complainant was informed by EULEX of the results of disciplinary proceedings, EULEX findings and/or the fact that the officer had been repatriated to his country of origin, EULEX submits that no disciplinary proceedings were conducted concerning the incident. An internal investigation was held, the purpose of which was to establish the facts and the veracity of the allegations. Disciplinary action could only be taken following the findings and recommendations made in the context of such an investigation.
31. EULEX further submits that had the official not been repatriated under the decision of his national authorities and a disciplinary board been convened within the mission, the HoM would have been able only to recommend disciplinary measures and communicate the disciplinary decision to the national authorities.
32. EULEX submits that it was in no position to inform the complainant of the result of the disciplinary proceedings as no such proceedings were instituted. Nor did it inform the complainant of the results of the internal investigation, because she was not a party thereto. The internal investigation was triggered by the report made by the official concerned and by the notification of the incident to EULEX by Kosovo authorities. The complainant neither approached the official concerned directly nor

submitted a formal complaint to EULEX. She only complained to Kosovo authorities and subsequently to the Panel.

33. EULEX submits that it had no obligation to inform the complainant about the outcome of the internal investigation. Information concerning that investigation was restricted to the person subject to it, his or her line manager and relevant national authorities.
34. EULEX acknowledges having been contacted by the Kosovo prosecutor. The prosecutor's request "to decide on the immunity" of the EULEX official referred to "suspicions" of "light body injuries". This request did not mention any serious injury or permanent ailment or even medical expenses incurred by the complainant. It contained no request to provide the insurance details of the EULEX official's private vehicle in order to claim compensation.
35. As to whether EULEX had considered offering some form of compensation to the complainant, and if not, if it would be willing to consider this possibility, EULEX refers to the relevance of Article 10 paragraph 2 of the Council Joint Action 2008/124/CFSP (see par. 23 above). In the circumstances of the present case, EULEX did not consider offering any compensation to the complainant.

#### **The possibility to be heard**

36. With regard to the question as to whether EULEX gave the complainant an opportunity to be heard in the context of the internal disciplinary investigation, EULEX reiterated the fact that no disciplinary proceedings had been conducted. However, it gave the complainant an opportunity to be heard in the context of the internal investigation.
37. EULEX submits that the IIU included in its file the statement made by the complainant to the KP on 8 June 2011 (see par. 15 above). EULEX further submits that according to the EULEX Head of IIU, it would have been preferable to have the presence of an EULEX representative while the statement was being taken. However, the EULEX police officer who tried to contact the complainant on that day was not contacted by KP investigators until three weeks later despite the information she had been given on 7 June 2011 (see par. 13 above).

#### **Available remedies**

38. As to what remedy was available to the complainant to seek and obtain redress, EULEX states that, should she have had a valid claim with regard to coverage of medical expenses and possible loss of earnings, she could have had recourse to the remedies included in the KP Manual on Principles and Procedures that regulates such matters. As she suffered the alleged injury in the exercise of her official duties, the relevant provisions should be applicable.

39. With regard to a possible criminal action, EULEX suggests that the Kosovo prosecutor decided that no further prosecutorial action was to be taken.
40. With regard to a possible civil claim, EULEX Kosovo is not aware of any civil action initiated by the complainant and suggests that redress could have possibly been sought through an insurance claim.
41. With regard to possible action through the Embassy of the EULEX staff member in Kosovo, EULEX states that the complainant through her previous submissions to the Panel also mentioned the possibility of having recourse to this remedy.
42. With regard to EULEX procedures for third party claims, EULEX states that it is empowered to consider the review of third party claims arising in connection with its operations. HoM has contracted a comprehensive insurance policy whose coverage includes liability in respect of claims made by third parties. A properly substantiated claim filed in a timely manner could result in granting compensation for, *inter alia*, medical expenses, loss of earnings and/or loss of financial support, transportation expenses associated with the injury, illness or medical care and legal and burial expenses borne by a claimant. No compensation could be paid for non-pecuniary damages such as pain and suffering or moral anguish. Likewise, no punitive damages can be paid. Any such valid claims should be addressed to HoM. Decisions on financial compensation to be paid depend on the merits of the claim; in particular whether the claimant has suffered quantifiable pecuniary damage.

