



HUMAN RIGHTS REVIEW PANEL

**CASE-LAW NOTE ON
PRINCIPLES OF HUMAN RIGHTS ACCOUNTABILITY OF A RULE OF LAW
MISSION**

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1. General considerations – Accountability for International Missions

In the performance of their duties international organizations and international missions set up to perform certain delegated responsibilities (Missions) are capable of violating the fundamental rights of those with whom they interact. This simple truth was the trigger for a search for a system of accountability capable of holding those Missions to a reasonable level of compliance with basic standards of human rights. Guaranteeing human rights accountability of such Missions is necessary not only to protect individuals against the harm resulting from their activities, but also to bolster the credibility and integrity of these Missions. A Mission tasked, for instance, with a “rule of law” mandate would have little credibility and legitimacy should it conduct its own activities in manner falling short of the standards it preaches for others.

Given the limits of their mandates, Missions cannot be held responsible for failing to guarantee an effective and all-encompassing protection of human rights in the same way a state might be expected to do. Instead, the scope of their responsibility and accountability must be commensurate with their powers and resources.¹ However, whilst Missions in regard to the nature and extent of their human rights obligations and ability to provide for effective protection for those cannot be compared in all respects to states, they do share important common features relevant to evaluating what standard of human rights they should be expected to respect. As outlined below, in the exercise of their necessarily more limited mandates, Missions have been required to comply to a significant degree with the same set of obligations as are binding on states. Deviation from those standards have been the exception rather than the rule.

The first body tasked specifically with ensuring human rights accountability for a Mission was the Human Rights Advisory Panel (HRAP) of the United Nation’s Interim Administration Mission in Kosovo (UNMIK). The HRAP was established as an advisory panel in 2006 by the Special Representative of the Secretary-General (SRSG) in Kosovo. The Panel was composed of independent experts in the field of human rights. Its mandate was to examine complaints brought to it by any person or group of individuals affected by alleged human rights violations by or attributable to the UNMIK. Where it found that the fundamental rights of the complainants had been violated, the Panel would submit its findings and could make recommendations to the

¹ See, generally, H & G against EULEX, 2012-19 & 2012-20, 30 September 2013, para. 41.

SRSR for remedial action. In effect the HRAP covered the period 2005 to 2008, the recommendations of the Panel were of an advisory nature only. Whilst the HRAP set an important institutional precedent as well as significant jurisprudential landmarks, its overall effectiveness was greatly undermined by UNMIK's resistance to engage with its rulings. In effect, as the Final Report of the HRAP made clear, it failed to fulfil its accountability function in an effective fashion. This was primarily down to a lack of a receptive institutional culture within the Mission at the time and a lack of readiness on that part of the United Nations Mission to take on board human rights responsibilities attached to its mandate.² The HRAP thus came to the view that it had failed to make the United Nations accountable for a series of serious human rights violations which it had identified.

In 2008, UNMIK's responsibilities in the areas of police, justice and custom in Kosovo were passed on to European Union Rule of Law Mission in Kosovo (EULEX). At that point, it was thought necessary and justified to set up an accountability mechanism in order to ensure that EULEX would guarantee basic level of human rights protection in the context of its executive mandate. The Accountability Concept, one of the founding documents of the EULEX Mission, gave life to the Human Rights Review Panel (the Panel) and called for a meaningful, effective and transparent accountability mechanism. This document, in combination with the Council Joint Action³, made it clear that EULEX should ensure respect for internationally recognised human right standards and treat them as a guiding principle for the performance of its executive functions:

“[...] 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

² THE HUMAN RIGHTS ADVISORY PANEL, Final Report.

³ Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo Eulex Kosovo (as amended by later Council Joint Action and Council Decisions.)

and, in turn, depend on what right or rights were at stake and on the seriousness of the threats to those rights [...].”⁴

The Panel echoed this provision in its case law:

“50. 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 [...].”⁵

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 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.

⁴ *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.

⁵ *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; *Đorđević 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.

Most prominent among those and most relevant to the work of the Panel is the European Convention of Human Rights. The prominence of this Convention in this particular context is easily explained. 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.⁶

From the institutional point of view, EULEX's responsibility and commitment to upholding human rights standards requires that the Mission be managed and structured in such a way that it is able to comply with those responsibilities and commitments. It also means that resources and expertise for human rights must be available throughout the Mission to ensure an adequate level of compliance. It also implies that an accountability mechanism should oversee and, where necessary, demand this compliance. This is the function assigned to the Panel – as well as other accountability mechanisms built into the structure of the Mission.⁷

2. Effectiveness of accountability mechanism

The effectiveness of any such accountability mechanism is dependent upon a number of converging and partly overlapping factors, including: its mandate; its independence; its powers to obtain information; its ability to affect the Mission's conduct; the context of its operations; and its ability to reach out to communities of potential claimants.

2.1. Mandate

The mandate of the accountability mechanism will set the outer limits of what it may be expected to achieve in terms of human rights protection. Particularly important in this context is the nature and range of activities in relation to which the mechanism is competent. Equally important is the set of rules and standards that it is expected to

⁶ See, Constitution of the Republic of Kosovo, Article 22.

⁷ The other two accountability mechanisms of EULEX are: 1) The EULEX Internal Disciplinary Mechanism, and 2) the EULEX Kosovo Third Party Liability Insurance Scheme.

apply when evaluating the activities of the Mission and its compliance with those rules and standards. In this regard, the fact that the Mission will apply the same body of human rights rules as would be applicable to a state and the ability of the accountability mechanism to resist making exceptions to those standards will have an important effect on the level of human rights protection that a Mission is able to set for itself.

2.2. Independence

Sufficient independence from the Mission and the availability of its own resources are core elements of the mechanism's independence. This independence is, in turn, a critical factor to enable the mechanism to perform its functions effectively. This necessity of operational independence does not mean that the mechanism should be independent in all respects vis-à-vis the Mission (e.g. logistically or administratively). But it does mean that the Mission should not be able to interfere in any way with the mechanism's performance of its mandate in a specific case. This requires, *inter alia*, a certain degree of independence from the resources of the Mission so that the accountability mechanism is not unduly delayed or hampered in the fulfilment of its responsibilities.⁸ It also requires that its members or, at least, a majority thereof should be professionally independent from the Mission.⁹

2.3. Power to obtain information

The accountability mechanism's ability to seek and obtain the information that it needs in order to verify the Mission's compliance with its human rights duties is critical to its effectiveness. This information should be as complete as possible and enable the mechanism to evaluate each of the material aspects relevant to the resolution of the complainant. Incomplete factual records are likely to interfere with the ability of the mechanism to perform its mandate effectively and credibly.

Whilst the ability of the mechanism to obtain all relevant information should, ideally, include the power to demand or order the disclosure of such information, a system of

⁸ This applies, in particular, to the mechanism having enough staff or adequate experience and expertise to perform its function effectively. This also applies to other relevant auxiliary services, such as translations and outreach.

⁹ In the case of the HRRP, only one out of three members is a staff of the Mission.

voluntary but thorough disclosure has proved generally effective in enabling a sufficient degree of oversight and transparency.

2.4. Ability to affect the conduct of the Mission

Strong pronouncements by the accountability mechanism will not be of much value unless they are backed by a sufficient degree of compliance by the Mission. The ability of the mechanism to ensure actual, rather than formal or promissory, compliance with human rights is what ultimately decides its value and effectiveness as a means of relief. This implies that ideally the mechanism should have the authority to issue binding decisions. The weaker power to make recommendations, as was given to both the HRRP and the HRAP, relies on the readiness of the authorities receiving those recommendations to comply with them.

Whilst the Head of Mission (HoM) of EULEX has generally shown a high level of engagement with the HRRP's recommendations, the experience of the UN's HRAP has been much less positive. In all but a tiny minority of instances, the United Nations has simply disregarded the recommendations of HRAP and refrained from implementing them.¹⁰ Where only powers of recommendation are granted, a culture of institutional commitment to human rights is therefore essential to the accountability mechanism having a real impact on the way the Mission acts.

The ability of the mechanism to follow-up on the implementation of its recommendations, available to both the HRAP and the HRRP, is also an important feature of the process. Such authority enables the accountability mechanism to keep an issue open until it has been adequately addressed by the mission or until that point where such possibility has been exhausted.

2.5. The context of the operations

The environment in which a Mission and its accountability mechanism operate is a critical factor to their ability to effectively protect human rights. Missions typically

¹⁰ THE HUMAN RIGHTS ADVISORY PANEL, Final Report, para. 241 .

operate in conflict or post-conflict environments which are necessarily challenging environments to protect human rights in.¹¹

Contextual factors to consider in this regard include the pre-existing level of law abidance in that society, the existence and effectiveness of local accountability mechanisms (including the local judiciary), as well as the level of physical violence with which the Mission and the local authorities are confronted. Sometimes the very institutions that are supposed to protect and guarantee human rights have taken part to the conflict and/or human rights violations.

What a Mission should endeavour to achieve in such context is the creation of a strong, commonly shared inter-institutional culture of human rights compliance – *including within the Mission*. EULEX, for example, uses induction training and the continued distribution of information pertaining to human rights standards in order to try to promote a basic understanding of human rights and to create an environment that is receptive to these priorities. In keeping with this, the HRRP has regularly recommended that the HoM should transmit the Panel’s decisions to the relevant organs of the mission to remind them that human rights standards are relevant to the performance of their operational duties and how to implement them. In one particular case the Panel has, for example, recommended as a remedial action that:

“b. The HoM should provide copy of the present Decision to the EULEX Prosecutors through the relevant channels. [...]”¹²

In the decision on the implementation of that recommendation, the Panel stated that:

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

¹¹ See e.g. *L.O. against EULEX*, 2014-32, 11 November 2015, para. 44 and references cited therein.

¹² *Desanka and Stanisić against EULEX*, 2012-22, 11 November 2015, Disposition.

[...]

The Panel is satisfied that these steps are consistent with and fully satisfy the recommendation issued by the Panel on the point.”¹³

2.6. Outreach - Ability of the mechanism to reach out to communities of human rights victims

The ability to reach out to affected communities and other potential claimants is crucial to the capability of any accountability mechanism to perform its function. It is also a critical condition of its relevance.

Potential complainants need to know about the existence of the mechanism and about the relevance of its mandate to their rights. In this regard, outreach efforts by the Mission and its accountability mechanism are central to ensuring that the latter is able to play its role in making the Mission accountable for its actions.¹⁴

2.7. Institutional culture

The institutional culture of the Mission is a factor impacting the effectiveness of the mechanism’s performance. The readier the Mission is to adopting and abiding by human rights standards, the more effective the mechanism is likely to be at performing its functions. This is one of the main differences between the legacy of the HRAP and the HRRP. Whilst the former was confronted with extreme resistance to its work, the HRRP has generally enjoyed the cooperation of the EULEX Mission. In its final report, the HRAP apologized to the victims who had placed their confidence in them. The HRAP further recorded the view that they had been part of a sophisticated sham or pretence of accountability.¹⁵

The experience of the HRRP has been quite different. Whilst the human rights record of EULEX has certainly not been perfect, the HRRP has operated in an environment a great deal more receptive to human rights concerns. Whilst EULEX has committed a number of human rights violations, those remained essentially case-specific, rather than institutional. The only one important exception to that proposition concerns

¹³ *Desanka and Stanisić against EULEX*, 2012-22, 29 February 2016, paras. 6 and 9.

¹⁴ See, e.g. Annual Report 2016 of the HRRP, page 38.

¹⁵ THE HUMAN RIGHTS ADVISORY PANEL, Final Report, pages 86-94.

EULEX's failure to address certain categories of criminal cases dating back to the Kosovo conflict (in particular, occurrences of "enforced disappearance" during the Kosovo conflict or in its immediate aftermath).

A great deal of the human rights violations attributed to EULEX arose from omissions or failures to act, rather than positive actions. Whilst certain omissions might involve serious violations of right, they do not necessarily reflect the same degree of disregard or neglect for human rights. However, as was noted by the Panel on a number of occasions, as a rule of law mission, EULEX is expected to demonstrate particular commitment to upholding human rights standards so as to set an example for local authorities as well as to protect the credibility and legitimacy of EULEX as a guardian of the law.

In its relationship with the Panel, EULEX generally demonstrated its commitment to upholding basic human rights standards. Whilst it did on occasion decline to follow the recommendations of the Panel, it generally put a genuine effort into trying to remedy the rights of those affected by its activities. General compliance by the HoM with the recommendations of the Panel was an important indication of EULEX's genuine commitment to human rights standards. This, combined with distribution of the decisions of the HRRP to the relevant organs of the mission, sent a powerful institutional message to the staff of EULEX that it was expected to apply and comply with those standards in the performance of their individual mandates. In all likelihood this general level of support for human rights within the Mission also contributed a great deal to avoiding the most serious sort of violations and led to a situation where most of the violations attributed to EULEX were based on omissions rather than on positive acts.

Importantly, the Mission also generally provided a satisfactory degree of cooperation in locating and providing to the Panel information that it had requested for the fulfilment of its duties.

It is worth noting finally that EULEX also built up its institutional culture of respect for human rights by ensuring that all new staff members would receive training on human rights upon arrival in the mission, as well as by providing information about the existence and functions of the HRRP.

