



**HUMAN RIGHTS REVIEW PANEL'S *WHITE PAPER* –  
HUMAN RIGHTS AND LEGACY ISSUES**

## **I. INTRODUCTION – *RAISON D’ETRE* OF THE “WHITE PAPER”**

The EULEX Kosovo Mission (hereinafter, “the Mission”) will soon come to an end. The upcoming closure of the Mission or re-structuring of its mandate raises a number of issues that might impact the fundamental rights of individuals connected to its activities.

As part of the process of planning and preparing for the transition of the Mission, it is important that the EU should carefully consider these issues so as to reduce the risk of human rights violations resulting from or accompanying its closure/re-organisation. It is equally important that EU member states, the CPCC and the Mission should treat those issues and challenges as strategic and operational priorities and give them consideration without delay.

With a view to helping the relevant authorities in identifying these issues and addressing them, the Human Rights Review Panel (hereinafter, “the HRRP” or “the Panel”) has prepared the present “White paper”. This document is intended to achieve the following:

- i. To provide a list of issues of concern that might present a challenge to the Mission’s obligation to act at all time in compliance with relevant human rights standards in the context of its transition strategy. And, in that context, to offer suggestions and recommendations in relation to each of these for the purposes of future performance of the Mission’s restructured or reduced mandate.
- ii. To draw attention to certain lessons learnt from the Mission’s and the Panel’s experience with issues of human rights accountability. This, the Panel considers, would be relevant to improving upon the performance of similar EU missions in the future and hopefully assist the EU in drawing up a new and improved architecture for the EULEX Mission post-June 2018.

The Panel remains available to discuss the present document and to offer whatever assistance might be considered useful and relevant to ensuring the effective protection of human rights in the framework of the Mission’s mandate and transition strategy.

## **II. RELEVANT HUMAN RIGHTS ISSUES OF CONCERN IN THE CONTEXT OF THE TERMINATION OF THE MISSION'S MANDATE WITH REGARD TO THE EXECUTIVE FUNCTIONS AND RELATED LEGACY ISSUES**

### ***I. Relevant legal framework***

In 2008, UNMIK's responsibilities in the areas of police, justice and custom in Kosovo were transferred to European Union Rule of Law Mission in Kosovo (hereinafter, "EULEX" or "the Mission"). Later on, on 29 October 2009, the Sending States adopted an additional document providing for creation of the Human Rights Review Panel (hereinafter referred to as the Accountability Concept). The Accountability Concept, in combination with the Council Joint Action<sup>1</sup>, made it clear that EULEX should in the performance of its functions 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 and, in turn, depend on what right or rights were at stake and on the seriousness of the threats to those rights [...]."<sup>2</sup>

The Panel echoed this demand and the responsibility that was thus placed onto the Mission in regards to the effective protection of human rights:

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<sup>1</sup> 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 Council Joint Action 2009/445/CFSP of 9 June 2009, NOORA'S NOTE: there are 4 other amendments – as we are talking here about the establishment of the panel, I would leave the amendments out. Alternatively, I would add them all here.).

<sup>2</sup> See, e.g., 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.

“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 [...]”<sup>3</sup>

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 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.<sup>4</sup>

## ***II. The end of the executive mandate and related human rights issues***

It is not entirely clear at this point in time<sup>5</sup> when the Mission will come to an end. Nor is it apparent whether a residual mechanism will be put in place to ensure the effective transfer of competence to local authorities and, if so, what sort of mechanism this would be.

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<sup>3</sup> See, generally, *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, para. 31.

<sup>4</sup> The other two accountability mechanisms of EULEX are: 1) The EULEX Internal Disciplinary Mechanism, and 2) the EULEX Kosovo Third Party Liability Insurance Scheme.

<sup>5</sup> April 2018.

As part of the planning process that is involved in the transition of the Mission and the transfer of responsibilities to others, it is essential that the Mission should prepare and to plan for relevant challenges posed by this process, in particular as regards its potential impact on the effective protection of human rights.

It is the view of the Panel that such an exercise should commence as soon as possible and that it should seek to ensure an effective transition that treats the protection of human rights as one of its priorities.

The principal human rights challenges that have been identified by the Panel as being associated with the process of closing down of the Mission are as follows:

- i. Staffing
- ii. Transition and necessary legal framework
- iii. Transfer of cases and casefiles
- iv. Ongoing criminal investigations
- v. Witnesses and collaborators of justice
- vi. Records of the Mission
- vii. Enforced disappearances
- viii. Future role and mandate of the Mission
- ix. Rights and protection of minorities
- x. Legacy issues
- xi. The justice area
- xii. Human rights education and promotion
- xiii. HRRP

The above list is not intended to be exhaustive of the human rights challenges that might result from the transition and eventual closure of the Mission. The Panel therefore invites the EU and other competent authorities to give consideration to any other aspects of the process of transition of the Mission that might have a bearing on the effective protection of human rights and to remain alert to any new challenge that might become apparent as part of that process. The Panel remains committed to providing advice and expertise where considered relevant to the effective protection of human rights and compatible with its mandate.

### ***III. Relevant human rights challenges***

## **Staffing issues**

The effectiveness of the Mission depends on the continued presence and commitment of qualified staff. For the Mission to succeed and fulfill its mandate, the number and qualification of staff should be commensurate to the nature and breadth of the Mission's mandate. Inadequate staffing (in terms of numbers or competence) is likely to have a negative effect on the Mission's efforts. It is also likely to have a negative effect on the Mission's responsibility to ensure that its operations are conducted in compliance with relevant human rights standards.

It is therefore essential that the Mission should continue to be provided with a sufficient number of staff that is a) commensurate with the nature and scope of its mandate and b) which reflects the requisite level of knowledge and expertise to ensure continued compliance by the Mission with its human rights obligations. The frequent turn-over of staff should therefore be prevented as the experience has shown that it deprives the Mission of qualified staff, institutional memory and continuity. So should the need for relevant legal (investigative, prosecutorial, adjudicative) expertise, in particular in the field of human rights for the remainder of the life of the Mission.