#### **Further comments on the merits of the case**

43. As to whether the misconduct of the EULEX staff member was recorded by EULEX in his Performance Evaluation Report and/or in any other form, EULEX indicates that this has not been the case. This would have required that a Disciplinary Board (DB) be convened, that the deliberations of the DB be held and that a report setting out the relevant facts and findings be made. The Code of Conduct and Discipline establishes that all decisions on sanctions imposed by the disciplinary board will be duly recorded in the staff members personnel file. This record can be used as grounds for denial of an extension of the staff member's tour of duty or contract. However, as stated above, no disciplinary proceedings were instituted in the present case.
44. As to whether EULEX discussed with the national authorities the possibility of the sending state providing compensation and/or reparation to the complainant, EULEX indicated that it had not done so. The HoM has stated that he is not in a position to enter into discussions with national authorities since any communication between EULEX and the member states should be channelled through the European External Action Service (EEAS) office.



45. As to whether EULEX was informed of any steps or measures taken by the national authorities of the staff member concerned, EULEX stated that it has not been so informed.
46. EULEX further reiterates its arguments which have already been submitted at the admissibility stage (see 2012-14, *Zahiti v EULEX*, 7 June 2013, pars. 17 - 22). Attribution of its employees' private acts to EULEX would impose a disproportionate burden on the mission which employs over 2000 officials all of whom have interactions with Kosovo citizens, residents and authorities while performing their day-to-day activities. EULEX further submits that Article 17 of the Law on Jurisdiction authorizes EULEX police to exercise the powers conferred by the applicable laws on the Kosovo Police and according to the modalities established by the HoM. The relevant modalities are those set out by the OPLAN according to which EULEX has been divided into Executive and Strengthening Divisions. The officers of the latter division have, as a general rule, no authority to exercise police powers in Kosovo.

#### **EULEX on possible legal action against the complainant**

47. EULEX further submits that it was the complainant, as a KP officer, who was acting in an official capacity in the exercise of powers entrusted to her as a KP agent. Her conduct during the incident could possibly be considered *ultra vires* or an abuse of authority. EULEX, while stating that it is not a concern for the Mission, notes that the concerned EULEX official or his national authorities may also lodge a complaint against the complainant.

#### **The complainant's comments to HoM's submissions of 27 September 2013**

48. On 22 October 2013, the complainant provided her observations to the HoM's reply of 27 September 2013. She submitted as follows: "*I would like to add that with regard to the case I always have been open and I am ready to face justice. Although the comment written by EULEX is not a threat, I perceive it like a threat. (see par. 47 above) I would be ready to face any legal action initiated against me.*"

#### **THE PANEL'S ASSESSMENT**

49. The Panel has already held that it will examine the case under Article 8 of the ECHR in conjunction with its Article 13 (see par. 4 above).
  - i. **EULEX's submissions regarding the alleged conduct of the complainant**
50. Before turning to the substance of the complaint, the Panel notes with concern EULEX's submission regarding the complainant's conduct (see

par. 47 above). The Panel notes that EULEX raises the possibility that third parties might lodge complaints against her.

51. The Panel notes that this sort of EULEX's submissions neither add anything to the factual basis nor to the legal argument relevant to the case. The Panel takes the view that this sort of submission could have the negative effect of dissuading complainants from pursuing their claims. Based on that view, the Panel regards these submissions as irrelevant.

**ii. EULEX responsibility for human rights protection**

52. First, 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.
53. The Panel notes EULEX's general submissions regarding its understanding of what its executive mandate might involve (see par. 46). As it was argued in other cases before the Panel, EULEX submits that its police officers, in particular those working within the Mission's Strengthening Division, do not generally exercise any executive powers.
54. In this respect, the Panel reiterates that it has already held in its admissibility decision that "*it is irrelevant whether [concerned EULEX staff member] worked for one particular department within EULEX or another. This is a matter of internal organization that cannot affect third party claimants*" (compare Zahiti v EULEX, 7 June 2013, at par. 35).
55. The Panel notes that EULEX did not provide a legal basis for its suggestion that "modalities as established by the Head of Mission" (see paragraph 46 above) refer to those set out by the OPLAN dividing EULEX into an Executive Division and a Strengthening Division. The Panel is not aware of any stipulations in the OPLAN that would support such an argument.
56. The Panel reiterates that EULEX's character as an international Mission is not to be equated with that of a state, in particular when it comes to its human rights obligations. The Panel has held on previous occasions that "*given the limited 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 [...] cannot be imposed on the Mission*" (see 2012-19 & 20, H and G v. EULEX, 30 September 2013, at par 41; 2012-09, 10, 11 & 12, A,B,C & D v. EULEX, , 20 June 2013 at par. 50 and 2012-16, Kahrs v. EULEX, 10 April 2013 at par. 30).
57. The Panel notes, however, that it is the obligation of EULEX under the Council Joint Action to ensure that its own activities should be carried out in compliance with international standards of human rights (see Article 3 (i), Council Joint Action 2008/124/CFSP; see paragraph 25

above, also compare 2012-19 & 20, *H and G v. EULEX*, 30 September 2013, at par 42).