3. Mission is not a state: institutional and practical limitations

The Human Rights Review Panel has repeatedly pointed out that EULEX is a Mission and not a state. It follows that EULEX does not possess all the attributes and resources typically available to states in the performance of their governmental functions. This, in turn, impacts the standard by which its human rights compliance must be assessed. More specifically, the Panel has stated:

“As a preliminary matter, the Panel notes that EULEX is not expected to provide better policing than the resources put at its disposal would allow. EULEX is obliged, however, to take necessary and reasonable measures within the scope of its competence to provide for the effective protection of the human rights of those who find themselves on the territory of Kosovo.”¹⁶

Along the same line, the Panel also noted the following:

“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.”¹⁷

Thus a Mission’s ability to guarantee the effective protection of human rights cannot therefore be compared in all respects to the state’s abilities and the expectations that follow.¹⁸ Any such evaluation must take into account the specificities of the Mission that are relevant to its ability and responsibility to ensure effective compliance with relevant human rights standards.

¹⁶ *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 44.

¹⁷ *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 64.

¹⁸ See e.g. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 72; see also *L.O. against EULEX*, 2014-32, 11 November 2015, para. 42; compare also HRAP opinion in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 35; *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 30; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 56.

Also, given its limited *executive* mandate, EULEX cannot be held responsible for failing to guarantee a general and all-encompassing protection of human rights in Kosovo as that would place an impossible or disproportionate burden on the Mission.¹⁹ Nor can a rule of law mission be expected to replace the state in which it operates. Instead, a rule of law mission such as EULEX should be perceived as an additional layer of human rights accountability that protects the rights of those who come in contact with the mission.

Furthermore, differences in the way a state, as opposed to a mission, is structured may impact the interpretation that is given to the tenor of a particular right. For instance, whilst the concept of “effective remedy” might carry a particular meaning within a state, which typically possesses general executive responsibilities and can rely on its judicial authorities, the means by which a rule of law mission might ensure access to justice and an effective remedy for rights violations might be much narrower in scope and nature. The Panel has thus noted the following:

“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.”²⁰

The Panel added, however, that to the extent that EULEX has the mandate and the resources necessary to fulfil a government-like function as part of its executive mandate, it is required to perform those functions in compliance with human rights standards. In the words of the Panel:

“The Panel concludes that, as a result of insufficient resources allocated to the *Vidovdan* operation by EULEX with a view to ensuring respect for human rights, inadequate training and insufficient operational guidelines, complainant H and G were denied the full and effective enjoyment of their right to respect

¹⁹ See e.g. *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 41.

²⁰ *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 64.

to private life, freedom of assembly as well as right to exercise their religion safely and without unnecessary hindrance.”²¹

In another case related to the same *Vidovdan* celebrations, the Panel pointed out the following:

“59.The occurrence of incidents of violence on the day in question which is not in dispute between the parties suggests that the number of EULEX police officers was inadequate to address the executive mandate responsibilities of EULEX in the context of the large scale gathering which could conceivably be strenuously opposed by certain elements, or parties of the population of Kosovo.

60.Under such circumstances, the Panel is of the view that EULEX should have ensured that an adequate number of EULEX police officers were assigned to monitor those events, that they be placed at critical locations (e.g., administrative boundary entry points; roads to and from those entry points and at identified gathering places as well as at Gazimestan; etc), that they had all the necessary means at their disposal, for instance, in terms of transport and communication as well as means of enforcement, to perform their functions effectively and that they were given clear instructions and guidance as to when and in what circumstances they were required and expected to intervene to prevent human rights violations, including the prevention of intimidating or aggressive behaviour by private parties.

61. The inadequacy of resources allocated by EULEX to this operation contributed to the three complainants being denied the full and effective enjoyment of their right to respect to private life, their freedom of assembly as well as their right to exercise their religion safely and without unnecessary hindrance.”²²

It should be noted here that international Missions such as EULEX might perform many of the same functions as a state and may thus present the same risks to human rights than might arise from a state’s actions. There is no reason of principle to suggest that Missions performing such state-like functions should be less accountable than a state when it comes to human rights protection. If anything else,

²¹ *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 53.

²² *A,B,C,D against EULEX*, 2012-09 to 2012-12, 20 June 2013, paras. 59-61.

there are specificities attached to this type of Missions that make it all the more important that they are required to uphold the standards of human rights binding on states. First, they are typically not subjected to the jurisdiction and competence of local court and, thus, to large extent unaccountable to local laws. Their mere existence thus constitutes an exception to universal accountability in the location where they operate. Secondly, because they perform very specialized functions, they might be better suited in some instances to adopt a tailor-made mechanism of accountability that can cater to these specificities and guarantee that operational effectiveness does not conflict with the need for accountability. Lastly, a heightened expectation of human rights compliance is in order where the core function of the mission is directed towards the upholding and reinforcement of the rule of law, as is with EULEX. The Panel has thus noted the following:

“Furthermore, as a rule of law mission, EULEX is expected to pay particularly close attention to the need for the restoration, maintenance and reinforcement of the rule of law. The effective investigation and prosecution of serious crimes is a particularly important feature of this aspect of EULEX’s mandate. It is therefore essential that the Mission should interpret the requirement of “exceptional circumstances” within the meaning of Article 7(A) of the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation [...] in a way that is consistent with the fulfilment of that mandate. There is little difference between the ability of a State or a rule of law mission to prioritise the investigation of such crimes and to devote adequate time and resources to this operational priority [...].”²³

In evaluating the extent to which a mission such as EULEX should be expected to comply with human rights standards normally applicable to states, the Panel has therefore taken into consideration a number of relevant factors, including the nature and scope of the mission’s mandate, the amount and nature of resources at its disposal to perform its functions, particular operational difficulties associated with the performance of its mandate and the absence of normally available state powers that enable enforcing the will and authority of the state.

²³ *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 58 and its references to paras. 9, 10 and 49 in the same decision, and to *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 75; *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 46-47. See also *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 32; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 64.

4. Mandate and scope of the accountability mechanism

Substantively, the mandate of EULEX pertains to the performance of certain “executive” functions in the field of justice, police and customs.²⁴ In practical terms, these constitute a replication (or duplication) of some of the responsibilities that are normally born by a state. This mandate sets the outer limits – *ratione materiae* – of the competence of the Panel to review the actions of EULEX:

“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.”²⁵

EULEX has not, therefore, been endowed with generic, all-encompassing powers, but only with “executive” powers limited to certain areas. It follows from this that it cannot be held responsible for all sorts of rights violations regardless of the context in which the violation has occurred:

“[G]iven 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.”²⁶

Therefore, to potentially engage the Mission’s human rights responsibilities, the conduct must pertain to acts carried in the context of its “executive mandate”. The Panel has recalled the importance of the “executive” focus of the Mission:

“The complaint submitted to EULEX, referred to in par. 11 above, did not trigger the Panel’s jurisdiction to examine the case. First, the issue raised in that letter does not appear, on its face, to fall within the scope of the Mission’s executive mandate. Secondly, when replying to the complainant’s letter, the EULEX Chief of Staff did not exercise executive authority within the meaning of the EULEX Accountability Concept of 29 October 2009 on the

²⁴ 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.

²⁵ *Zahiti against EULEX*, 2012-14, 4 February 2014, paras. 52 et seq.

²⁶ *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, paras. 41-42.

establishment of the Human Rights Review Panel as he merely informed the complainant that the matter did not fall within the jurisdiction of EULEX [...].”²⁷

What does, then, the concept of “executive mandate” encompass? The Panel has taken a case-by-case approach to the question. However, for the purpose of analysis, certain categorisations of executive actions may be readily identified.

4.1. Executive mandate – Matters not coming within the executive mandate of the Mission

The Panel has expressly excluded certain aspects of EULEX’s work from the scope of its “executive mandate”. For instance, employment matters, internal disciplinary and tax matters fall beyond the scope of EULEX’s executive mandate.

On employment matters, the Panel has for example decided that:

“7.The issue raised in the present complaint relates to recruitment procedures in EULEX Kosovo and therefore it does not fall within the ambit of the executive mandate of EULEX Kosovo, the latter being confined to certain matters pertaining to justice, police and customs.”²⁸

Regarding internal disciplinary matters, the Panel has pointed out that:

“14.The complainant’s case concerns an examination conducted by the Internal Investigations Unit of EULEX and the Disciplinary Board of Inquiry of EULEX, of an alleged breach of the Code of Conduct of EULEX Kosovo. The final decision on the termination of the contract of employment was taken by the HOM EULEX Kosovo.

15. The Panel can examine complaints relating to alleged human rights violations by EULEX Kosovo in the conduct of its executive mandate. Matters pertaining to employment and internal disciplinary measures are the responsibility of EULEX. Therefore the complaint does not fall within the

²⁷ See e.g. *Z.A. against EULEX*, 2014-36, 29 February 2016, para. 18, and its references to *Ajet Kaciu against EULEX*, 2014-26, 2 February 2015, para. 19 and *Shaban Kadriu*, 2013-27, 27 May 2014, para. 18.

²⁸ *Hunaida Pasuli against EULEX*, 2010-12, 14 September 2010, para. 7. See also *Horst Proetel against EULEX*, 2010-10, 14 September 2010; *Lulzim Gashi against EULEX*, 2010-14, 7 December 2011; *Bojan Mirkovic against EULEX*, 2011-09, 8 June 2011, paras. 14-15.

ambit of the executive mandate of EULEX Kosovo, the latter being confined to certain matters pertaining to justice, police and customs.”²⁹

And on tax matters the Panel has noted the following:

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

24. In this connection, the Panel finds that the complainant’s case, concerning taxation matters, manifestly does not fall within the ambit of cases which can be taken over by EULEX prosecutors within the meaning of the Law on Jurisdiction. A decision to that effect is also at the discretion of the EULEX prosecutor and as such it cannot be subject to examination by the Panel.”³⁰

4.2. Executive mandate – The special case of judicial activities

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

“14. According to the said Rule, based on the accountability concept in the OPLAN of EULEX Kosovo, the Panel cannot review judicial proceedings before the courts of Kosovo. In particular, it is not its function to deal with errors of fact or law allegedly committed by a Kosovo court unless and in so far as they may have infringed rights and freedoms protected by international human rights law applicable in Kosovo.”³¹

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

²⁹ *Bojan Mirkovic against EULEX*, 2011-09, 8 June 2011, paras. 14-15.

³⁰ *Hoxha against EULEX*, 2011-18 23 November 2011, paras. 23-24.

³¹ *Avdyli Smajli against EULEX*, 2011-16, 23 November 2011, para. 14. See also *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, para. 18.

“The Panel notes that the complainant’s grievances concern a dispute between him and the Organisation of KLA Veterans regarding his veteran status. The complainant unsuccessfully tried to bring his case before the Kosovo courts. According to Rule 25 paragraph 1, based on the accountability concept in the OPLAN of EULEX Kosovo, the Panel cannot in principle review judicial proceedings before the courts of Kosovo. It has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. Consequently, the Panel cannot influence the outcome of judicial proceedings or the speed with which the pending complaints are examined by the Kosovo courts. Even where EULEX judges take part in the proceedings, it does not detract from the fact that this court forms part of the Kosovo judiciary [...]”³²

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

“With regard to the alleged excessive length of the criminal proceedings before the Court the present complaint concerns judicial proceedings conducted by the courts in Kosovo. The Panel therefore finds, under Rule 25 of its Rules of Procedure, that it lacks jurisdiction to examine the compatibility of judicial proceedings before the courts of Kosovo with the human rights standards (See also Panel’s decision in the case of SH.P.K “SYRI” v. EULEX (2011-05, Decision of 14 September 2011). In any event, the Panel notes that the criminal proceedings against the complainant which were pending before the courts for two years do not appear to raise an issue as to their compatibility with the right to have a case heard within a reasonable time.”³³

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

“27.The present complaint concerns a request to reverse a final decision of the Supreme Court of Kosovo. 28.The Panel notes that it does not have a

³² *Z.A. against EULEX*, 2014-36, 29 February 2016, para. 17, and its references to *Gani Zeka against EULEX*, 2013-15, 4 February 2014, para. 13, and *Shaban Kadriu against EULEX*, 2013-27, 27 May 2014, para. 17.

³³ *Slobodan Martinovic against EULEX*, 2011-13, 23 November 2011, para. 15.

mandate to reverse any decision made by a Kosovo court. The Panel is not a court of appeal against the decisions of Kosovo courts. Its mandate does not cover examining errors of fact or law allegedly committed by those courts. It is not the panel's function to examine the decisions taken by Kosovo courts with regard to admissibility and the assessment of evidence either.”³⁴

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 the tribunal or bench alleged to have violated the rights of a complainant did not modify the “Kosovo” nature of that tribunal or bench so that the Panel did not acquire jurisdiction in such cases:

“25.The Panel has held on numerous occasions that, according to Rule 25, paragraph 1 of its Rules of Procedure, based on the accountability concept in the OPLAN of EULEX Kosovo, it has no jurisdiction in respect of either administrative or judicial aspects of the work of Kosovo courts. *The fact that EULEX judges sit on the bench does not detract from the courts the character as part of the Kosovo judiciary [...]*”.³⁵

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

“16.Furthermore, the indictment in the case has already been lodged before a court and the case is now being prepared for trial. The complaint relates to judicial proceedings before a court of Kosovo. The fact that the case has been taken over by EULEX under the provisions of Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03 L/053) does not detract from the fact that the acts of courts composed in their entirety of EULEX judges remain the courts of Kosovo. The Panel notes that it is not entitled to review the judicial proceedings (as

³⁴ *Burim Ramadani against EULEX*, 2010-09, 8 June 2011, paras. 27-28. See also *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, para. 18.