Also relevant here are pending disciplinary proceedings against staff (current or former). It is essential both to the legacy of the Mission and to the ability of potential victims to obtain a remedy for harm done to them that such procedures should be duly and effectively completed in timely fashion. Consideration should also be given to a way to maintain records of disciplinary proceedings against staff so as to ensure that this information is available to others and can be consulted where relevant.<sup>6</sup>

From the point of view of individual staff, the Panel recommends that procedures be put in place to ensure that records of their individual work product be duly finalized and diligently organised in such a way that they may be retrieved and consulted where necessary. The Panel recommends that the Head of Mission should instruct all current staff to see to it that their records are properly safeguarded and organized.

Finally, a degree of "job security" would go a long way towards keeping staff for longer periods of time and reducing the path of turn-over. It is therefore recommended

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<sup>6</sup> See, e.g., HRRP, *Zahiti against EULEX*, Case No. 2012-14, Decision and Findings, 4 February 2014 and *Zahiti against EULEX*, 2012-14, 7 June 2013.

that contractual practice should address the need for greater job security for staff of the future, re-structured, Mission by offering staff longer-term contracts and avoiding last-minute renewals.

### **Transition and necessary legal framework**

It is essential for the EU and member states to ensure that the Mission is able to operate, at all times, within the relevant and necessary legal framework.

The executive functions of the Mission derive from the latest exchange of letters which contain a clear end-date of 14 June 2018. Considering the current political state of affairs, it is unclear whether new letters or agreement could be signed without their being a gap-period before this is achieved.

Such a gap could have grave implications, in particular in regard to the effective protection of human rights by the Mission. In particular, it would impact the application of the Law on Jurisdiction (and the Mission's "extraordinary" competence arising from it) and the derived authority of the Mission (including, for instance, in relation to victims).

This, in turn, might undermine the ability of and in some cases prevent the Mission from meeting its human rights obligations.

It is therefore essential that the EU (and member states) should take active steps to prevent such a legislative gap (however short it might be). For that purpose, the Panel would recommend that consideration be given to the following steps:

- i. Discussions and negotiations between the EU and the Kosovo Government should start without delay in order to achieve that goal.
- ii. The EU should set a clear deadline to achieving this by no later than 15 June 2018. Member states and the EU should ensure that its wish to have the necessary legal framework in place at that date is backed by a strong negotiation position in order to ensure continuity and effective protection of associated rights.
- iii. Explore the possibility of agreeing upon a temporary, bridging, regime working as a temporary patch to avoid a legal hiatus. The possibility for the Government to do so by executive order or exchange of letter pending parliamentary approval should be explored.

A prompt resolution of the matter with local authorities will also require the EU and the Mission to have reached a clear view of what the future of the Mission should look like. It is not readily apparent to the Panel that this has been achieved yet (see below). The Panel urges the Mission and the EU to draw up the clear outline of the future mission and invites consideration of a strong human rights focus for that new mission.

### **Transfer of cases and casefiles**

EULEX police and prosecutors (as well as relevant forensic services) have been involved in the investigation and/or prosecution of a large number of criminal cases. It is important that these records should be carefully maintained and organized. The inadequate organizing and transfer of such files could have human rights implications, as illustrated by the Panel's caselaw.<sup>7</sup>

Furthermore, accessibility to the records of those cases after the end of the Mission and during any transitional period referred to above, as well as issues pertaining to the protection of confidential information contained therein, should be carefully considered by the Mission so as to ensure that all relevant human rights (including those of victims, plaintiffs, suspects or convicts) are duly guaranteed when adopting policies and practices pertaining to the use of and access to those casefiles. In particular, consideration should be given in this context to the following fundamental rights:

- i. The right to truth;
- ii. The right to access to justice and to a remedy;
- iii. The procedural rights of victims to an investigation of certain categories of violations (in particular, of the right to life and right not to be subject to torture or inhuman or degrading treatment);
- iv. The right of victims to be kept adequately informed of and involved in an investigation concerning the alleged violations.

The Panel understands that most cases have now already been transferred to the competent authorities. The organized transfer of any remaining cases as well as the

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<sup>7</sup> See, e.g., HRRP, *Becić against EULEX*, 2013-03, 12 November 2014, §§ 58–60; *Sadiku-Syla against Eulex*, 2014-34.

question of their accessibility (including, conditions; procedure; competent authorities to grant access) should be addressed without delay by the Mission. Policies adopted should be compatible with relevant human rights standards, as outlined above.

As part of the process of reviewing its cases and records, it is recommended that

- a) the Mission should identify priority cases that local authorities would be expected to address with some urgency. Those should include cases involving allegations of serious rights violations. And,
- b) the Mission should consider the possibility of monitoring the progress in the investigation and prosecution of such cases (see below).

### **Ongoing criminal investigations**

EULEX remains involved in a number of criminal investigations. Criminal investigations constitute a core element of the rule of law. It is essential that the EU considers them as such and gives careful consideration to the need to perpetuate the Mission's involvement in those, in particular in relation to ongoing investigations which must be continued and finalized with the requisite level of effectiveness and expeditiousness.

As outlined above, the absence of the necessary legal framework post-14 June 2018 could greatly complicate the work of EULEX agents and could open the door to challenges on the legality of acts conducted without proper legal framework. Therefore, providing the necessary legal framework after that date and without gap-period is also eminently relevant in this context to guaranteeing the effective protection of rights.

The Panel also notes that the Mission remains competent to initiate or continue investigations/prosecutions of cases in "extraordinary circumstances"<sup>8</sup> under its residual competencies after the amendment of the Law on Jurisdiction in May 2014.<sup>9</sup>This is an important element of the Mission's ability to act residually where local authorities fail or are unwilling to do so. Consideration should be given to maintaining this possibility. In that regard, the Panel invites the Mission to consider conducting a careful and thorough evaluation of all pending criminal cases with a view to identifying among them any such case as might warrant the exercise by the Mission of its

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<sup>8</sup> On the concept of "extraordinary circumstances", see for instance, *Rejhane Sadiku-Syla against EULEX*, 2014-34, 29 September 2015, par 62. See also, *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, 30 September 2015, par 90.

<sup>9</sup> Article ... of the Law on Jurisdiction.