58. The Panel will consequently assess whether in the circumstances of the present case EULEX, within the scope of its limited executive powers and means, complied with its obligation to provide remedies to the complainant in line with Articles 8 and 13 ECHR.

**iii. EULEX's obligation to provide an effective remedy for violations of rights attributable to EULEX**

59. The Panel reiterates the approach of the European Court of Human Rights (hereinafter "the Court") whereby "*Article 13 states that any individual whose Convention rights and freedoms "are violated" is to have an effective remedy before a national authority even where "the violation has been committed" by persons in an official capacity. This provision, read literally, seems to say that a person is entitled to a national remedy only if a "violation" has occurred. However, a person cannot establish a "violation" before a national authority unless he is first able to lodge with such an authority a complaint to that effect. Consequently, (...) it cannot be a prerequisite for the application of Article 13 that the Convention be in fact violated. In the Court's view, Article 13 requires that where an individual considers himself to have been prejudiced by a measure allegedly in breach of the Convention, he should have a remedy before a national authority in order both to have his claim decided and, if appropriate, to obtain redress (see *Klass v. Germany*, no. 5029/71, judgment of 6 September 1978, at par 64).*
60. The Court has stated that "[t]he effect of Article 13 is thus to require the provision of a [...] remedy to deal with the substance of an "arguable complaint" under the Convention and to grant appropriate relief (see, among many other authorities, *Kudła v Poland*, no. 30210/96, judgment of 26 October 2000, at par. 157). The Panel adopts this approach for the purposes of the present case.

**iv. The 'arguability' of a complaint**

61. The fact that EULEX exercises certain executive powers carries the possibility that the exercise of such powers might result in human rights violations. This, in turn, raises the issue of the availability of an adequate relief to remedy such a violation.
62. The Court recognised that a right to relief would exist where the victim's claim is 'arguable' (see, among many other authorities, *Silver and others v. UK*, no. 5947/72, judgment of 25 March 1983 at par. 113; *Boyle and Rice v. UK*, 27 April 1988, § 52, Series A no. 131).
63. In this connection, the Panel stresses that in the present case at no stage of the proceedings was it contested that on 7 June 2011 the complainant was the subject of a physical attack by an uniformed EULEX police officer who, following a verbal altercation, drove into her

leg with his car. Neither was it in dispute that the complainant suffered an injury, was hospitalised immediately after the incident and was unable to work for a period of time. The Panel considers, having regard to the uncontested impact that the incident had on the applicant's life, that her complaint constitutes an arguable claim.

64. The Panel has stated already in its admissibility decision that its task was "*not to consider whether the officer's misconduct may be imputed to EULEX. Rather, [was] is called upon to determine whether, in the circumstances of the case and for the purposes of the effective exercise of its executive mandate, EULEX was obliged to provide adequate legal avenues with a view to ensuring adequate redress for the complainant and thus to comply with its human rights obligations under Articles 8 and 13 of the ECHR*" (see 2012-14, *Zahiti v EULEX*, 7 June 2013, at par. 40). The Panel is well aware that the notion of an effective remedy when applied in the context of a mission led by an international organisation cannot be construed in the same way as in the context of a national state. However, it needs to assess, having regard to the specificity of the legal situation of EULEX in that it enjoyed immunity and cases against its officials could not be directly pursued before the Kosovo courts, whether it addressed the complainant's situation in a manner compatible with at least the minimum procedural requirements compatible with the notion of an effective remedy.

**v. An effective remedy regarding EULEX**

65. The complainant submits that she tried to pursue her claim through the Kosovo judicial system but was advised that her complaint cannot be pursued through criminal or civil proceedings due to the immunity of concerned staff member in Kosovo. Consequently she complained to the Panel.