³⁵ *E against EULEX*, 2012-17, 30 August 2013, para. 25 (emphasis added); see also *Halili against EULEX*, 2012-08, 15 January 2013, para. 21; *Pajaziti against EULEX*, 2012-05, 4 October 2012, paras. 9-10; *Dobruna against EULEX*, 2012-03, 4 October 2012, para. 12; *Zeka against EULEX*, 2012-02, 4 October 2012 para. 21. See also *Shaban Sylva against EULEX*, 2015-10, 1 March 2016, para. 14.

mentioned above, Para 14.). Therefore the complaint does not fall within the ambit of the Panel's mandate."³⁶

The Panel has also commented on its lack of jurisdiction over activities other than the "executive" actions of the EULEX judges, when it noted that:

"19. The complaint submitted to EULEX, referred to in par. 11 above, did not trigger the Panel's jurisdiction to examine the case as a matter falling within the executive mandate of EULEX. When the EULEX judge replied to the complaint, he did not exercise executive authority within the meaning of the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel [...]"³⁷

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

The Panel has, however, carved out a narrow exception to that principle. 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 [...]"³⁸ 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

³⁶ *Samedin Smajli against EULEX*, 2011-15, 23 November 2011, para 16.

³⁷ *Ajet Kaçiu against EULEX*, 2014-26, 2 February 2015, para. 19, and its references to *Hamiti against EULEX*, 2012-01, 5 June 2012, para. 17, and *Shaban Kadriu against EULEX*, 2013-27, 27 May 2014, para. 18.

³⁸ *Milica Radunovic against EULEX*, 2014-02, 12 November 2015, para. 17. See also *Mazlam Ibrahimovic against EULEX*, 2014-05, 21 April 2015, para. 24.

apply to a complaint pertaining to the acts and decisions of judicial authorities as such where credible allegations of human rights violations attributed to EULEX judges have not been fully addressed by the competent judicial authorities in the appellate proceedings.

16. In this regard, the Panel refers to the explanatory memorandum of 15 September 2009 to the Accountability Concept of EULEX Kosovo. It makes it clear that the Panel is not excluded from evaluating judicial actions as: “[a]ll matters dealt with by the ordinary courts in Kosovo have to be addressed [...]. This does not mean, however, that the judiciary is entirely exempted from the review by the Panel per se. In the same way as individual deeds by a judge may be addressed separately if the action of the respective judge amounts to perverting the course of justice, the Panel may review complaints addressing human rights violations of similar nature or violations of the procedural human rights, notably the right to a fair trial. The Panel will at any time respect the independence of the judiciary.”³⁹

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

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

19. The requirement to pay fees to civil courts cannot be regarded as a restriction on the right of access to a court that is incompatible, per se, with Article 6 § 1 of the Convention [...] It largely depends on the amount of the

³⁹ *Tomë Krasniqi against EULEX*, 2014-04, 27 May 2014, paras. 15-16.

fees assessed in light of the particular circumstances of a given case, including the applicant's ability to pay them, and the phase of the proceedings at which that restriction has been imposed that are material in determining whether or not a person has enjoyed his/her right of access [...].

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

20. The Panel notes that the decision taken by the EULEX SCSC single judge did not end the proceedings. In the instant case, the payment of a fee or translation costs has not been placed as a condition precedent for the initiation of the proceedings before the SCSC and the requirement in the instant case has only resulted in a delay. The activity of the court is not dependent on the payment of these costs. The case itself has, therefore, proceeded and a decision is awaited regarding the merits of the complainant's case. It follows that the decision not to exempt the complainant from costs of translation has not prejudiced her right to have access to court [...].

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

panel will then decide on the final costs of the proceedings according to Article 67 of the Law.”⁴⁰

4.3. Executive mandate – Police as a core element of the executive mandate

The actions of EULEX prosecutors and the police are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel’s mandate.⁴¹ The Panel has thus determined that a core aspect of its jurisdiction pertains to the activities of EULEX police officers:

“[...] the actions taken by the EULEX Police during the arrest of the complainant’s son and the subsequent house search on 23 September 2009 might have been deemed by the Panel as falling within the executive mandate of EULEX.”⁴²

The Panel’s jurisdiction covers in principle all action and measures taken by the police, such as arrests, searches, the monitoring and overseeing of public events as well as investigative activities carried out by the police.⁴³

4.4. Executive mandate – Investigation and prosecution

In contrast to judicial activities discussed above, investigative and prosecutorial activities – at least up a certain point – come within the scope of the Panel’s reviewing authority. The Panel has recalled that:

⁴⁰ *Milica Radunovic against EULEX*, 2014-02, 12 November 2015, paras.18- ,and its references to *Tolstoy Miloslavsky v UK*, Application no. 18139/91, Judgment of 13 July 1995, para. 59; *Golder v. the United Kingdom*, Application no. 4451/70, Judgment of 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 2007, para. 52; *Kreuz v. Poland*, Application no. 28249/95, Judgment of 2001, 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.

⁴¹ *Y. against EULEX*, 2011-28, 15 November 2012, para. 35, and its references to *Lafit Fanaj against EULEX*, 2010-06, 14 September 2011.

⁴² *Novica Trajkovic against EULEX*, 2011-12, 23 November 2011, para. 12

⁴³ *Ibid.* See also further references below.

“[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.”⁴⁴

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

“16. Contrariwise, the Panel is of the opinion, that actions or omissions by the prosecutors during the investigative phase of criminal proceedings may not be considered as being made in the context of “judicial proceedings” and that “the actions and omissions of EULEX prosecutors [...] before the filing of indictment may fall within the ambit of the executive mandate of EULEX” [...].”⁴⁵

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

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

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

56. The EULEX prosecutors, in addition to performing monitoring, mentoring and advising activities of the EULEX Rule of Law Mission in Kosovo, exercise executive powers by conducting criminal investigations and by prosecuting

⁴⁴ *Desanka and Stanisić*, 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.

⁴⁵ *Slobodan Martinović against EULEX*, 2011-13, 23 November 2011, para. 16, and its reference to *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.

new and pending cases, as defined in Articles 7 and 8 of the Law on Jurisdiction (see paragraph 37 above).

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

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

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

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

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

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

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

64. For these reasons the Panel holds that the actions of a EULEX prosecutor taken while examining a case are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel’s mandate as long as no indictment has been filed with a court competent to examine the merits of a case.”⁴⁶

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

“16. Furthermore, the indictment in the case has already been lodged before a court and the case is now being prepared for trial. The complaint relates to judicial proceedings before a court of Kosovo. The fact that the case has been taken over by EULEX under the provisions of Law on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law no. 03 L/053) does not detract from the fact that the acts of courts composed in their entirety of EULEX judges remain the courts of Kosovo. The Panel notes that it is not entitled to review the judicial proceedings (as mentioned above, Para 14.). Therefore the complaint does not fall within the ambit of the Panel’s mandate.”⁴⁷

Similarly, in another case the Panel noted that:

“38. The Panel has previously found that the actions of a EULEX Prosecutor taken while examining a case are part of the executive mandate of the

⁴⁶ *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; *Nevmerzhtsky v. Ukraine*, Application no. 54825/00, Judgement of 5 April 2005, para. 125; *Niedbala v. Poland*, Application no. 27915/95, Judgment of 4 July 2000, para. 53; *Schiesser v. Switzerland*, Application no. 7710/76, judgment of 4 December 1979, paras. 27-41; *Zlínstat, spol. s.r.o., v. Bulgaria*, Application no. 57785/00, Judgment of 15 June 2006, para. 78.

⁴⁷ *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.

EULEX Kosovo and therefore fall within the ambit of the Panel's mandate as long as no indictment has been filed with a court competent to examine the merits of a case [...].

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

40.In such circumstances, the Panel unanimously decides that the complaint falls within the ambit of its mandate and satisfies the admissibility criteria as set out."⁴⁸

The fact that the investigative or prosecutorial actions have been subject to judicial review by the Kosovo judiciary would not exclude the Panel's jurisdiction over the matter. However, in such a case, the Panel would only intervene if and where

⁴⁸ For an illustration, see, generally, *Maksutaj against EULEX*, 2014-18, 12 November 2015, paras. 38-40:

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

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

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

See also and its references to *B.Y against EULEX*, 2014-06, 27 May 2014, 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; *Thaqi v. EULEX*, 2010-02, 14 September 2011 para. 64.

allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities.⁴⁹

The responsibility of EULEX can be triggered by act or omission attributable to the prosecuting authorities.⁵⁰ For an omission to be capable of engaging the responsibility the Mission, an EULEX prosecutor must have failed to act when they were competent and required to do so. The Panel has clarified this when it stated the following:

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

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

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

76.The Panel, while appreciating the difficult situation in the courts in Mitrovicë/Mitrovica, concludes, however, that there has been a violation of the complainant’s right of access to a court under Article 6 § 1 of the Convention and a violation of his right to the peaceful enjoyment of his possessions guaranteed by Article 1 of Protocol No. 1 to the Convention.⁵¹

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

⁴⁹ *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;

⁵⁰ See e.g. *W.D. against EULEX*, 2015-13, 1 March 2016, paras. 18-19.

⁵¹ *Kazagic Djeljalj against EULEX*, 2010-01, 8 April 2011, paras. 73 -76.

“20. The Panel notes that the decision of EULEX Kosovo not to take over the complainant’s case was communicated to him on 26 January 2010. The complaint should have been lodged at the latest on 9 September 2010. The complaint was lodged 1 April, 2011. Thus, the complaint does not comply with the requirement of Rule 25, paragraph 3 of the Rules of Procedure.”⁵²

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

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

[...]

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

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

52. The Panel considers that, in the light of the parties’ submissions, the complaint raises serious issues of fact and law pertaining to alleged violations of human rights in relation to Articles 13 and 14 ECHR as well as Article 1 of

⁵² See e.g. *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, para. 20.

Protocol 1 of the ECHR, the determination of which requires an examination of the merits of the complaint.”⁵³

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

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

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

60. The failure of EULEX at the time to put in place a reliable system of recording and registering complaints involving allegations of violations of rights resulted in the case of the complainant remaining dormant for a period of approximately two years and nine months. During that period, EULEX was therefore not diligently discharging its mandate in relation to that complaint. The fact that the Kosovo authorities were also competent in relation to this matter does not discharge EULEX of its own obligations to act at all times in a manner that is consistent with minimum standards of human rights.”⁵⁴

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

⁵³ *Goran Becić 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.

⁵⁴ *Goran Becić against EULEX*, 2013-03, 12 November 2014, paras. 58-60

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

24. In this connection, the Panel finds that the complainant’s case, concerning taxation matters, manifestly does not fall within the ambit of cases which can be taken over by EULEX prosecutors within the meaning of the Law on Jurisdiction. A decision to that effect is also at the discretion of the EULEX prosecutor and as such it cannot be subject to examination by the Panel.”⁵⁵

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

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

15.The Panel notes, however, that the prosecutor’s decision of 21 December 2012 does not enable the Panel to ascertain what facts were established by the prosecuting authorities on the basis of the evidence available to them. For instance, no findings of fact were made as to whether the trees had actually been planted as planned and whether the school playground had been arranged or not. No other findings of fact were made in relation to the charges of corruption. Nor has it been explained how the provisions of substantive law were applied by the prosecution to the circumstances of the case and what was the reasoning which had led the prosecuting authority to its legal assessment that no criminal offence had been committed.”⁵⁶

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:

⁵⁵ Hoxha against EULEX, 2011-18 23 November 2011, paras. 23-24.

⁵⁶ *I. against EULEX*, 2013-01, 27 November 2013, paras. 14-15.

“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.”⁵⁷

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

“61.[...] the claim that the case never reached the Mission is contradicted by the fact that the record of this case has been within the custody of the DFM since at least December 2008. Since the case was in a database to which EULEX Prosecutors had access, this information may be said to have been constructively in their custody. In the diligent exercise of their responsibilities, they should and could have obtained information pertaining to that case. The Panel has already noted in earlier cases that a Mission such as EULEX is expected to organise its records and the transfer thereof in such a way that it is able to guarantee in all circumstances the effective protection of the rights

⁵⁷ *B. Y. against EULEX*, 2014-06, 27 May 2014, parass 14 et seq

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.”⁵⁸

For the Panel to be competent to address such a matter, the complainant must therefore demonstrate that the impugned action or omission which, he claims, resulted in his rights being violated are attributable to the prosecuting authorities rather than to the courts.⁵⁹ As noted above, under certain circumstances, the Panel could be competent to review the acts of EULEX prosecutors even where their actions are subject to judicial review:

“[I]t cannot be excluded that the Panel might be competent to evaluate the actions of EULEX prosecutors in criminal investigations even if they are subject to judicial review. The Panel would be competent to examine such acts and decisions, for instance, where the subject matter of acts and decisions subject to such review touches on human rights issues such as, for example, the right to personal liberty and security within the meaning of Article 5 of the ECHR. The Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities [...].”⁶⁰

⁵⁸ *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.

⁵⁹ See e.g. *Z against EULEX*, 2012-06, 10 April 2013, pars 43-44:

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

44.However, in the absence of any indication of the evidence which was, in the complainant’s view, essential for challenging effectively the need for his detention, and, crucially, having regard to the fact that the complainant has not shown that he raised this issue in his appeals, expressly or in essence, thus giving the courts an opportunity to address it, the Panel is of the view that it lacks jurisdiction to examine this part of the complaint.”

⁶⁰ *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, paras. 23 *et seq*:

“23.As regards the present case, the Panel notes that the complainant challenges the decisions given by the courts in respect of his detention and the compatibility of these

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

decisions with relevant human rights standards, in particular a right to personal liberty and security guaranteed by Article 5 of the Convention.

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

[...]