“extraordinary” competence under the above-mentioned regime. Guidance has been given in that regard by the Panel in its jurisprudence regarding the interpretation of that notion.<sup>10</sup> Particular attention should be paid in that process to the (apparent or verified) unwillingness or inability of local authorities to investigate and/or prosecute particular cases (or categories of cases).

As part of its investigative activities, the Mission is obliged to keep victims sufficiently involved and informed.<sup>11</sup> It is essential that the Mission should continue fulfilling that obligation. In particular, when closing investigations, the Mission should carefully consider how to inform them of that fact. The Mission should also consider whether to inform them when cases are being transferred to the responsibility of local authorities so that they may follow up with and obtain information from those authorities.

### **Protection of witnesses and other collaborators of justice**

The issue of the transfer of cases and ongoing (EULEX) criminal investigations also raises a most sensitive issue regarding the protection of (potential) witnesses and other collaborators of (informants; judicial officials; etc). Should all files be disclosed, third party access to this information could occur and could in turn pose security threats to individual concerned.

This raises the question of the responsibility of the Mission regarding the protection of individuals who have provided it with sensitive information. Such individuals might be in danger if their contribution and identities are made public or come in the “wrong hands”. Undue disclosure of information might also undermine the possibility of effective investigations and prosecutions of serious criminal matters.

The question therefore arises of the best way for the Mission to a) contribute to the possibility of investigations/prosecutions of cases involving serious rights violations by disclosing those files to the authorities whilst b) at the same time ensuring the protection of the collaborators of justice. If these files are not disclosed or not fully, it is

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<sup>10</sup> See e.g., *Rejhane Sadiku-Syla against EULEX, 2014-34*, 29 September 2015; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17*, 30 September 2015; *Rejhane Sadiku-Syla against EULEX, 2014-34*, 19 October 2016.

<sup>11</sup> See, section 3 “Involvement and participation of victims”, pp 28 et seq: <http://www.hrrp.eu/docs/Case%20law%20note%20on%20DUTY%20TO%20INVESTIGATE.pdf>.

possible that this might prevent a case being brought to justice. The custodianship of these files might also be problematic.

In order to guarantee the rights of collaborators of justice and those of victims, whilst at the same time seeking to contribute to accountability, the Panel would recommend that consideration be given to the following:

- i. The safety and security of witnesses and collaborators of justice should be treated as an unqualified obligation on the part of the Mission. The Mission should not therefore disclose information until and unless it can satisfy itself that doing so can be done in a manner consistent with the effective protection of their rights. Until it has satisfied itself that this is the case, it should remain the exclusive custodian of these files. Arguably, by seeking, requesting and obtaining such information from collaborators of justice, it has created a legitimate expectation on their part that the Mission/EU would remain responsible for their safety and security.
- ii. The Mission should conduct a thorough review of its records with a view to identifying any information the disclosure of which to the authorities (or any third parties to which information could be communicated) could raise issue of concern regarding the security and safety of collaborators of justice.
- iii. In relation to such information, the Mission should seek to enquire with the persons concerned whether they object to the disclosure of the information to local authorities. In parallel, the competent organs of the Mission should conduct a risk assessment evaluation in relation to any such person.
- iv. Where the person objects and his/her stated concern is assessed to be not unreasonable and the potential danger associated with disclosure of that information is assessed as real, the Mission should refrain from disclosing the information until and unless a credible mechanism of protection has been put in place. This material could be characterized as *work product* for that purpose or be granted EU immunities so as to enable the EU to maintain custody and control over particularly sensitive information.
- v. However, where that information might be of use to future investigations and prosecutions, the Mission and the EU should seek ways to ensure that

it can be so used where this can be done in a way that does not infringe on the rights of collaborators of justice. Consideration should be given here to various possibilities:

- a. Providing that information in redacted form only;
- b. Providing that information “for lead purposes” only;
- c. Requesting the assignment of a “special counsel” to be responsible for the investigation and, as the case may be, prosecution of the part of the case pertaining to the protected person (with special counsel to be designated by the EU or by the Mission);
- d. Providing information under the condition that the authorities accept any and all conditions that the EU might set to the disclosure of that information (in particular as regards relevant protective measures or limited right of further disclosure) or to its use (e.g., use of video-link facilities rather than in-person testimony);
- e. Consideration should also be given to the legal possibility of information being provided under the strictest condition of anonymity.

Consideration should be given to the possibility of the EU providing a limited “residual mechanism” that could exercise necessary and limited judicial functions arising out of the activities of the Mission. This has been done, for instance, in relation to the UN war crimes tribunals (for the former Yugoslavia, Rwanda and Sierra Leone).

### **Records of the Mission**

The Mission has collected and produced large records of its activities. Some of these might be relevant to issues arising after the final closure of the Mission. They might also involve questions of human rights. This might be the case, for instance, in relation to the ongoing investigation of disappearance cases or in regards to other ongoing criminal investigations.

It is essential that the Mission should ensure that its records are properly kept, organized, maintained and transferred to the competent authorities. A full and complete record of the content of these and of the handing process should be carefully drawn up.

For that purpose, the Mission also needs to adopt, well in advance, certain rules/policies in particular as regards a) custodianship, b) accessibility, c) procedure for access and competent authority to grant access, d) issues of immunities and e) confidentiality. For the reasons outlined above, the effective protection of human rights might require the Mission/EU to maintain custody of certain information until it can be provided under conditions guaranteeing the safety and security of collaborators of justice.

These policies should be drawn up in such a way as to promote and not restrict the effective protection of those whose rights might be at stake. The Panel therefore invites the Mission to ensure that, when drawing up such policy documents, diligent consideration be given to the need to ensure the effective protection of those whose rights might otherwise be affected by the closure of the Mission.

### **Enforced disappearance**

Enforced disappearances during and as an aftermath of the 1999 conflict remain one of the greatest challenges facing the Mission. This issue has not been adequately dealt with thus far by any of the relevant stake-holders (the UN; EULEX; Kosovo authorities). It remains very much an issue to be finally and properly addressed.