***Human Rights Review Panel as an avenue of recourse for the complainant***

66. EULEX's reference to the Panel's existence in that context is without merit. Firstly, EULEX bears its *own* responsibility to provide an effective remedy for violations of rights attributable to the mission. Placing EULEX's own responsibility to provide such a remedy on the Panel would be inconsistent with EULEX's mandate and obligation to meet its own human rights obligation in the fulfillment of its executive mandate. Secondly, the Panel is not empowered to order or recommend financial compensation even where this would be otherwise appropriate (see Annex J of the EULEX OPLAN). Therefore, where this form or reparation would be appropriate, it would be unavailable to the complainant before the Panel.

***The possibility of paying compensation***

67. EULEX submits that the complainant could have recourse to the Third Party Liability Claim Insurance. She had no standing within the EULEX

internal disciplinary proceedings so that she was not entitled to be heard or informed about their result. In addition, EULEX makes reference to the national authorities of the official involved in the incident, noting however that EULEX is in no position to directly enter into discussions with those authorities. These arguments will be considered in turn.

68. EULEX seems to argue that the complainant should have claimed compensation either from EULEX or directly from the official concerned.
69. The Panel notes that EULEX has throughout its submissions taken the view that it is not responsible for the injury caused to the complainant. In that sense, the Panel cannot see how a request to EULEX to compensate for something it denies being responsible for could be regarded as an effective relief which the complainant should reasonably be expected to have pursued.
70. If, however, the HoM should consider granting compensation to the complainant, the Panel notes that this would resolve the matter. The Panel itself is not empowered, however, to recommend pecuniary compensation when a finding of a human rights breach is made. It can only make recommendations for a remedial action to be taken by the Mission (Rule 34 of the Panel's Rules of Procedure).

#### ***EULEX procedures concerning third party claims***

71. In this context, the Panel reiterates the Council of Europe's Venice Commissions' observation that, "*in principle, restitutio in integrum is the most suitable manner of redress of human rights violations. The possibility for the HRRP to recommend remedial action removing the effects, and the causes, of the violation is therefore crucial. However, in some cases the most effective remedy is financial compensation, which instead the HRRP cannot recommend. In such cases it will be possible to claim monetary compensation, at least for the material damage, under the Third Party Liability Insurance scheme of EULEX. The Venice Commission stresses, however, that the procedure under the insurance scheme should not be unduly lengthy or complex. It notes in this respect that the Head of Mission of EULEX has committed himself to reviewing the insurance procedures to ensure that they remain effective*" (see European Commission for Democracy through Law, Opinion no. 545 / 2009, 21 December 2010, at par. 67).
72. EULEX points to the review of third party claims arising in connection with its operations (see pars. 42 and 67). In this regard, the HoM is insured by a comprehensive policy whose coverage includes third party liability claims. While such a procedure might result in compensation for pecuniary damage, the Panel notes that the Mission has not so far considered offering any compensation to the complainant in this regard (see par. 35 above).

#### ***Internal investigations***

### **The complainant's position in EULEX internal investigations**

73. Contrary to EULEX's submissions that an internal investigation is restricted to the person subject of the investigation, the line manager and the relevant national authorities (see par. 33 above), the Panel notes that the Code of Conduct as well as relevant provisions require that certain decisions related to preliminary investigations, investigative procedures and the disciplinary board have to be communicated to the complainant, and in one case to the victim, who can appeal such decisions and have at a certain stage the right to access materials in the case file. Therefore, internal investigations available within the framework of the Mission confer certain procedural rights on victims of alleged misconduct by EULEX staff members. Furthermore, the regime does not prohibit or exclude the possibility that, where the situation so warrants, information could be provided to the complainant.
74. The Panel notes that in the case of internal investigations against an EULEX staff member about the latter's responsibility regarding an alleged attack against a Kosovo police officer it would have been critical to have the alleged victim interviewed about the incident so that her version of events could be compared with that of the alleged perpetrator. Information thus gathered would have been directly relevant to the assessment of whether it was reasonable to drop the matter upon the staff member's departure from the Mission.
75. The Panel is aware that EULEX tried to establish contact with the complainant once (see para. 13 above). However, it notes that it did not take any other steps which could have been reasonably expected in the circumstances with a view to obtaining relevant information from the complainant. As the Mission was immediately aware of the incident, EULEX could have been expected to renew its efforts to take a statement from her. No persuasive grounds for this failure to establish the circumstances were adduced. To sum up, the complainant was not given an opportunity to be heard.