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

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

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

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

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

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

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

See also *Y.B. against EULEX*, 2014-37, 19 October 2016, para. 27 ("Furthermore, the Panel has found that it cannot be excluded that it might be competent to evaluate the actions of EULEX prosecutors in criminal investigations even if they are subject to judicial review. The Panel would be competent to examine such acts and decisions, for instance, where the subject matter of acts and decisions subject to such review touches on human rights issues. The Panel would only intervene if and where allegations of human rights violations attributed to the prosecutor have not been fully addressed by the competent judicial authorities (see *E against EULEX*, 2012-17, 30 August 2013, § 22; *Z against EULEX*, 2012-06, 10 April 2013, § 34).").

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.⁶¹

The Panel has similarly taken a generally broad view of EULEX prosecutors' executive competence over certain categories of cases. In *D.W. et al*, for instance, a case pertaining to enforced disappearance, the Panel rejected the narrow interpretation of its competence given by EULEX prosecutor to investigate such cases and gave its own interpretation of the law to determine the scope thereof. The Panel also noted that the Mission's *obligation* to investigate these cases arises not from these provisions which set out EULEX Prosecutors' jurisdictional competence over these cases, but from Articles 2-3 of the European Convention, which mandates the Mission to guarantee the effectiveness of these rights in the context of its executive function.⁶²

In this context, the Panel generally rejected interpretations of the role and responsibilities of EULEX prosecutors that would be inconsistent with their general obligation to guarantee the effective protection of rights in the performance of their duties. The Panel has thus interpreted EULEX Prosecutor's "exceptional" competence pursuant to Article 7(A) of the (amended) Law on Jurisdiction in a manner that gives effect to the mission's overall responsibility to guarantee the effective protection of rights in the investigative context and, in effect, rejected the minimalist and purely discretionary interpretation of that concept that both EULEX Prosecutors and the mission had favoured. In so doing, it has expanded the proposed narrow interpretation of what would constitute "extraordinary circumstances" as would allow EULEX prosecution to intervene under its residual competencies after the amendment of the Law on Jurisdiction in May 2014.⁶³ Such a

⁶¹ *Y.B. against EULEX*, 2014-37, 19 October 2016, para. 29.

⁶² See e.g. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, paras. 84 *et seq.*

⁶³ On the concept of "extraordinary circumstances", see for instance, *Sadiku-Syla against EULEX*, 2014-34, 29 September 2015, para. 62:

"Lastly, the HoM submits that the new legislation that entered into force on 17 May 2014 has "considerably reduced the possibility for EULEX Prosecutors and Judges to exercise executing functions in new cases" (Response, p 6, referring to the Omnibus

purposeful approach to setting the outer limits of EULEX Prosecutor's competencies is also apparent from the Panel's view that EULEX Prosecutors might bear a residual investigative obligation if and where local authorities fail to perform their duties in relation to categories of offences over which EULEX Prosecutors have competence.⁶⁴ The Panel's purposive reading of the EULEX prosecutors' obligations

Law that amended the Law on Jurisdiction). The Panel notes, however, that Article 7(A) provides for "Authority of EULEX prosecutors in extraordinary circumstances": "In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority." The HoM has failed to explain why this provision would not provide an adequate legal basis on which EULEX Prosecutors should act, in particular in a case such as the present one where the local authorities do not appear to be investigating. The Panel would invite the parties to address this matter should they wish to make additional submissions in regard to the merit of this case."

See also, *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 90:

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

See also *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, paras. 23 *et seq.*

⁶⁴ See, e.g., *Halili against EULEX*, 2012-08, 15 January 2013, para. 28:

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

See also *X. and 115 other complainants*, 2011-20, 22 April 2015, Disposition, where the Panel recommended that the Head of Mission should instruct competent EULEX officials to make enquiries with Kosovo authorities whether an investigation in this matter is ongoing and, if so, at what stage of the process the matter stands.

is intended to ensure that rights are protected effectively and that rights' victims are not left without a remedy where EULEX could provide one.

4.6 Executive mandate – Irrelevance of nature of underlying act and ultra vires actions

It is not relevant for the purpose of determining whether the impugned actions comes within the scope of the mission's executive mandate what office or organ of the mission is responsible for that conduct. What matters is the nature of the function performed and whether this function comes within the scope of the "executive" mandate of the Mission. The Mission cannot for instance evade its human rights obligations by distinguishing between its executive and "strengthening" functions.⁶⁵ Similarly, the fact that the EULEX staff acted as a training advisor to the police rather than as a police officer would not allow the Mission to evade its human rights responsibilities in relation to his actions.⁶⁶

⁶⁵ See e.g. *Zahiti against EULEX*, 2012-14, 4 February 2014, paras. 53-55:

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

54. In this respect, the Panel reiterates that it has already held in its admissibility decision that "*it is irrelevant whether [concerned EULEX staff member] worked for one particular department within EULEX or another. This is a matter of internal organization that cannot affect third party claimants*" (compare *Zahiti v EULEX*, 7 June 2013, at par. 35).

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

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

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

37. The Panel notes in this connection that, pursuant to Article 17 of the Law on jurisdiction, "[f]or the duration of the EULEX Kosovo in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX Kosovo". Therefore, EULEX police as such is in principle vested with the same executive powers as Kosovo police unless otherwise qualified by the modalities set out by the HoM. The Panel is unaware of any such modalities which would have the effect of restricting EULEX's responsibility for the actions of its police officers merely on the strength of the fact that there were charged with training activities."

⁶⁶ *Zahiti against EULEX*, 2012-14, 7 June 2013, par 36 ("In so far as EULEX argued that the officer concerned could not be regarded as being vested with executive powers because he had been working as a training advisor, the Panel is of the view that it is irrelevant whether he

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 a EULEX policeman had intentionally ran over a Kosovo police woman and thus caused injury to her. The unlawful character of the conduct does not exclude that the underlying act may be said to have formed part of the Mission's executive mandate. In such a case, it must be shown, however, that the act is sufficiently connected to the performance of an aspect of the Mission's executive mandate. Thus, in *Zahiti*, a case involving a (EULEX) police officer who rammed his car intentionally into a Kosovo police women, the Panel said this:

“33.The Panel adopts the approach developed by the Court, that “[a] *State may also be held responsible even where its agents are acting ultra vires or contrary to instructions [...] .*

[...]

35.The Panel notes the view expressed by the International Law Commission that it is “*a particular problem [...] to determine whether a person who is a State organ acts in this capacity. It is irrelevant for that purpose if the person concerned may have had ulterior or improper motives or may be abusing public power. Where such a person acts in an apparently official capacity, or under colour of authority, the actions in question will be attributable to the State.*” Further, state responsibility is excluded if “*the act had no connection with the official function and was in fact merely the act of a private individual. The case of purely private conduct should not be confused with that of an organ functioning as such but acting ultra vires or in breach of the rules governing its operation. In this latter case, the organ is nevertheless acting in the name of the State [...] .*”⁶⁷

The Panel proceeded to reject EULEX's submissions that the Mission did not have “effective control” or “ultimate authority and control” over the activities of the staff

worked for one particular department of within EULEX or another. This is a matter of internal organization that cannot affect third party claimants.”).

⁶⁷ *Zahiti against EULEX*, 2012-14, 7 June 2013, pars 32 *et seq.* and its references to ECtHR, *Ilascu and others v. Russia and Moldova*, Application no. 48787/99, Judgment of 8 July 2004, at par. 319; “The International Law Commissions Articles on State Responsibility: Introduction, Text and Commentaries”, James Crawford, Cambridge University Press (2002) at page 99.

member in question and therefore could not be held liable to acts or omissions imputable to it.⁶⁸ The Panel found the Mission responsible for the acts of the staff member on the basis that what could be connected to the Mission's executive mandate was not his underlying act of violence but the Mission's subsequent failure to provide an adequate remedy for the victim so that she could seek justice for what had been done to her.⁶⁹

5. What a Mission may be held accountable for

As noted above, it is EULEX' general obligation under the Council Joint Action to ensure that its activities should be carried out in compliance with international standards of human rights.⁷⁰ Therefore, like states, a rule of law mission may be held responsible for an act or omission of one of its organs or official, which resulted in the violation of the fundamental rights of an affected third party. Also, like a state, in the fulfilment of its human rights obligations, when performing a function that could negatively affect the rights of a third party, the Mission is required to act "in accordance with the law",⁷¹ pursue a legitimate aim,⁷² limit any restriction of rights to

⁶⁸ *Zahiti against EULEX, 2012-14, 7 June 2013*, paras. 38-39.

⁶⁹ *Ibid*, paras. 40-41

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

41.The Panel has taken the view that, based on the material before it, the manner in which EULEX has dealt with the disciplinary process concerning one of its police officer might raise an issue regarding the right of the complainant to obtain an adequate remedy pursuant to Article 13 of the ECHR and in relation to the rights guaranteed under Article 8 of the Convention. The Panel notes, in particular, that the information disclosed so far to the Panel does not provide clear indications of what steps, if any, were taken by EULEX to ensure that its actions did not result in a denial of complainant's right to seek and obtain an adequate remedy. The complaint therefore raises serious issues pertaining to Articles 8 and 13 of the ECHR and is not manifestly ill-founded. No other grounds to declare it inadmissible has been established."

⁷⁰ See, generally, Article 3 (i), Council Joint Action 2008/124/CFSP. See also *Zahiti against EULEX, 2012-14*, 4 February 2014, para. 57; *H & G against EULEX, 2012-19 & 2012-20*, 30 September 2013, para. 42.

⁷¹ See, e.g., *W against EULEX, 2011-07*, 10 April 2013, paras. 41 *et seq*.

"41.Turning first to the issue of whether EULEX's actions were "in accordance with the law", the Panel notes that EULEX failed to point to any legal provision based on which the information provided to the Serbian authorities was based.

what is proportionate and necessary to the legitimate aim being pursued.⁷³ In that latter regard, operational challenges associated with the environment in which the Mission operates should be accounted for when determining what the mission should have done or what could have been expected of the Mission in particular circumstances.⁷⁴ There is a strong expectation, however, that the authorities will do

42. The Panel notes that by providing this statement without an apparent legal basis to Serbian authorities, EULEX Prosecutors have all but denied the complainant the procedural ability to contest their actions in local courts and to do so in such a way that he could have prevented such disclosure or obtained relevant procedural guarantees that might have assuaged some of his concerns.

43. The inability of EULEX to identify a legal basis for its actions is worrying considering the nature of the case in question, the real and immediate risk of witnesses being interfered with in the local environment and the fact that the complainant had repeatedly objected to his statement being communicated to the Serbian authorities.

44. It follows from the above that the interference was not “in accordance with the law” as required by the second paragraph of Article 8 and that there has been a violation of this provision. In these circumstances, an examination of the necessity and proportionality of the course taken is not strictly speaking required. However, to the extent that it might have some bearing on the implementation of the Panel’s recommendations by EULEX, the Panel will also address, albeit briefly, the requirements of “necessity”, “proportionality” and “legitimate aim”.

See also *Y.B. against EULEX*, 2014-37, 19 October 2016, para. 48.

⁷² See e.g. *W against EULEX*, 2011-07, 10 April 2013, para. 45:

“45. The Panel is satisfied that co-operation with Serbian authorities pursued the legitimate aim of the prevention of disorder or crime within the meaning of par. 2 of Article 8. The investigation and prosecution of war crimes and other international crimes is unquestionably an aim which should be energetically pursued and which, in some circumstances, might warrant setting limitations to the rights guaranteed under Article 8 of the Convention.

⁷³ See, *inter alia*, *W against EULEX*, 2011-07, 10 April 2013, paras. 40, 44-53. See also *Y.B. against EULEX*, 2014-37, 19 October 2016, para. 48 (“The Panel’s task is to determine whether the interference served a legitimate aim and whether it struck a “fair balance” between the demands of the general interest of the community and the requirements of the protection of the individual’s fundamental rights (see *Beyeler v. Italy* [GC], no. 33202/96, § 107, ECHR 2000). Turning to the next criterion in Article 8 § 2, the Panel is prepared to accept that the interference pursued one of the legitimate aims enumerated in Article 8 § 2, notably the prevention of disorder or crime.”).

⁷⁴ See e.g. *L.O. against EULEX*, 2014-32, 11 November 2015, paras 44-45

“44. The Panel also takes notice of the difficulties necessarily involved in the investigation of crimes in a post-conflict society such as Kosovo (see *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011, § 70; HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, §§ 44 and 62 et seq.). Those difficulties should not, however, serve to camouflage or explain investigative shortcomings that are not in any meaningful manner connected to this particular sort of challenges. The Panel will, therefore, evaluate in each case whether a particular investigative step that was normally open would have been rendered impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation.

45. Expectations placed upon EULEX’s ability to investigate and resolve complex criminal matters should therefore be realistic and not place upon the mission a disproportionate burden that its mandate and resources is not able to meet (see HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, §§ 70-71). In each case, the Panel is therefore expected to review whether there were concrete and real obstacles that might have undermined the possibility for EULEX to conduct a prompt

and effective investigation of a case. Such an evaluation is not intended to justify operational shortcomings unrelated to concrete and demonstrable challenges.”