With a view to advancing the process of resolving this issue, the Panel has produced a “White Paper” devoted to that problem.<sup>12</sup> The Panel herewith reiterates the need for the Mission to treat this issue as an absolute operational and diplomatic priority. The Mission would risk great criticism and would see its legacy suffer if it did not, at the very least, put in motion a credible, meaningful and effective process of investigation and resolution of this matter.

The Panel also strongly recommends that, in identifying the remaining challenges faced by local authorities and Government (see below), the Head of Mission should fully address this pending issue and make it one of the authorities’ top human rights priorities for the years to come.

The Panel also recommends this issue should form an integral and central part of any future mission (see next).

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<sup>12</sup> See HRRP’s *White Paper* on Enforced Disappearance; <http://hrrp.eu/docs/Case%20law%20Note%20on%20Disappearance.pdf>.

### **Future tasking/nature of the mission's role**

Should the Mission continue to exist, be it with a restricted mandate, after the current (June 2018) deadline, the Panel strongly recommends that it should continue to focus on the effective protection of human rights.

First, it is suggested that the Mission should not try to do more than what can reasonably be achieved in light of the resources that are put at its disposal. The Panel has already stressed this point in its case-law.<sup>13</sup> This would prevent undue expectations and disappointment with its performance. It is therefore recommended that, as part of any discussions on the future of the Mission, a diligent assessment of its needs be conducted of the resource implications of its potential tasks (in particular as regards human rights aspects of its mandate). If necessary, the mandate should then be narrowed down and re-focused based on resources made available.

Secondly, a clear and precise mandate (clearer and more specific than the initial, wide and rather all-embracing, mandate of the Mission) would also enable the Mission to focus on core functions and invest its resources effectively in relation to those.

The protection and promotion of human rights is one of the issues that should be core to any new mandate. The Mission has started the process of rule of law building in Kosovo. That process must continue, expand and accelerate. It should also have a greater focus on improving upon the human rights situation in Kosovo.

It is therefore suggested that, should the Mission continue to function in one form or the other (or be replaced by a new mission), a clear focus on human rights-sensitive issues should feature in the Mission's mandate (in particular, potent monitoring and reporting on official activities; training and support of human rights actors; standard setting for the authorities in the performance of their responsibilities; combating corruption as a human rights violation). It is also recommended that the new or re-structured mission be given a clearer and more defined mandate with the promotion of human rights in Kosovo as one of its core features.

A clear mandate to address the issue of enforced disappearance should also form an integral part of that future mission (see above).

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<sup>13</sup> See, generally, <http://www.hrrp.eu/docs/05072017%20HR%20ACCOUNTABILITY%20FOR%20INTE%20ORGANISATION.pdf>, in particular, sub-section 3.

The Panel also strongly recommends against any attempt to give the Mission a continued executive role unless adequate resources are provided to back such a mandate.

The Panel also recommends that the future Mission be provided with adequate human rights expertise – in particular, at managerial and operational level. Staff should be senior enough and possess *relevant* expertise. The Panel would also recommend in that regard that the selection of staff should focus on their relevant professional expertise, rather than on any prior “mission” experience. The possibility of secondment from national authorities of staff with relevant expertise should be duly considered as an alternative to short-term contracts for staff.

### **Rights and protection of minorities**

The protection of minorities remains a key social and political issue in Kosovo. This is also one of the most important human rights challenge for the Mission and Kosovo at large.

The Panel therefore recommends that, in drafting the mandate of the new mission, this issue should constitute a core aspect of that mandate. Equal rights and treatment in the education system, political representation, employment, access to public offices and services should all be pursued as operational priorities by the new Mission (and, through the Mission, by local authorities).

### **Legacy**

The work of the Mission was, in many respects, an important experiment for the EU. Success has been mixed and errors have been made. This is true, in particular, in regards to the Mission’s human rights obligations.

Overall, it is the Panel’s assessment that the human rights performance of the Mission has improved over time, in particular over the last year and a half of its activities since the appointment of the new Head of Mission, Ms Papadopoulou. On the whole, the Panel has been encouraged by the Mission’s effective procedural cooperation when dealing with the cases, by general compliance with the Panel’s decisions and recommendations and by the fact that there have been no examples of the Mission ignoring or trying to undermine the Panel’s decisions. The Panel also appreciated

various efforts undertaken within the Mission and by its Head to address a number of important human rights issues. However, much work remains to be done.

As part of the transition process, the Panel would therefore recommend that the Mission should draw up a fair, balanced and candid assessment of its performance, with a particular focus on human rights issues (past, present and future). The Panel recommends particular focus on the following: a) identified human rights shortcomings of the Mission (past or present) and b) future or outstanding human rights challenges in Kosovo. It is indeed essential that the EU, States and other stakeholders should learn from this Mission so as to improve upon its performance in future mission and so as to seek to address pending issues. Consideration should be given to making such an assessment public (in whole or in part) to ensure the necessary degree of transparency and accountability.

As part of that process, the Panel would also recommend that consultations should take place between the Mission and other relevant human rights stakeholders in Kosovo (including, NGOs; civil society; the ombudsman; etc) in order to help the Mission identify outstanding human rights challenges that should inform the EU's position regarding the future of the Mission and its relationship with Kosovo. Such a meeting of relevant stakeholders could also help the Mission draw up future plans for it and clarify its priorities.

The Panel would also invite the Head of Mission to consider requiring relevant entities within the Mission to draw up individual "legacy" documents of their own so as to ensure that the legacy of the entire Mission is fully and properly recorded. It is indeed essential to the effective protection of human rights that the EU and other stakeholders should learn from the experience of EULEX so as to build those lessons into future such missions.

The designation of an expert historian or consultancy could also be considered, who would be tasked to write an independent history of the Mission so as to secure a credible, complete and impartial record of the life of the Mission.

Finally, the Panel would recommend that, before the closure of the Mission, States and the EU be fully briefed by competent EULEX officials about –

- a) the principal lessons learnt (*positive and negative*) from the work of the Mission; and

- b) what, according to the Mission, remains to be achieved by local authorities in terms of “rule of law” and human rights improvement. Identification of particularly problematic areas and priorities (e.g., the investigation of inter-ethnic crimes and disappearance cases; investigation of corruption) would be most valuable.