### **Internal investigations as an adequate remedy**

76. It is not necessary for the Panel to take a position, in the circumstances of the present case, as to whether EULEX's internal investigations could be said to constitute an "effective remedy" where an allegation of human rights violation is at stake. It merely notes, in that regard, that the regime in place is not "independent" of EULEX, that it has not been shown that it can directly lead to an award of compensation to a victim, that it cannot render binding decisions and leaves the final decision upon the application of a disciplinary measure to the discretion of the HoM. In any event, in the present case the applicant was not given an opportunity to participate in the internal investigation in any procedural role.

77. It is further noted that the internal investigation in this case concluded that a violation of the Code of Conduct did in fact occur (see par. 16 above and 2012-14, *Zahiti v EULEX*, 7 June 2013, par. 27). In the proceedings before the Panel EULEX advanced no arguments to demonstrate that in those circumstances, it was consistent with the rights of the complainant to abandon the enquiry without any formal decision being given and thereby deny her the possibility of seeking redress. Nor has it been explained satisfactorily why the possibility of lifting the immunity of the staff member was not considered.
78. Further, the Panel notes that it has not been shown that either the Code of Conduct applicable at the time, nor the current Code of Conduct, provided a legal basis for the closure of an enquiry into the case due to the repatriation of the seconded staff member. These instruments provide for such a possibility *only* for cases that appear not to be sufficiently substantiated. It has not been argued, let alone shown, that the complainant's allegations were unsubstantiated.
79. Furthermore, the Panel accepts that from the moment of repatriation of individuals subject to it, they cease to be EULEX staff members. This, however, does not absolve the Mission from its obligations regarding human rights accountability. The departure of the staff member did not therefore put an end to the Mission's obligation to abide by the complainant's human rights and to act in accordance therewith. It is for EULEX to decide what measures are available to it in such situations. In the present case EULEX neither contacted EEAS Services with a view to liaising through them with the authorities of the sending state, if only to ensure that the conduct of the staff member should be properly recorded for the purposes of his professional evaluation, nor has EULEX demonstrated in the proceedings before the Panel that it ever envisaged doing so.

**vi. The absence of an effective remedy**

80. What remedy might be left to the complainant (namely, to try to take her case outside of Kosovo to the competent national authorities of the concerned EULEX staff member) would be clearly too onerous and of uncertain availability to be characterized as "effective" in the circumstances. Furthermore, considering that such a "remedy" falls exclusively within the jurisdiction and competence of the national authorities, it could not be said to serve as an effective remedy when it comes to EULEX's own actions and responsibility. In this regard, the Panel underlines that Article 10 of the Joint Action cannot be read as to imply that the seconding state of a staff member takes over EULEX's institutional accountability for human rights violations (compare pars. 23 and 35 above).
81. The Panel, therefore, concludes, in the circumstances of this case, that EULEX violated the right of the complainant to an effective remedy, as

guaranteed *inter alia* under Article 13 of the ECHR, enabling her to seek reparation for the harm done to her by an EULEX staff.

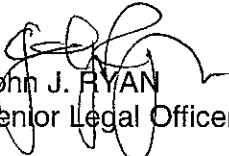
82. Finally, concerning an alleged violation of Article 8 of the ECHR the Panel has found that the actions of the EULEX staff member *as such* did not violate Article 8 taken on its own as the act in question did not have a close enough connection with the official function of the EULEX police officer.

**FOR THESE REASONS, THE PANEL, BY MAJORITY**


1. **Holds that there has been a violation of Article 13 of the European Convention of Human Rights and Fundamental Freedoms,**
2. **Holds that there has not been no violation of Article 8 of the European Convention of Human Rights and Fundamental Freedoms,**
3. **Finds it appropriate, in the light of its above findings of fact and law, to make the following recommendations to the HoM under Rule 34 of its Rules of Procedure:**
  - i. The HoM should acknowledge that the complainants' rights have been breached by EULEX. The Panel invites the HoM to inform the complainant of his position on that point;
  - ii. The HoM should consider lifting the former staff's immunity and informing the local Kosovo prosecutor accordingly;
  - iii. If necessary through the EEAS, the HoM should inform the national authorities of the sending state of the Panel's findings;
  - iv. Considering the HoM's submissions regarding the availability of third party claims to the complainant and should the HoM consider that this case might warrant having recourse to that scheme, the Panel recommends that the HoM should invite the complainant to submit an application under that scheme.

The HoM is invited to inform the Panel of the measures he has undertaken in connection with the present decision by 15 March 2014.

For the Panel,

  
John J. RYAN  
Senior Legal Officer



  
Magda MIERZEWSKA  
Presiding Member