See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 73-74. See also *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 54 (“54. Nevertheless, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every risk to human rights can entail for the authorities a requirement to take operational measures to prevent that risk from materialising (see, *mutatis mutandis*, *Osman*, quoted above, § 116).”); *W against EULEX*, 2011-07, 10 April 2013, Disposition:

1. “*Recommends* the following actions to be taken by the HoM:
 - A declaration should be made acknowledging that the circumstances of the case amounted to a breach of the complainant’s rights attributable to the acts of EULEX in the performance of its executive mandate;
 - The HoM should order that the following measures be adopted without delay, i.e.:
 1. EULEX Prosecutors in charge of this case should be invited to request their Serbian counterparts to return copies of any documents provided to them which bears the name or refers to the complainant. This would include the two statements given by the complainant to EULEX.
 2. EULEX Prosecutors in charge of the case should be invited to request their Serbian counterparts –
 - i. To destroy any copy made of the above-mentioned documents and to redact the name and any information in other documents that could identify the complainant; and
 - ii. To give notice to EULEX Prosecutors that this has been done, and
 - iii. Not to disclose to any suspect or defendant any information provided by the complainant to EULEX
 - The HoM should order an evaluation of what legal instruments are available to EULEX Prosecutors to cooperate in matters of judicial and criminal cooperation and, should available legal basis be determined to be inadequate or insufficient, to undertake the necessary steps to try to bring all necessary legal instruments into force;
 - Pending this evaluation, the HoM should instruct EULEX Prosecutors not to communicate any information provided by witnesses to any authorities – Serbian or any other – without having received an assurance from the competent investigative and prosecutorial organs of EULEX that the requisite legal basis is in place for that purpose and that EULEX Prosecutors will comply with these legal requirements in all circumstances;
 - The HoM should order the competent organs of EULEX to conduct a thorough evaluation of the risk incurred by the complainant and/or his family as a result of his statement having been provided to Serbian authorities. Once this has been done and if a risk has been identified, the Panel recommends that EULEX should discuss with the complainant any step or measure which could be taken to limit and prevent the risk of harm.
 - The HoM is invited to disseminate the present decision to relevant EULEX officials involved in the investigation and prosecution of crimes in Kosovo with a view to ensure that they are duly made aware of their duties and responsibilities vis-à-vis witnesses from whom they obtain information.”

See also *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 31; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, par 57.

all they reasonably can to preserve and protect the effectiveness of rights despite the challenges that may be posed by the circumstances in which operate:

“Undoubtedly, many years after the events there would be considerable difficulty in assembling evidence or in identifying and mounting a case against any alleged perpetrators. The essential purpose of such investigation is to secure the effective implementation of domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Even where there may be obstacles which prevent progress in an investigation in a particular situation, a timely and effective response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts [...]”⁷⁵

This general obligation of the Mission to act at all times in a manner consistent with relevant human rights standards has been sub-summed by the Panel as included various sub-obligations. In particular, it requires the Mission to organise itself and its functioning in a manner that is consistent with the effective protection of human rights and will contribute to that purpose:

“89.The HoM also argued that the EULEX Prosecutors never became competent to investigate these cases where the case file did not formally reach them. The Panel cannot accept these submissions for at least two reasons. The first is that it is the responsibility of the Mission to ensure that it organises itself in such a way as to guarantee the effective protection of human rights in the exercise of its executive mandate. 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 [...]. The second reason is that the effective protection of these rights cannot depend on the particular arrangement put in place by UNMIK and EULEX in regard to the transfer of case file. The Mission was duly

⁷⁵ *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 63, and its references to *Varnava and Others v Turkey*, Application no. 16064/90 et al, judgment of 18 September 2009, para. 191; *McKerr v. the United Kingdom*, no. 28883/95, paras. 111 and 114, 2001; *Brecknell v. the United Kingdom*, Application no. 32457/04, 27 November 2007, para. 65; *L.O. against EULEX*, cited above, para. 46

informed by the complainants of the existence of such cases. From the point of view of human rights law, the Mission's responsibility to investigate these cases did not and could not depend on the formal submission of a case "live" case file by UNMIK. It was the Mission's own responsibility to effectively review and investigate these cases when they were brought to its attention."⁷⁶

Likewise, in *Sadiku-Syla*, the Panel rejected the suggestion that EULEX Prosecutors never formally became competent to investigate this matter as the case file did not formally reach them on time. The Panel thus explained:

"60. [...] The first [reason] is that it is the responsibility of the Mission to ensure that it organises itself in such a way as to guarantee the effective protection of human rights in the exercise of its executive mandate.

61. Secondly, the claim that the case never reached the Mission is contradicted by the fact that the record of this case has been within the custody of the DFM since at least December 2008. Since the case was in a database to which EULEX Prosecutors had access, this information may be said to have been constructively in their custody. In the diligent exercise of their responsibilities, they should and could have obtained information pertaining to that case. The Panel has already noted in earlier cases that a Mission such as EULEX is expected to organise its records and the transfer thereof in such a way that it is able to guarantee in all circumstances the effective protection of the rights of those concerned by those files [...]. Furthermore, in a case of that importance, it is not unreasonable to expect that EULEX experts in charge of that file should have brought it to the attention of the competent investigative authorities with a view to ensure that the case was duly investigated."⁷⁷

In *Becić*, the Panel determined that the Mission had failed to properly register complaints and that the mission could not rely on its own failure to register the complainant's application to justify its violation of his rights.⁷⁸ The Panel concluded:

⁷⁶ See e.g. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 89, and its reference to *Becić against EULEX*, 2013-03, 12 November 2014, paras. 58–60.

⁷⁷ *Sadiku-Syla against EULEX*, 2014-34, 29 September 2015, paras. 60-61, and its reference to *Becić against EULEX*, 2013-03, 12 November 2014, paras. 58–60.

⁷⁸ *Goran Becić against EULEX*, 2013-03, 12 November 2014, in particular, pars 51-52, and 56:

“60.The failure of EULEX at the time to put in place a reliable system of recording and registering complaints involving allegations of violations of rights resulted in the case of the complainant remaining dormant for a period of approximately two years and nine months. During that period, EULEX was therefore not diligently discharging its mandate in relation to that complaint. The fact that the Kosovo authorities were also competent in relation to this matter does not discharge EULEX of its own obligations to act at all times in a manner that is consistent with minimum standards of human rights.”⁷⁹

In *Sadiku-Syla*, the Panel found that the Mission was constructively in possession of information that should have demanded the action of its prosecutors. The fact that this information had remained with the forensic department of the Mission could not justify its failure to act nor the prejudice thus caused to the rights of the complainant. It was the responsibility of the Mission to organize itself in such a way as to ensure that its various organs communicated with one another in such a way as to guarantee the effective protection of those affected by its activities.⁸⁰ The Panel

“56. [...] it is of paramount importance that arguable claims brought forward by individuals should be properly recorded and that they should reach those EULEX prosecutors, for them to be in a position to make an informed assessment as to whether to investigate a case or not. It can be reasonably expected from a Mission with an executive mandate that an effective system of registration and communication of complaints will be put in place which ensures that claims and grievances involving allegations of violations of rights brought to its attention and which can arguably impinge on the exercise of the Mission’s executive mandate are at least registered and duly recorded and, in timely fashion, scrutinized by respective units within EULEX, in particular EULEX prosecutors. This clearly did not happen in this case.

See also *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 39:

“39.As regards the first period, the Panel has already had occasion to underline the obligations of the Mission to diligently record and, in turn, duly register grievances formally brought to its attention and to communicate those to the competent bodies within the Mission (see HRRP, *Becić against EULEX*, 2013-03, 12 November 2014, §§ 58–60, *mutatis mutandis*). The Mission is also responsible to ensure that the hand-over of files from UNMIK to EULEX and the organisation of case files is conducted in such a way that ensures the effective performance of the function of the Mission and protection of human rights in that context (see, e.g., admissibility decision in *Sadiku-Syla*, cited above, § 61).

⁷⁹ *Ibid*, para. 60.

⁸⁰ *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, paras. 40-42:

“40.In the present case, as noted above (§ 10) and in the admissibility decision given in the present case by the Panel (§ 51), information pertaining to the case was in the possession of the Mission since 2008 (albeit within the framework of its forensic branch). On that basis, the Mission should have ensured through proper organisation and communication between its various branches that information of this importance was communicated to the competent investigative authorities. It has not been argued by EULEX, let alone shown, that there has been any communication between the

noted, furthermore, that it was not for a victim of rights violation to make up for or compensate for the Mission's own failures:

"41.The Panel also notes the following in this context. A person alleging a violation of this sort cannot be expected to conduct his/her own investigation of the case, nor should he/she be required to check with or consult the various institutions in the hope of identifying one that might be responsible for the case [...]. In order to guarantee the effective protection of human rights in these types of cases, it is imperative that the responsibility to coordinate investigative (and prosecutorial) efforts is and remains with the authorities themselves. They, not the victims, bear the responsibility to ensure the effective protection of the rights of those who have suffered prejudice."⁸¹

DFM and the prosecutorial authorities as to any possible steps to be taken in connection with the disappearance of the father of the complainant. In this particular case, the HoM has offered no explanation as to why important information that was available to the DFM was not provided to the investigative organs of the Mission.
[...]

42.The Panels concludes that, owing to the failure of the Mission to ensure that relevant information was brought to the attention of its investigative and prosecutorial branches, no proper investigation of this case may be said to have taken place during the first period of time under examination."

See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, paras. 47 *et seq*:

"47.When addressing the issue of admissibility of these cases, the HoM argued that the EULEX Prosecutors never became competent to investigate these cases where the case file did not formally reach them. The Panel is of the view that this position should be rejected for two primary reasons.

48.First, it is the responsibility of the Mission to ensure that it organises itself in such a way as to guarantee the effective protection of human rights in the exercise of its executive mandate (*D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, cited above, § 89). No argument has been advanced to explain how the transfer of files of criminal investigations from UNMIK to EULEX was conducted in respect of persons who were subject to unlawful killings or had disappeared during the conflict or shortly afterwards from UNMIK to EULEX. Nor was it explained what steps were taken with a view to safeguarding the procedural rights of victims of alleged offences; including by way of, *inter alia*, proper recording of all transferred files.

49.Secondly, the effective protection of these rights cannot depend on the particular arrangement put in place by UNMIK and EULEX in regard to the transfer of case files. In the cases under examination, the Mission was duly informed by the complainants of the existence of such cases. The Mission's responsibility to investigate these cases did not and could not depend on the formal submission of a "live" case file by UNMIK. It is the Mission's own responsibility to effectively review and investigate these cases, in particular when serious offences such as those concerned in the present case were brought to its attention (*D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, cited above, § 89)."

⁸¹ *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 41, and its references to *L.O. against EULEX*, 2014-32, 11 November 2015, para. 63

This general obligation also implies that within the limits of its ability, the Mission should deploy adequate resources to fulfil its human rights responsibilities. In *Sadiku-Syla*, the Panel thus noted:

“The Panel is fully aware of the challenges and difficulties which result from the reduction of the resources of the Mission due to reconfiguration etc. However, within the confines of these resources and in a manner commensurate with the importance that the Mission attaches to the effective protection of human rights, the Panel invites the HoM to ensure that investigative bodies within the Mission have at their disposal all the necessary resources and support to accomplish their mission effectively and in a manner consistent with the effective protection of the human rights of all those involved.”⁸²

Where the actions of the Missions or those of one of its organs are capable of affecting the protected human rights of third parties, the Mission is expected to act in accordance with a general duty of diligence in order to ensure compliance in the performance of its duty with the effective protection of those affected by its activities. This expectation of due diligence has been relevant, *inter alia*, to setting the scope of the mission’s obligation to act to guarantee and protect the effectiveness of fundamental rights within the general scope of its mandate (e.g., as regard the investigation of a criminal case that remained dormant; or in regard to operational measures necessary to protect people from harm). It has also been relevant to assessing the way in which the Mission treated sensitive information provided by a witness which was shared without his consent by EULEX with Serbian authorities.⁸³ The Mission would also be required to intervene in order to remedy a rights violation where it becomes aware after it has occurred and that the underlying act (or omission) that caused the injury is attributable to the Mission or one of its organs. The Mission is also required to act 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 and that it was its responsibility to do so.⁸⁴

⁸² *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, Disposition. See, also, *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 59.

⁸³ *W against EULEX*, 2011-07, 10 April 2013, pars 46 *et seq.*

⁸⁴ *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, par 42. See also *Đorđević 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 23452/94, Judgment of 28 October 1998, para. 16. See also *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 53 (emphasis added): (“Within the context of MMA the obligation for EULEX officers to act in order to prevent human rights violations can be said

Ratione personae, the Mission can only be held responsible for acts or omissions attributable to the Mission itself (by reason of its own actions or those of its organs or officials).⁸⁵ But it cannot use the excuse of others having overlapping responsibilities to justify its own failure to act:

“57.EULEX submission that “a reasonable interpretation in line with EULEX’s mandate of assistance to Kosovo Rule of Law Institutions is that redress shall be sought within the Kosovo legal system allowing the remedies and mechanisms available within its legal framework to operate”, fails to convince the Panel as for the period from 2009 to 2013 the complaint precisely complains that the Kosovo legal system’s remedies failed to address his complaint appropriately.

[...]

59.The fact that the judicial mechanisms in Kosovo ultimately functioned which led to the sentencing of the usurper and the restitution of the complainants’ property does not absolve EULEX Kosovo from its own obligations, in particular, its obligation to diligently record and, in turn, duly register grievances formally brought and communicate them to the competent bodies within the mission. In the present case the failure to do so precluded a timely assessment of the case by EULEX.”⁸⁶

Nor could the Mission point to the possibility of other avenues of relief, outside of the Mission, to justify its own failure to guarantee the rights of the complainant:

to arise *when they are faced with a threat of any imminent and serious violation of individual rights, regardless of the subject matter of the right concerned*. 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 (compare *Kahrs*, quoted above, §§ 30-31.”); *A,B,C,D against EULEX*, 2012-09 to 2012-12, 20 June 2013, para. 50 (emphasis added) (“50. 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 (see Article 3 (i), Council Joint Action 2008/124/CFSP; see paragraph 38 above). 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* (see, e.g., *Đorđević v. Croatia*, no. 41526/10, § 138-139, ECHR 2012 and references cited therein; *Osman v. the United Kingdom*, 28 October 1998, § 16).”