### **The justice area**

This area is particularly sensitive as it is one of the pillars of the rule of law. It is also particularly important in the Kosovo context as an essential actor of the transition towards a fully functional democracy.

Whilst the judiciary was placed explicitly beyond the scope of the Panel’s mandate, a large number of complaints have pertained to the activities of the judiciary and its alleged shortcomings. Because it is not competent to deal with the activities of the judiciary, the Panel has declared these applications inadmissible. The number and repetitive nature of the complaints raises concerns with the Panel however.

It is essential that the judiciary be reinforced and supported in order to ensure that it serves its institutional functions and does so independently, impartially and effectively.

For that purpose, it is essential that the EU (with the assistance of the Mission) should put in place a mechanism “with teeth” in order to evaluate the performance of the judiciary and associated state organs.

The mere act of “monitoring” judicial proceedings (as has been experimented upon in other contexts) might have some limited dissuasive and informational value, but it is unlikely to suffice or to prove an effective way to empower and support the construction of an independent judicial system.

According to the Panel, in drawing up a strategy to evaluate and improve upon the performance of the local judiciary, particularly important are the following considerations:

- i. The evaluation of the work of the system should not commence with the judicial phase of the process. Instead, great attention should be paid to the earlier investigative and prosecutorial phases. In particular, it is eminently important that the investigative and prosecutorial authorities should ensure that all relevant cases are in fact fully and diligently

investigated. There is at present a widely felt accountability gap in relation to certain categories of cases and persons. Such a situation cannot be permitted to continue.

- ii. For that reason, the Panel recommends that, prior to providing its records and transferring records of cases to local authorities, the Mission should draw up a list of pending cases that have not yet been investigated or fully investigated. Among those, the Panel suggests that particularly sensitive cases (in particular, a) those involving serious violations of rights; b) those of an inter-ethnic sort; and c) those involving powerful political actors) be flagged as priority cases. These and the progress made by the local authorities in relation to them should be closely monitored. Delays and postponement (or termination) should be closely looked into and enquiries made.
- iii. It is recommended in that regard that the EU should insist that, if any form of assistance be given to the local authorities that this assistance would be conditioned by an agreement on the part of the local authorities to give the EU (or those designated by it) some insight into their investigative efforts made in the priority cases listed above. Whilst this should, of course, be done in compliance with relevant legal standards (in particular, those pertaining to confidentiality and independence of the judiciary), it should be made clear that the absolute priority and *raison d'être* of such a system is to ensure progress in these cases and the overall fairness of proceedings and equal treatment for all. Issues of confidentiality can readily be addressed through an MoU that would provide relevant and necessary safeguards.
- iv. Particularly important would be that the Kosovo Government agrees to providing necessary access to the relevant Investigative records of sensitive cases.
- v. Also relevant in this context are perceived shortcomings of the judiciary. Again, it is the Panel's view that mere "monitoring" or reporting of real or perceived shortcomings is unlikely to achieve much. If the EU undertakes to continue involving itself in the development of the local judiciary (*and it is recommended that it should*), it should do so in a manner that is

capable of achieving that result. Recommendations to that effect are made below.

- vi. Because it is important to both preserve and support the independence and impartiality of the judiciary, any effort undertaken by the EU in that regard should carefully respect these fundamental principles. At the same time, if asked by Kosovo authorities to assist with building a stronger and more efficient judiciary, the EU/Mission should have the tools to address perceived shortcomings in the judiciary, failing which its involvement could have the opposite effect and create an appearance of legitimacy where unwarranted. It is therefore suggested that:
  - a. The position of the Kosovo Judicial Council could be strengthened. A strong and autonomous body dealing with judicial appointments, promotions, sanctions and similar issues is of primary importance for strong judiciary. Such Council should have the power to take credible steps to sanction and remove judges and prosecutors. It should be carefully shielded from political pressure and influence. Existing efforts in that context should be pressed further and consideration given to re-enforcing such a structure. A similar, independent, structure should regulate prosecutors.
  - b. Such Council should have (*proprio motu* and upon complaint) investigative authority to which, again, the EU should seek to participate. Investigation into alleged misconduct or systemic problems arising within the judiciary could be commenced *proprio motu*. The authority competent to do so will be a critical factor. It should be manned by expert and independent individuals.
  - c. Third parties (including the EU) should be permitted to file “complaints” or reports with that authority and to follow up on its evaluation of those.
  - d. A requisite level of publicity and adversarial procedure should be guaranteed. All relevant due process safeguards should be guaranteed.
- vii. One of the well-known principles of the European Convention for the Protection of Human Rights and Fundamental Freedoms which forms a

part of the Kosovo legal order is that individual rights should be interpreted and applied in a manner which makes them “practical and effective, not theoretical and illusory”.<sup>14</sup> From the point of view of the Mission and the EU, this should mean that the EU and the Mission should not undertake to do more than they are capable of achieving and that they should only accept to perform functions that have a built-in capability to respond to perceived abuses or shortcomings. In other words, the EU and the Mission should guard against giving any sort of legitimacy where not warranted and to caution its assistance to the authorities having agreed to give it access and leverage necessary to ensure the integrity and legitimacy of its mandate.

- viii. Finally, the EU and the Mission should give consideration to the long-term view of things through support for legal education and training. Education in human rights (in particular at university level and as part of the training of judicial officials) should be promoted as part of this agenda (see next).

### **Human rights education and promotion**

The situation of human rights in Kosovo is far from ideal. Corruption is common. Investigative, prosecutorial and adjudicative authorities are said to be subject to pressure or influence. Unresolved criminal and property cases are manifold. Justice is slow and at times ineffective. Entire categories of cases are being ignored (either through fear or inability to proceed). The rights of minorities need continued and increased protection.

The Panel invites the EU and the Head of Mission to give consideration to ways of fostering within Kosovo a culture of respect for human rights. This is an essential element of other efforts being conducted by various actors to build a strong culture of respect for the rule of law in Kosovo.

The Panel would recommend, in particular, that consideration be given by the EU, the Head of Mission and other relevant stake-holders to –

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<sup>14</sup> See, among many authorities, European Court of Human Rights, *Stanford v. the UK*, para. 68.