⁸⁵ See below.

⁸⁶ *Goran Becić against EULEX*, 2013-03, 12 November 2014, pars 57 and 59.

“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).”⁸⁷

The same general point was made in *Becić* where the Panel emphasised that the fact that the Kosovo authorities were also competent to deal with the complainant’s case (a property dispute) did not discharge EULEX of its own obligations to act at all times in a manner that is consistent with minimum standards of human rights.⁸⁸ That is even the case where the primary responsibility to deal with a particular issue lays with another entity (in particular Kosovo state organs). This was made clear in particular in cases where police operations were under the primary responsibility of the Kosovo authorities and under the residual responsibility of EULEX. In *K et al*, for instance, the Panel said this:

“44.The Panel has also held that the mere fact that the police operations on that day were led by and fell within the primary responsibility of Kosovo Police does not exclude the fact that EULEX may be held responsible for its own actions or failures in so far as they impacted on the exercise on the executive mandate of EULEX. In such circumstances, the Panel will consider, in particular, whether any shortcoming attributable to EULEX could have violated or contributed to a violation of the human rights of the complainants [...].”⁸⁹

⁸⁷ *Zahiti against EULEX*, 2012-14, 4 February 2014, par 80.

⁸⁸ *Goran Becić against EULEX*, 2013-03, 12 November 2014, par 60.

⁸⁹ *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 44, and its references to *A,B,C and D against EULEX*, 2012-09 to 2012-12, 20 June 2013, para. 45. See also *A,B,C and D against EULEX*, 2012-09 to 2012-12, 20 June 2013, paras. 45 and 49:

“45.The Panel is of the view that the mere fact that the police operation on that day was led by and fell within the primary responsibility of Kosovo Police does not exclude the fact that EULEX may be held responsible for its own actions or failures in

By the same token, the mission cannot abjure its own human rights obligations by reference to the acts of others. Thus, the fact that a previous mission has failed to meet its human rights responsibilities or is primarily responsible for the violation of the complainants' rights does not offer a justification for the mission itself to disregard its own obligations. This was noted specifically by the Panel in relation to the transition between UNMIK and EULEX Kosovo:

“[T]he fact that a prior mission (UNMIK) has “closed” a case or declared it “inactive” does not exonerate EULEX from its procedural obligations. The Panel is of the view that where, as in the present case, the Mission’s attention was drawn to possible human rights issues in the investigation of a case arising in connection with alleged serious offences, the Mission may be expected to carefully review the record of that case to conduct its own evaluation of the compatibility of that investigation with the procedural standards of human rights law.”⁹⁰

Where the mission acts alongside that state’s organs it must ensure that its own involvement remains at all times consistent with relevant human rights standards and, if necessary, that it intervenes to prevent violations by the state itself. This was

so far as they impacted on the exercise on the executive mandate of EULEX. The Panel will consider, in particular, whether any shortcoming attributable to EULEX in the preparation of or the carrying out the Vidovdan operation in 2012 could have violated or contributed to a violation of the human rights of the complainants.

[...]

49. The Panel notes the argument of EULEX that in the exercise of EULEX’s responsibility as a “second responder” it would only be required to intervene if and when so requested by KP. The Panel has been unable to identify any legal basis that would restrict the obligation of EULEX to intervene as a “second responder” and that the EULEX claim that such an obligation to respond would only arise upon the request of the Kosovo authorities.

Instead, the Panel notes the clear, unambiguous language of the Joint Action Article 3 (b) which stipulates an obligation for EULEX to “ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities” (see paragraph 38 above). This approach is further supported by paragraph (h) of the same article that states that EULEX shall “assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security” (see paragraph 38 above). Further, should the EULEX argument be accepted, it would be at odds with the inherent obligations of EULEX to protect human rights as it would arguably diminish the effectiveness of this protection.”

⁹⁰ *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 71.

made clear, for instance, in the context of police operations to which both the mission and the Kosovo police (KP) were participating:

“The undisputed fact that the operation was KP-led does not release EULEX from its own responsibility to ensure that its involvement in these events and operations was consistent with relevant human rights standards. In particular, the Panel has not been provided with information that adequate steps were taken to ensure proper coordination with KP in order to secure effective protection of participants against violence or other sorts of violations of their rights, including preventive measures to ensure that KP’s actions were consistent with relevant human rights standards. In this regard, the Panel emphasises that it is of particular importance that KP is properly trained and advised on applicable human rights standards regarding the general treatment of participants in this sort of events as well as about the conditions for lawful seizure of their property.”⁹¹

Furthermore, when operating with another entity which creates a risk that human rights violation might occur, the mission is expected to take reasonable measures to guard against that risk:

“This is also the case where, as in the present case, the conduct of KP presents a real risk that these rights might be violated. In such a case, EULEX is expected to provide safeguards – including operational ones – capable of ensuring that KP acts in accordance with its obligations and, where they fail to do so and put the effective exercise of these rights at risk,

⁹¹ *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 52. See also *A,B,C,D against EULEX*, 2012-09 to 2012-12, 20 June 2013, paras. 64-65:

“64. The Panel also takes note of the HoM’s submissions that the operation was a KP led operation. Whilst this fact is not in dispute, EULEX bore its *own* responsibility to ensure that its involvement in these events and operations, satisfied and was consistent with relevant human rights standards. In particular, it has not been shown that adequate steps were taken to ensure coordination with KP in order to secure effective protection of participants against inappropriate or excessive action, including alleged human rights violations by KP members. Further, it has not been shown that EULEX authorities provided clear operational guidelines to the EULEX police officers on the ground, in particular in what circumstances the latter would be required to intervene to guarantee the effective protection of human rights.

65. The Panel concludes that, similarly to the other complainants, as a result of insufficient resources being allocated to the Vidovdan operation by EULEX with a view to ensuring respect for human rights, not least by the KP, complainant A was denied the full and effective enjoyment of his right to respect to private life, his freedom of assembly as well as his right to exercise his religion safely and without unnecessary hindrance.”

to intervene appropriately to prevent any violation, and, should this be necessary for that purpose, even to reverse or cancel KP operational decisions in accordance with Article 3b) Joint Action.”⁹²

The appropriateness of the mission’s response in every case should be commensurate to the circumstances and, in particular, reflect the importance of the rights that are at stake and the seriousness of the threats posed to those in a particular situation. As the Panel held, 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.⁹³ In all cases, its response is expected to be such as to provide for the *effective* protection of fundamental rights. The mission cannot, for instance, satisfy its human rights obligations by referring to means of redress that have not proved to be effective in guaranteeing the rights of a complainant.

As noted above, it is not relevant for the purpose of that determination what office or organ of the mission has committed the impugned act as long as this act may be attributed to the mission and formed part of its executive mandate.⁹⁴ What matters is the nature of the *function* in which it was performed and the fact that this function came within the scope of the Mission’s “executive mandate”. In Zahiti, for instance, EULEX sought to argue that the officer concerned could not be regarded as being vested with executive powers because he had been working as a training advisor. The Panel took the view that it was irrelevant for the purpose of its determination whether he worked for one

⁹² *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 45.

⁹³ *Kahrs against EULEX*, 2012-16, 10 April 2013, para. 31; *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, para. 42; *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 53; *A, B, C, D against EULEX*, 2012-09 to 2012-12, 20 June 2013, para. 50.

⁹⁴ See e.g. *Zahiti against EULEX*, 2012-14, 4 February 2014, paras. 53-55, on the absence of a material distinction between *executive* and *strengthening* division of the Mission:

“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.”

particular department of within EULEX or another. This is a matter of internal organization that cannot affect third party claimants.⁹⁵ The Panel added this:

“37.The Panel notes in this connection that, pursuant to Article 17 of the Law on jurisdiction, “[f]or the duration of the EULEX Kosovo in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX Kosovo”. Therefore, EULEX police as such is in principle vested with the same executive powers as Kosovo police unless otherwise qualified by the modalities set out by the HoM. The Panel is unaware of any such modalities which would have the effect of restricting EULEX’s responsibility for the actions of its police officers merely on the strength of the fact that there were charged with training activities.”⁹⁶

In making that determination for the purpose of establishing whether the mission had fulfilled its human rights obligations, the Panel has tended to adopt a rather liberal and purposeful approach to defining the scope of the mission’s human rights responsibilities. Thus, the Panel quite systematically gave a broad definition of the Mission’s executive mandate. This was the case, for instance, in *A, B, C and D against EULEX*, a case pertaining to violence directed by locals against Serbs in the general presence of EULEX police officers. EULEX submitted that the alleged absence of EULEX officers at the location where the alleged abuses have taken place must mean that EULEX could not be held responsible for the alleged violation. These submissions were said not to be dispositive and eventually set aside by the Panel:

“58.First, the Panel takes note of the submissions of EULEX that its personnel were absent from a number of locations relevant to this case. The Panel

⁹⁵ *Zahiti against EULEX*, 2012-14, 7 June 2013, paras. 35-36; *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 54.

⁹⁶ *Ibid*, para. 37. See also *Zahiti against EULEX*, 2012-14, 4 February 2014, par 64, in regard to the distinction between the underlying actions of a mission staff (that might not come within the scope of the executive mandate of the mission) and the subsequent failure arising from that initial action (which might come within that scope) (“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, [it] is called upon to determine whether, in the circumstances of the case and for the purposes of the effective exercise of its executive mandate, EULEX was obliged to provide adequate legal avenues with a view to ensuring adequate redress for the complainant and thus to comply with its human rights obligations under Articles 8 and 13 of the ECHR” (see 2012-14, *Zahiti against EULEX*, 7 June 2013, at par. 40).”); *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, paras. 48 *et seq.*

reserves its position in regard to the relevance, if any, of this fact for the purpose of deciding the merits of the present case.

59. Second, EULEX has failed to point to and specifically address Article 3 (d) of the Council joint action, which appear to be relevant to the determination that is expected of the Panel. That provision states that EULEX shall:

“(d) ensure that cases of [...], inter-ethnic crimes, [...] and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities.”

60. Considered in the context of this provision, and in light of EULEX’s acknowledgment that its officers had in fact been dispatched to these events, the Panel has taken the view that there are sufficient indications *prima facie* that the involvement of EULEX officers in the monitoring of these events fall within the ambit of exercise of the mandate of the Panel. If, however, the HoM wishes to take issue with this finding, the Panel invites the HoM to provide a detailed account of the circumstances under which EULEX officers were sent to participate in these events and in what capacity and under what mandate they were deployed.”⁹⁷

In verifying the mission’s compliance with its obligations in this context, the Panel also focused on the substance of what the mission had done rather than the label attaching to its activities. Thus, the fact that the underlying conduct was carried out as part of the Mission’s MMA’s responsibilities (Monitoring, Mentoring and Advising) did not provide for an exception to the Mission’s human rights obligations.⁹⁸ In a

⁹⁷ *A, B, C and D against EULEX*, 2012-09 to 2012-12, 10 April 2013, paras. 57 *et seq.*

⁹⁸ Regarding the Mission’s attempt to evade its human rights responsibilities on the basis of the MMA nature of the underlying acts: *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, paras. 48 *et seq.*; *Kahrs against EULEX*, 2012-16, 10 April 2013, paras. 27 *et seq.*:

“27. The Panel notes the explanation by EULEX that its police officers present at the scene of the alleged incident were acting in an advisory capacity and exercising MMA responsibilities.

28. The Panel further notes, as stated by EULEX, that MMA activities can carry a positive obligation to take action where immediate intervention is needed in view of the protected right.

similarly purposeful approach, the Panel developed a range of circumstances where the mission would have a positive obligation to act to fulfil its human rights obligation. In *Kahrs*, the Panel made the following statement of principle on this point:

“29. In this regard the Panel finds relevant the approach developed by the Court which implies that under the ECHR in certain well-defined circumstances a positive obligation arises on the part of the authorities to take preventive operational measures to protect an individual. In this regard the Court noted in the context of cases concerning the right to life that “bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities

[...]

30. The Panel accepts 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 as regards policing cannot be imposed on the Mission. It is noted, 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 concerning human rights (see Article 3 (i), Council Joint Action 2008/124/CFSP). Hence, limiting the Mission’s obligations arising in the context of MMA only to situations of imminent and serious threats to violations of Articles 2 and 3 would not only be incompatible with EULEX’s character as a rule of law mission, but would also undermine the general effectiveness of human rights protection in Kosovo. Besides, it is noted that the respondent did not provide any legal basis for this argument, either derived from the Council Joint Action or the Operational Plan of the Mission or any other legal authority.

31. The Panel therefore concludes that within the context of MMA the obligation for EULEX officers to act in order to prevent human rights violations can be said to arise when they are faced with a threat of any imminent and serious violation of individual rights, regardless of the subject matter of the right concerned. 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.

32. Referring to the circumstances of the instant case, the Panel observes that the EULEX police officers present during the material incident were acting in the MMA capacity. The Panel is of the view that in the present case the circumstances complained of were not such as to trigger the obligation of the EULEX officers to intervene and act in their corrective capacity. It is noted in this connection that it has not been argued, let alone shown, that the complainant had not at his disposal legal remedies to address the issue of the allegedly unlawful seizure of his property. Nor was it argued that in the circumstances of the case the available remedy would not, for some case-specific reasons, be effective. It is further noted that the complainant was not under threat to life or limb. Nor was he exposed to a threat to his personal integrity. No threat of use of physical force was proffered against him. He was not verbally abused. The right at stake concerned the peaceful enjoyment of his possessions. The Panel is sensitive to the fact that the confiscated material, namely his camera and computer were used by the complainant for professional purposes. However, it was not argued that their pecuniary value was very high or that any serious prejudice was caused for which he could not otherwise seek redress. In the last analysis, they were ultimately returned to him.