- a) intensifying and expanding efforts to train investigative and prosecutorial officials on relevant human rights standards,
- b) facilitating and supporting translation into the Albanian and Serbian language of relevant human rights textbooks and other relevant material,
- c) seeking to advance educational and training opportunities (through grants or internships) of qualified Kosovans interested in the field of human rights, and
- d) putting in place and monitor the human rights performance of relevant state actors in all areas of activity funded (in whole or in part) by the EU.

## HRRP

The Accountability Concept Paper provides expressly that "(t)he role of the Panel is linked to the duration of the executive mandate of EULEX Kosovo. The Panel may act for a limited supplementary period of time after completion of the executive mandate of EULEX Kosovo, to the extent necessary for examining complaints still being processed or to be made within the six month time limit." Hence, the Panel finds it natural that it should continue to exist after June 2018 in order to ensure that the Mission continues to perform its functions in compliance with relevant human rights and that it serves as a symbol of the EU's commitment to human rights and accountability for all.

In light of the fact, however, that the nature of the mission might change in June 2018 (or thereafter), the Panel has already taken steps to record its activities and legacy. For that purpose, it has from its inception prepared and widely disseminated regular Annual Reports that describe in some detail its yearly activities. The Panel has also drafted a number of case-law notes that effectively represent its jurisprudential legacy and made them public on its website.<sup>15</sup> The present "White Paper", it is hoped, would also form part of its legacy.

In addition, in relation to its activities (past, present and future), the Panel recommends the following:

- a) The Mission should continue to follow-up on pending HRRP cases, including relevant recommendations from the Panel. In parallel, the Panel will continue to follow-up on its recommendations and compliance with its Decisions.

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<sup>15</sup> [http://www.hrrp.eu/Case-Law\\_Notes.php](http://www.hrrp.eu/Case-Law_Notes.php).

- b) The Panel recommends that the Mission should continue to monitor the development in those cases that were said to fall within the competence and responsibility of local authorities (e.g. HRRP, X and 115 others).
- c) The Panel recommends that the Mission should ensure that the public is duly informed of the end of the Mission and of the fact that the deadline to file complaints with the Panel should lapse no later than six months after the alleged violation of rights attributable to the Mission. This should help ensure that any and all potential complaints against the Mission are submitted within the relevant and legally applicable timeframe.
- d) The Head of Mission is also invited to consider whether there might be a need for a “residual mechanism” of sort to deal with matters arising from the work of the Panel after it has formally closed its doors. The Panel is available to discuss relevant issues and possible solutions with the Head of Mission.
- e) The Panel also invites the Head of Mission to consider adopting a procedure to protect the integrity and confidentiality of the records of the Panel, as well as a procedure by which access to those might be justified to guarantee the rights and interests of relevant claimants.

### **III. LESSONS LEARNT – HUMAN RIGHTS ACCOUNTABILITY AND RULE OF LAW MISSIONS: THE EXPERIENCE OF EULEX KOSOVO AND HRRP**

In addition to the above, the Panel wishes to draw the attention of the Head of Mission and of the EU to a number of lessons learnt by the Panel over the course of its existence. These, it is hoped, would enable the EU to best tailor future missions to ensure that they perform their functions in a manner consonant with relevant human rights standards and that they are made accountable for their actions through an effective mechanism of accountability.

These lessons may be placed in the following categories:

- i. **Mandate of the Mission:** As noted above, the mandate of the Mission was very ambitious in its scope and rather lacked specificity as regards its priorities. The Mission has suffered from both as it had to do perhaps too much with too little, without the necessary manpower, resources and support to achieve all of its goals. A more focused and more clearly specified mandate, in particular one with a strong focus on rule of law issues and

human rights, would have been desirable. Consideration should be given to providing future missions with better tailored mandate, commensurate with the circumstances and resources put at its disposal.

- ii. Architecture of the Mission and accountability of the Mission:** The Panel was created in 2009, a year after the mission was deployed, and started to function in June 2010. It is important for perception of the legitimacy of future missions of a similar character that a human rights accountability body is created contemporaneously with creation of the mission; this is relevant for the legitimacy of such a body, both internal and external, that the function of human rights review is not perceived as a kind of last-minute addition, of no real relevance for the mission's mandate and performance. It is equally important to the reputation and credibility of the mission that it be made subject to some form of credible (human rights) accountability.
- iii. Legal basis of the Panel:** At this stage of the Mission's life, the issue is moot for the purpose of the work of the Panel. However, for the future purposes of any new missions, the following should be noted: the agreement of the sending states on the basis of which the Panel was created (Accountability Concept Paper) has never been made public. The Panel repeatedly advocated for its publication; to no avail. This unnecessarily affects the perception of publicity and transparency in the functioning of the Mission and Panel. This also undermines the ability of complainants to rely upon that document to guide their submissions. In the future, any such document should be made public early on – if only to make it clear that it was the intention of the sending states to make a panel an independent body, not just a part of the Mission. This is also relevant for the assessment of independence of any future human rights review bodies in similar missions. The Panel wished to offset this effect by repeatedly referring to the Accountability Concept Paper in its decisions – so as to make at least its existence, if not the full content, public and to make the general public aware of the limitations to the Panel's jurisdiction originating in this document.
- iv. Independence of the Panel and effective cooperation of the Mission:** In order to guarantee the credibility of any human rights accountability mechanism, that mechanism must be independent of the overseen mission.

This has been generally respected in the case of EULEX/HRRP, both in the letter of the documents founding the Panel and in the Mission's practice. It is of note, however, that perception of independence would have been further increased had the Panel been given a budget that is independent of the Mission. This would have been particularly desirable a) to ensure continued and timely staffing (see below) and b) in order to conduct its own outreach efforts.