33. Having regard to the circumstances of the case seen as a whole the Panel is of the opinion that the situation complained of did not create a situation that would have obliged EULEX police officers to intervene with local authorities, in order to stop or prevent a violation of the complainant’s human rights.”

and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention” [...].”⁹⁹

The same approach was adopted and applied in *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX* in relation to MMA activities and allegations of rights violations under Article 5 and 8 of the Convention.¹⁰⁰ The Panel also noted that Article 2 of the ECHR lays down a positive obligation on the authorities to take appropriate steps to safeguard the lives of those within their jurisdiction, which it said also applied to the Mission.¹⁰¹

⁹⁹ *Kahrs against EULEX*, 2012-16, 10 April 2013, para. 29, and its reference to *Osman v the UK*, Application no 23452/94, Judgment of 28 October 1998, paras. 115 et seq.

¹⁰⁰ *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, paras. 51-52:

“51. The Panel further notes that MMA activities can carry a positive obligation to take action where immediate intervention is needed in view of the protected right.

52. In this regard the Panel finds relevant the approach developed by the European Court of Human Rights (the Court) which implies that under the Convention in certain well-defined circumstances a positive obligation arises on the part of the authorities to take preventive operational measures to protect an individual. In this regard the Court noted in the context of cases concerning the right to life that “bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, such an obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention” (see, among other authorities, *Osman v the UK*, judgment of 28 October 1998, § 115 et seq.)”

¹⁰¹ See *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 60 (“60. Furthermore, Article 2 does not concern only deaths resulting from the use of force by agents of the State (*Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, § 69). It also lays down a positive obligation on the authorities to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *Mursel Hasani against EULEX*, 2010-05, 14 September 2011, § 66, 69-70; see also ECHR, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports of Judgments and Decisions 1998-III, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 54,

In all such cases, a failure on the part of the mission to act could engage its responsibility. Such an approach was particularly important in the context of establishing the scope of EULEX Prosecutors' jurisdictional competence and in verifying that they had acted at all times in a manner consistent with their human rights obligations. In *X and 115 others complainants against EULEX*, a case pertaining to the placing of a large community of individuals of Roma ethnicity in sub-standard living conditions, the Mission sought to evade any responsibility to investigate the violation of their rights on the ground that a recent amendment of the law on jurisdiction has set out a cut-off point after which it could not deal with the matter. The Panel rejected this narrow interpretation and preferred one that guaranteed the effective protection of their rights and enabled the mission to investigate the matter:

“64.Thirdly, it is noted that under Article 7 (A) of the Law No. 04/L-273 it was possible for EULEX prosecution to apply an exception to the general principle that cases which were not considered ongoing within the meaning as described above were to be dealt with by the Kosovo authorities (see Applicable Law above). It was possible for EULEX prosecution to take over cases if it was warranted by exceptional circumstances. Again, EULEX failed to explain why, in light of all circumstances relevant to this case, it was reasonable for EULEX Prosecutor not to seize themselves of this case. Particularly relevant in that regard was the fact that the case had not been properly investigated up to that point. This should have alerted that a failure to act in this matter would likely result in depriving victims of access to an effective remedy.

65.The Panel further observes that the present case relates to facts going back as far as 1999. The facts of the case related, *inter alia*, to one of the most important of all fundamental human rights, the right to life. It gave rise to a number of proceedings in which residents of the camps sought relief and

ECHR 2002-II), including by putting in place a legal framework designed to provide effective deterrence against threats to the right to life in context of any activity, whether public or not, in which the right to life may be at stake (see, ECHR, amongst many other authorities, *Zubkova v. Ukraine*, No. 36660/08, § 35, 17 October 2013). Whatever form the investigation takes, the available legal remedies should be capable of establishing the facts, holding accountable those at fault and providing appropriate redress (see, e.g., *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, §§ 69-70 and 95-101). Any deficiency in the investigation, undermining its ability to establish the cause of the death or those responsible for it, may lead to the finding that the Convention requirements have not been met (see ECHR, *Antonov v. Ukraine*, No. 28096/04, § 46, 3 November 2011).”).

compensation from bodies and organisations they considered responsible for their plight; to no avail. There was also a clear ethnic element inherent to the case in that the residents were Roma. Proceedings were instituted before various bodies of the United Nations with a view to providing some form of redress to the inhabitants of the camps, giving rise to a number of decisions, including these of the Human Rights Advisory Panel (see paragraphs 31-35 above), again to no avail.

66. These circumstances, taken together, can be said to carry the weight and gravity relevant to considering whether, in the exercise of diligent prosecutorial discretion, exceptional circumstances within the meaning of Article 7 (A) obtained and whether the case should not therefore be retained by EULEX prosecution. It is true that the law conferred on EULEX prosecuting authorities a discretionary power to take over cases they consider exceptional in nature. It is not for the Panel to replace the EULEX authorities in interpreting that requirement. However, that discretion cannot be exercised arbitrarily. It must be exercised diligently in light of all relevant circumstances and in a manner that is consistent with the effective protection of human rights. In this case, it has not been argued, let alone shown, that adequate consideration was given by the EULEX prosecuting authorities to the question of whether the circumstances of the case warranted qualifying it as exceptional for the purposes of this statute. Nor has it been demonstrated that the human rights consequences of their decision was given its due weight.

67. The decision of the Mission not to open an investigation until after the cut-off date of 14 April 2015 negatively affected the complainants' ability to seek and obtain an effective relief for the harm done to them. The Panel notes that, according to Article 14 of the Law 03/L-006 on Contested Procedure, a civil court is bound merely by a final judgment given in criminal proceedings finding the accused guilty (see Applicable Law above). There is no basis for finding that the absence of criminal investigation or of a final judgment in a criminal case makes it impossible in law to seek civil liability before civil courts against persons in respect of whom Kosovo civil courts have jurisdiction. Still, the Panel is of the view that EULEX's failure to initiate an investigation, given the seriousness of issues involved, the lengthy period which elapsed since the material events, the difficulty for the complainant to obtain evidence absent such an investigation, seriously undermined the ability of the complainants to seek compensation through civil liability and

gravely compromised their ability to obtain an effective remedy for the harm which they suffered.”¹⁰²

A similar approach was adopted in *Sadiku-Syla*, a case of enforced disappearance.¹⁰³ In this case, the Panel interpreted the Law on Jurisdiction that set out the scope of the Mission’s investigative responsibilities under the “exceptional circumstances” exception broadly and in light of the Mission’s human rights responsibilities. Particular attention was given in this context to ensuring that the Law was not to be interpreted in a manner that would be inconsistent with the victims’ fundamental rights to a full and effective investigation of the matter:

“44.Among the considerations relevant to the existence of “exceptional circumstances” are the following: first, whether an effective investigation of the case has been conducted up to that point. A negative answer would militate in favour of EULEX Prosecutors exercising their “exceptional” competence. In the present case, It has not been argued, let alone shown, that the case was ever subject to an effective investigation for any significant period of time by any entity. Secondly, it is relevant whether the case concerns important rights and violations of extreme gravity. Such considerations would again weigh in favour of the “exceptional” involvement of EULEX Prosecutors. The case under consideration pertains to the fundamental rights. Also, there was a very real possibility that the disappearance of the complainant’s father was based on ethnic or religious considerations, thereby going further into the jurisdictional

¹⁰² *X. and 115 other complainants against EULEX*, 2011-20, 22 April 2015, pars 64 *et seq.*

¹⁰³ *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 43:

“43.As regards the period following the entry into force of the law amending of the Law on Jurisdiction, the Panel takes the following view. As noted by the Panel in an earlier case, Article 7 (A) of the Law No. 04/L-273 gives EULEX prosecution the ability to apply an exception to the general principle that cases which were not considered ongoing as of the cut-off date of 14 April 2014 were to be dealt with by the Kosovo authorities (compare, *X and 115 other complainants against EULEX*, 2011-20, § 64). This provision cannot result in undermining or qualifying the responsibility of the Mission to act at all times in a manner consistent with relevant human rights standards (see, e.g., *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, §§ 41 *et seq.*)”

See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, paras. 83 *et seq.*, in particular para. 84 (“84. As noted by the Panel in an earlier case, Article 7 (A) of the Law No. 04/L-273 gives EULEX prosecution the ability to apply an exception to the general principle that cases which were not considered ongoing as of the cutting date of 14 April 2014 were to be dealt with by the Kosovo authorities (compare, *X and 115 other complainants against EULEX*, 2011-20, § 64). This provision cannot result in undermining or qualifying the Mission’s responsibility to act at all times in a manner consistent with relevant human rights standards (see, e.g., *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, §§ 41 *et seq.*)”).

territory over which the Mission has competence. In a post-conflict environment where ethnic and religious relations might still be tense and fragile, such cases are obvious investigative priorities. Furthermore, the underlying facts of the present case go back to December 2000. The complainant has had to live since then with the trauma and emotional distress of not knowing the fate of her father. This, again, does not appear from the record to have been considered relevant to the Mission in its determination of “exceptional circumstances”. Thirdly, if the EULEX Prosecutors decide not to exercise their “exceptional” competence, a question arises whether there is a genuine and real prospect of local authorities carrying out their responsibility in relation to that case. In the present case, there is no indication that this would be the case or, in any event, it does not seem that any steps were taken in order to establish the facts relevant for the existence of such a prospect [...]. Lastly, in this particular case, a failure to ensure that information relevant to this case was transmitted from one organ of the Mission to another is attributable to the Mission itself. This adds weight to the suggestion that the circumstances of the case are “exceptional” within the meaning of Article 7(A) of the Law No. 04/L-273.

45. The law confers on EULEX prosecuting authorities a discretionary power to take over cases which they consider exceptional in nature. It is not for the Panel to replace the EULEX authorities in the application of that requirement. However, the discretion of the Mission in that regard cannot be exercised arbitrarily without the consideration of all relevant factors and circumstances. It must be exercised in a manner that is consistent with the effective protection of human rights. In this case, it has not been argued, let alone shown, that consideration had been given by the prosecuting authorities of EULEX to the question of whether the circumstances of the case warranted qualifying them as “exceptional” for the purposes of this statute.

46. In conclusion, the Panel is satisfied that, *prima facie*, the circumstances of the case could be regarded as falling within the ambit of “exceptional circumstances” of Article 7(A) of the amended Law on Jurisdiction and that the Mission would therefore have remained competent in principle to investigate them after the amendment of the Law on Jurisdiction. For these reasons, the Panel finds that the violation of the rights of the complainants by the Mission

continued even after the amendment of that Law on account of the failure of the consideration of the case under this provision.”¹⁰⁴

The Panel thus systematically set aside unduly formalistic requirements or interpretation by the Mission of relevant legal norms that had the practical effect of undermining the effective protection of human rights within the sphere of activity of the mission. A further illustration of that approach, which aims at ensuring an interpretation of the mission’s duties that is consistent with the effective protection of human rights is also apparent from the which in which the Panel dealt with the Mission’s suggestion that requests for information from victims in unlawful killing cases could only be entertained if filed by counsel:

“Furthermore, the Panel has noted the suggestion by the EULEX Prosecutor that the complainants could not act unless represented by members of the Kosovo Bar (see above). The Panel need not decide whether Article 63(1) of the CPC was indeed applicable to this matter or whether it was properly applied. However, it cannot but note that paragraph 2 of that provision would have provided a sufficient legal basis for the Prosecutor to regard the complainants’ representative as having been validly empowered to represent them. In the alternative, the EULEX Prosecutor could have treated the request as having been made by the complainants themselves pursuant to

¹⁰⁴ *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, paras. 44-46, and its reference to *X and 115 other complainants*, 2011-20, 22 April 2015, para. 66. See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, paras. 83 *et seq*, in particular para. 85:

“85. Among the considerations relevant to the existence of “exceptional circumstances” are the following: first, whether an effective investigation of the case has been conducted up to that point. A negative answer would militate in favour of EULEX Prosecutors exercising their “exceptional” competence. In the present case, the Panel has already found that that the cases were never subject to a full and effective investigation for any significant period of time by any one entity. Secondly, it is relevant whether the case concern important rights and violations of extreme gravity. Such considerations would again weigh in favour of the “exceptional” involvement of EULEX Prosecutors. The cases under consideration here all pertain to a series of fundamental rights, including the right to life. Also, there was a very real possibility that those crimes and the accompanying violations of rights were based on ethnic or religious considerations thereby going further into the jurisdictional territory over which the Mission has competence. In a post-conflict environment where ethnic and religious relations might still be tense and fragile, such cases are obvious investigative priorities. This, again, does not appear from the record to have been considered relevant to the Mission’s determination of “exceptional circumstances”. Thirdly, if the EULEX Prosecutors decide not to exercise their “exceptional” competence, is there a genuine and real prospect of local authorities carrying out their responsibility in relation to that case. In the present case, there is no indication that this would be the case or that any steps were taken in order to establish facts relevant for the existence of such prospect (see also, *X and 115 other complainants*, § 66).”