- v. **Scope of Panel's competence:** The mandate of EULEX pertains to the performance of certain "executive" functions in the field of justice, police and customs.<sup>16</sup> The scope of competence of the Panel mirrors the Mission's mandate with one qualification: the justice area, which was placed beyond the competence of the Panel.<sup>17</sup> This must have been justified based on concern for the independence of the judiciary. Whilst those concerns are indeed justified, the Panel notes that this substantive limitation of the Panel's mandate has had a number of consequences. First, the Panel has had to declare itself not competent in a large number of cases concerning complaints pertaining to the activities of the judiciary. Secondly, some of these complaints appeared, *prima facie*, to be meritorious from the point of view of human rights, so that a potential accountability issue might have arisen but for the Panel's lacking jurisdiction to examine the cases. Thirdly, many of these complaints pertained to similar issues so that a number of systemic or institutional issues were apparent that were, for the most part, left un-addressed. The Panel has been able to limit the negative consequences of these jurisdictional restriction by a) declaring itself competent to consider the actions of (EULEX) prosecutors (up to a certain stage of criminal

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<sup>16</sup> 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.

<sup>17</sup> *Avdyli Smajli against EULEX*, 2011-16, 23 November 2011, para. 14 ("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."). See also *Milazim Blakqori against EULEX*, 2011-06, 23 November 2011, para. 18

proceedings)<sup>18</sup> and b) declaring itself competent to evaluate allegations of rights violations in the context of judicial proceedings where the complaints were raised by defendants but not addressed by the judiciary.<sup>19</sup> Consideration should be given to ensuring effective human rights accountability in the context of judicial activities too, as they lay at the core of any rule of law mandate.

**vi. Scope of Panel's competence *ratione personae* and conduct of staff:**

- a. The Panel's jurisdiction was drawn up to exclude complains coming from EULEX staff members. This might have resulted in leaving an accountability gap in the system. Consideration should therefore be given to the current, existing, possibilities for staff to complain about (alleged) human rights violations and how effective internal mechanisms of the mission are to address those complaints.
- b. The Panel's competence, *ratione personae*, is directed towards the Mission *itself* as a legal entity. The Panel therefore does not have immediate competence to pass judgment on the acts of particular individuals. However, as part of its work, it has become apparent to the Panel that certain staff had abused their position and committed serious violations of human rights that could be directly traced back to their action. The Mission was therefore only found responsible as these individuals had acted as organs of the Mission. The Panel is most concerned that when such cases come to light that the impugned staff suffered little or no consequence for their action and that they are often permitted to leave the Mission with their service record untarnished. This creates the

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<sup>18</sup> *Desenka and Stanisic*, 2012-22, 11 November 2015, para. 54 (“[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.”) 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.

<sup>19</sup> See, e.g., *Milica Radunovic against EULEX*, 2014-02, 12 November 2015, para. 17 (where 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 [...]”). See also *Mazlam Ibrahim against EULEX*, 2014-05, 21 April 2015, para. 24; *Tomë Krasniqi against EULEX*, 2014-04, 27 May 2014, paras. 15-16/

possibility of their being employed again in situations where their actions should have given cause for concern. In a particular egregious case of individual misconduct by a Mission staff, the Panel observed: “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 EU-LEX 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/seconding 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.”<sup>20</sup> In other cases, the Panel had to evaluate the actions of a particular staff, whose conduct clearly reflect a lack of concern for the law and human rights standards.<sup>21</sup> Hence, the Panel recommends that some continuity, in terms of performance appraisal, should be ensured between the service of the agent in EULEX and his or her national service so as to avoid that examples of obvious mis-performance are left un-addressed either by EULEX and/or remain unknown by national administrations. Inter-agency coordination should be ensured within the EU to ensure that such actions are known to relevant bodies.

- c. In one particular case (see, above, *Zahiti*, cited above), the Panel has been confronted with the issue of the Mission’s immunities as an issue of concern regarding the ability of the complainant to seek and obtain access to justice for the harm done to her. Careful consideration should be given by the EU and the Mission in regard to the use and reliance upon EU immunities where serious rights violations are at stake. The Panel invites the EU and the Mission to draw up a clear policy on the matter that would

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<sup>20</sup> *Zahiti v. EULEX*, 2012-14, Decision and Findings, 4 February 2014.

<sup>21</sup> See, e.g., *F against EULEX*; *Zahiti against EULEX*.

not result in these immunities being used in a manner that undermines the effective protection of the fundamental rights of those affected by the actions of the Mission.

vii. **Authority of the Panel and non-binding nature of its decision:** The efficiency of the Panel as an effective human rights compliance body would have been better had the Panel's decisions and recommendations been binding on the Mission. Its standing and legitimacy as an accountability body would also thus have been reinforced. The Panel assesses its experience regarding the Mission's compliance with its decisions as generally adequate. There have been no over examples of refusal to comply, which stands as a significant difference from the experience of the HRAP vis-à-vis the United Nations.<sup>22</sup> Instead, the Mission has shown general willingness to respond positively and to follow most of the core recommendations of the Panel. Whilst the Panel has noted that some of its recommendations were not always enforced, this selectiveness has not been understood by the Panel as affecting the Mission's general commitment to respecting relevant human rights standards. This perception has been reinforced by the fact that the Mission has clearly taken on board many of the lessons learnt from the Panel's caselaw, in particular as regards its operational functioning. Despite the above, the Panel would recommend that consideration be given to endowing future human rights accountability bodies and the Panel itself with authority to give binding decisions.

viii. **Limited nature of the Panels remedial powers:** As noted above, the Panel's remedial authority is limited to a) establishing a violation of human rights and b) making remedial recommendations to the Mission. In addition to the issue of binding character of its decision (discussed above), two other issues have come to the fore in relation to the Panel's remedial powers:

a. **Ability to order/recommend financial compensation:** In some cases, financial compensation would have been the most obvious means of redress. However, the Panel is legally prohibited from making

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<sup>22</sup> See HRAP, ...

recommendations of a pecuniary sort.<sup>23</sup> The Panel has held thus in one case: “In this context, the Panel reiterates the Council of Europe’s Venice Commissions’ observation that, “*in principle, restitutio in integrum is the most suitable manner of redress of human rights violations. The possibility for the HRRP to recommend remedial action removing the effects, and the causes, of the violation is therefore crucial. However, in some cases the most effective remedy is financial compensation, which instead the HRRP cannot recommend. In such cases it will be possible to claim monetary compensation, at least for the material damage, under the Third Party Liability Insurance scheme of EULEX. The Venice Commission stresses, however, that the procedure under the insurance scheme should not be unduly lengthy or complex. It notes in this respect that the Head of Mission of EULEX has committed himself to reviewing the insurance procedures to ensure that they remain effective*” (see European Commission for Democracy through Law, Opinion no. 545/2009, 21 December 2010, at par. 67).”<sup>24</sup> The Panel invites the EU to give consideration to the possibility of setting up a compensation fund and allowing the Panel and future human rights accountability bodies to grant financial compensations where justified (possibly within set limits).