Article 63(3) CPC. Furthermore, the text of that provision expressly provides that a victim “may” be represented so that the Code does not treat legal representation as a necessary condition (as is also evident from paragraph 3 of that provision). It further observes that the curt replies given to the complainants failed to take into consideration the serious nature of the situations concerned, the complainant’s distress and anguish. No explanation for this unduly formalist and insensitive approach has been provided to the Panel. Such an approach falls short of applicable standards and expectations in this matter [..]. No explanation for this unduly formalist and insensitive approach has been provided to the Panel.”¹⁰⁵

6. Temporal framework

The Mission started its operations on 9 December 2008. Accordingly, the Panel’s temporal jurisdiction commences at that point and covers its activities since that time.¹⁰⁶

However, the Panel may under certain circumstances have regard to facts which occurred prior to that date because of their causal connection with subsequent facts which form the sole basis of the complaint submitted to the Panel.¹⁰⁷ 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.¹⁰⁸ This was made clear in the *Sadik Thaqi* case:

¹⁰⁵ *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 78, and its references to *L.O. against EULEX*, 2014-32, 11 November 2015; *Desanka and Zoran Stanisić* against EULEX, 2012-22, 11 November 2015; HRAP opinion in cases nos 168/09, 169/09 and 312/09, 6 June 2013 paras. 89-90; HRAP opinion in case 02/09, 6 December 2012, para. 84

¹⁰⁶ See e.g. *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.

¹⁰⁷ *Thaqi against EULEX*, 2010-02, 14 September 2011, para. 74, at its reference to *Šilih v. Slovenia*, Application no. 71463/01, Judgment of 9 April 2009, para. 141.

¹⁰⁸ See again *Thaqi against EULEX*, 2010-02, 14 September 2011, para. 75:

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

“75. In this connection, the Court has observed that the procedural obligation to carry out an effective investigation under Article 2 constitutes a separate and autonomous duty. It can therefore be considered an independent obligation arising out of Article 2, capable of binding the authorities even when the death took place before the critical date [...]. The procedural obligation under Article 2 binds the public authorities throughout the period in which they can reasonably be expected to take measures with an aim to elucidate the circumstances of death and establish responsibility for it [...].”¹⁰⁹

In such a case, there must be a genuine connection between the original violation and the date marking the beginning of the Panel’s jurisdiction for the procedural obligations imposed upon the mission to investigate the matter:

““76. Furthermore, there must be a genuine connection between the death and the date marking the beginning of the Panel’s jurisdiction for the procedural obligations imposed by Article 2 to come into effect. In practice, this means that a significant proportion of the procedural steps required by this provision have been, or should have been, carried out after the critical date [...].

See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 80 (“80. Thirdly, the Panel notes that, even though no investigations in the cases at issue are pending at the moment and the competence of EULEX Prosecutors to investigate may have been limited under the amended Law on Jurisdiction, EULEX was involved in the investigations of this matter (see pars 13 and 27 above). Such conduct indisputably comes within the competence, *ratione temporis*, of the Panel. For the purpose of guaranteeing the effective protection of the complainant’s rights, this period cannot meaningfully be separated from the investigation that has been conducted up to this point (compare *Thaqi against EULEX*, no. 2010-02, 14 September 2011, § 85-89). It was therefore for the Mission to ensure that, whilst competent over these cases, they made diligent and timely use of their resources to investigate these.”).

¹⁰⁹ *Thaqi against EULEX*, 2010-02, 14 September 2011, para. 75, and its references to *Šilih v. Slovenia*, Application no. 71463/01, Judgment of 9 April 2009, para. 159; *Varnava and Others*, Application no. 16064/90 et al, Judgment of 18 September 2009, para. 147; *Velcea and Mazāre*, Application no. 64301/01, Judgment of 1 December 2009, para. 81; *Šilih v. Slovenia*, Application no. 71463/01, Judgment of 9 April 2009, para. 157. See also *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 80 (“80. Thirdly, the Panel notes that, even though no investigations in the cases at issue are pending at the moment and the competence of EULEX Prosecutors to investigate may have been limited under the amended Law on Jurisdiction, EULEX was involved in the investigations of this matter (see pars 13 and 27 above). Such conduct indisputably comes within the competence, *ratione temporis*, of the Panel. For the purpose of guaranteeing the effective protection of the complainant’s rights, this period cannot meaningfully be separated from the investigation that has been conducted up to this point (compare *Thaqi against EULEX*, no. 2010-02, 14 September 2011, § 85-89). It was therefore for the Mission to ensure that, whilst competent over these cases, they made diligent and timely use of their resources to investigate these.”).

77. Hence, in order for the Panel's temporal jurisdiction to arise in a case in which the deaths occurred before the critical date of 9 December 2008, it must be established that a significant proportion of the procedural steps under Article 2 of the Convention were or ought to have been carried out after the establishment of the EULEX and by EULEX."¹¹⁰

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

"The Panel will once again stress that it is not competent to examine the disappearance of the complainant's relative itself for which EULEX cannot be held responsible for obvious reasons. Nor will be Panel consider the initial failure to investigate which might be attributable to other authorities prior to the creation of the EULEX Mission. It will only consider those acts and omissions of the Mission itself that are said to have occurred from the point at which the Mission commenced to operate [...]."¹¹¹

This means that the Panel will be competent only in relation to those acts or omissions of the mission that occurred during the relevant timeframe. Thus, where an act of enforced disappearance has occurred before the inception of the mission, the mission could not be held responsible for the disappearance itself but only for subsequent actions or omissions that are attributable to the mission thereafter:

"There is no suggestion that the underlying acts of disappearance can be attributed to the Mission, the Panel is not competent to consider who may be held responsible for these acts. Nor will be Panel consider the initial failure of

¹¹⁰ See *Thaqi against EULEX*, 2010-02, 14 September 2011, paras. 76-77, and its references to *Velcea and Mazăre*, Application no. 64301/01, Judgment of 1 December 2009, paras. 83-85; *Tuna v. Turkey*, Application no. 22339/03, Judgment of 19 January 2010, paras. 58-60; *Çakir v. Cyprus (dec.)*, Application no. 7864, 29 April 2010. 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.

¹¹¹ See e.g., *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 38, and its reference to *Sadiku-Syla against EULEX*, 2014-34, 29 September 2015, para. 50.

taking investigative steps concerning deaths of the applicants relatives occurred prior to the creation of EULEX Kosovo and would be attributable to others (in particular to UNMIK). Because of the temporal and substantive limits on its mandate, the Panel can and will only consider those acts and omissions attributable to the Mission since it commenced its operations [...].”¹¹²

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

“50. Secondly, the Panel notes that the complainant never desisted from pursuing her claim. For that purpose, she solicited every and all authorities (domestic and international, including UNMIK, the British Government, various branches of EULEX), which she thought could help her obtain information about this matter. The fact that a succession of authorities followed each other in investigating this matter, not always with great clarity as regard their respective responsibilities, cannot fairly be laid at her door.”¹¹³

7. Who may be held accountable?

The Mission can only be held responsible for its own actions – i.e., those of its organs and/or its officials:

“78. First, the complaints pertain not to the actual killings of the complainants’ relatives but to what they consider to be an on-going failure to fully and effectively investigate their cases. In that sense, the complaints pertain to alleged violations of the procedural, as opposed to substantive, limbs of

¹¹² *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, para. 55, and its reference to *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 78; *Berisha against EULEX*, 2015-08, 1 March 2016, para. 14

¹¹³ *L.O. against EULEX*, 2014-32, 11 November 2015, para. 50.

Articles 2 and 3 (in addition to violations of Articles 8 and 13 of the Convention).

[...]

82. The HoM challenges the admissibility of cases nos 2014-12, 2014-14, 2014-15, 2014-16 and 2014-17 based on the view that they were never within the competence of EULEX Prosecutors so that no act or failure that contributed to the violation of the complainant's rights could be imputed to the Mission. The Panel does not agree with this analysis.

83. As a preliminary matter, the Panel notes that, the present complaints pertain not to the acts or inaction of KFOR or UNMIK, but to those said to be attributable to the Mission. The Panel's competence is limited to those alleged acts and omissions that are attributable to the Mission in the exercise of its executive mandate.

[...]

91. Pursuant to Rule 25, paragraph 3, of the Panel's Rules of Procedure, a complainant is required to file a complaint within six months from the act, decision or conduct which is said to amount to or involve a violation of his/her rights [...]

92. As noted above, the HoM submitted that the complainants in cases 2014-11 and 2014-13 had failed to comply with this procedural requirement.

93. The HoM's submissions on that point appear to be based on a misunderstanding as to what the complaints pertain to. Whilst the complainants' relatives were probably killed in 1999, the alleged violations of rights relevant to the present complaints do not pertain to those events but to an alleged subsequent – and on-going – failure on the part of the authorities to properly investigate the circumstances of those deaths.”¹¹⁴

Where there have been a succession of rights' violations by different actors, the mission can only be held responsible for its own acts and failures, not those of others:

“54. As a preliminary matter, the Panel notes that, contrary to the HoM's submissions (Response, p 11), the present complaint pertains, not to the acts/inaction of KFOR/UNMIK, but to those said to be attributable to the

¹¹⁴ See e.g. *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, paras. 78, 82-83, 91-93, and its reference to *Gashi against EULEX*, 2013-22, 7 April 2014, para.10; *Thaqi against EULEX*, 2010-02, 14 September 2011, para 51.

Mission. The Panel's competence is likewise limited to those alleged acts and omissions that are attributable to the Mission in the exercise of its executive mandate."¹¹⁵

The Panel must therefore verify in each case that the alleged acts and omissions that resulted in a rights' violation are attributable to the Mission in the exercise of its executive mandate. Where this cannot be established, the Panel is not competent to act. This was the case in *Berisha*, where the underlying conduct was carried out, not by EULEX, but by UNMIK, so that the Panel declared itself incompetent to rule on the matter:

"The Panel notes that the complaint originates from an incident that took place in Pristina in June 2000, under UNMIK administration and concerns the actions and/or inactions of KFOR and UNMIK Police. Taking into consideration Rule 25 of its Rules of Procedure, which limits the Panel's mandate to complaints relating to human rights violations committed by EULEX Kosovo, the Panel observes that it lacks jurisdiction to examine actions or omissions by KFOR and/or UNMIK [...]. Furthermore, according to Rule 25, paragraph 2 of its Rules of Procedure, the Panel will only examine complaints concerning alleged human rights violations that occurred after 9 December 2008, in Kosovo, the date on which EULEX became operational."¹¹⁶

An individual whose rights have been violated should not be prevented to seek and obtain an adequate relief based on ambiguities in the manner in which several entities have shared among themselves the responsibility of protecting his rights. In principle, he or she should be able to seek reparation from each of them in relation to their respective contribution to the violation of his or her rights.¹¹⁷

¹¹⁵ *Sadiku-Syla against EULEX*, 2014-34, 29 September 2015, para. 54.

¹¹⁶ See e.g. *Berisha against EULEX*, 2015-08, 1 March 2016, para. 14, and its reference to *Thaqi against EULEX*, 2010-02, 14 September 2011. See also *Thaqi against EULEX*, 2010-02, 14 September 2011, paras. 78 *et seq.*, in particular, para. 82 ("82.Nonetheless, in so far as it is understood that the present complaint concerns the actions or omissions of UNMIK, the Panel, having regard to the limits of the scope of its jurisdiction *ratione personae*, declares it inadmissible.").

¹¹⁷ See, e.g., *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 79:

"79.Secondly, the Panel notes that the complainants never desisted from pursuing their claim. For that purpose, they solicited various authorities (domestic and international, including UNMIK, the British Government, various branches of EULEX), which they thought could help them obtain relevant information. The fact that a succession of authorities followed each other in investigating their cases, not always

The Mission's responsibility may also be engaged by acts that are *ultra vires* of an official's competence or even illegal. Attributability of certain actions to the mission may be *indirect* – as in the case of an act of violence committed by an EULEX police officer, which triggered the mission's responsibility, not in relation to that act, but in relation to its subsequent failure to provide adequate relief for it.¹¹⁸ Attributability may also arise for the mission from a failure to act where it bore an obligation to do so to protect or guarantee the rights of a third party.¹¹⁹

The responsibility of the Mission does not cease if and when the individual primarily responsible for the violation of the complainant leaves the Mission. That is because the responsibility attaching to the Mission is not dependent on the continued presence of the official to whom the impugned conduct may be imputed. The Panel thus said this:

“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.”¹²⁰

The founding instruments of the Mission have excluded that an employee of the Mission could rely upon the Panel's procedure to seek relief for a violation of his or

with great clarity as regards their respective responsibilities under the successive complex legal situations of the international authorities and the emerging authorities in Kosovo cannot in fairness be laid at the door of the complainants.”

¹¹⁸ See, generally, *Zahiti against EULEX*, 2012-14, 4 February 2014, pars 49 et seq, in particular par 64.

¹¹⁹ See, generally, HRRP, *Case Law Note on the Human Rights Law Regarding (Enforced) Disappearances*; and also HRRP, *Case Law Note on the Duty to Investigate Allegations of Violations of Rights*.

¹²⁰ *Zahiti against EULEX*, 2012-14, 4 February 2014, para. 79.

her rights.¹²¹ Whilst the Panel did not have to deal with this scenario, this general prohibition would also apply in principle to *former* employees if a complaint pertains to their conduct during their employment in the mission.

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¹²¹ See, e.g., *A EULEX employee against EULEX*, 2010-13, 14 September 2010, paras. 2 and 5:

“2.The complainant, a member of EULEX Kosovo staff, has made an official complaint with regard to the allegedly irrational and abusive behaviour of his supervisor.
[...]

5.According to Rule 25, paragraph 1 of the Rules of Procedure the Panel can only examine complaints made by persons other than EULEX Kosovo personnel. This disqualifies the complainant’s case from examination.

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