- b. Recognition of violation by the Mission:** The Panel has recommended on a number of occasions where violations were found to have occurred that the Mission should formally acknowledge having violated the complainant’s rights. This is a well-known and well-practiced means of relief under human rights law.<sup>25</sup> It is all the more important as a remedy

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<sup>23</sup> See, generally, *Zahiti against EULEX*, 2012-14, 4 February 2014, par 70: “70. If, however, the HoM should consider granting compensation to the complainant, the Panel notes that this would resolve the matter. The Panel itself is not empowered, however, to recommend pecuniary compensation when a finding of a human rights breach is made. It can only make recommendations for a remedial action to be taken by the Mission (Rule 34 of the Panel’s Rules of Procedure).”.

<sup>24</sup> *Zahiti against EULEX*, 2012-14, 4 February 2014, paras. 70-72

<sup>25</sup> *H and G against EULEX*, 2012-19 and 2012-20, 27 May 2014, par 12. The Panel also pointed in that context to the practice of other human rights bodies including the Human Rights Advisory Panel (HRAP) of UNMIK (see for instance, *MITIĆ against UNMIK*, case no. 064/09 of 14 March 2014 at p. 43). See also Rule 62 A of the Rules of the ECtHR.

in cases where financial compensation cannot be granted.<sup>26</sup> The Mission has quite systematically refused to make such an acknowledgment. This appears to be the result of a concern that such acknowledgment could serve as basis for civil suits. The Panel believes that such concerns are exaggerated and should not prevent the Mission from remedying a violation by acknowledging it. The Panel invites further consideration being given to that issue with a view to ensuring that such acknowledgments can be issued where justified.

**ix. Implementation of Panel's recommendations and follow-up**

**competence:** Rule 45 *bis* of the Panel's Rules of Procedure provides the legal basis for follow-up of the compliance by the Mission with the Panel's decision and recommendations, by saying: "1.Where the Panel has made recommendations for remedial action, the Panel shall follow up on the implementation of such recommendations by the HOM. 2.The Panel's decision on the implementation of the recommendations by the HOM will be promptly published on [www.hrrp.eu](http://www.hrrp.eu) in English, Albanian and Serbian." The importance of the follow-up competence cannot be overestimated as it provides a public instrument to monitor the Mission's compliance with the Panel's decisions over sometimes lengthy periods of time. It is important that a number of successive follow-up decisions can be given in the same case, for the public to see how matters unfolded and how the Mission complied – or not – with the recommendations issued by the Panel. It is also essential that the Mission be willing to continue to engage with the Panel in regards to its recommendation and, where justified, to continue monitoring developing situations of relevance (e.g., an ongoing criminal investigation with significant human rights implications).

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<sup>26</sup> *H and G against EULEX*, 2012-19 and 2012-20, 27 May 2014, par 13 ("13.Given the fact that the Panel cannot recommend to the HoM that monetary compensation be paid to the victim, it invites the HoM to make use of the remedies available to him. In some cases, the formal acknowledgement of a violation of rights is capable of providing some redress to the victim of a violation. Considering the limitations placed upon the ability of the Panel to recommend financial compensation as stipulated by the in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel, the formal acknowledgment of a violation by the competent authority becomes all the more important as a form of redress.").

- x. **Procedural autonomy:** It is essential for the proper performance of any human right review similar to that of the Panel that it has procedural autonomy which involves, first and foremost, competence to adopt its own rules of procedure. The experience of the Human Rights Review Panel and its decision in the case of *Roma* complainants, is a telling example. Any form of interference with the procedural autonomy of a human rights mechanism would seriously undermine its efficiency and is detrimental to the legitimacy of the Mission itself. Granting such procedural autonomy from the outset, in the founding document, will allow avoiding such pitfalls. Such autonomy has enabled the Panel to a) adopt its own rules of procedure and to amend them when it considered it, in the light of its procedural experience, necessary, b) to maintain its independence from the Mission and c) to gain credibility with potential claimants. The HRRP's experience in that regard should be contrasted with the HRAP's experience, which has been marred by unfortunate procedural interferences from the body it was supposed to monitor.
- xi. **Outreach and publicity of work of the Panel:** At its creation, the existence and mandate of the Panel was not well known to the general public in Kosovo. This resulted in a relatively low number of complaints being brought and quite a number of applications falling outside the competence of the Panel. The Panel has therefore organized an outreach program, through visits, meetings and media campaign intended to increase the public awareness of its work. This has resulted in a significant increase of complaints. It has also positively impacted the perception of the Mission's accountability. The Panel's ability to conduct such activities remained dependent on the assistance provided by the Mission. Consideration should be given to enabling future accountability mechanisms to draw up and execute their outreach efforts independently of the Mission.
- xii. **Budget of the Panel:** The budget of the Panel is effectively part of the Mission's overall budget. This has a number of consequences. First, this might create the appearance of lack of independence vis-à-vis the Mission and thus affect the perceived legitimacy of both the Mission and the Panel (see above). Secondly, this has made the Panel dependent on budgetary decisions taken

by the Mission. This has had consequences in particular as regard staffing of the Panel. It also has hindered the Panel's capacity to act independently to perform necessary outreach functions. It is recommended that consideration be given in the future to providing accountability mechanisms with their own budget lines.

- xiii. Staffing issues:** In 2012, the European Court of Auditors' Report "European Union Assistance to Kosovo Related to the Rule of Law" criticised some aspects of the staffing policy of the Mission [see, in particular, paras. 87 to 89 of the Report]. It is not for the Panel to deal in depth with human resources issues. However, a number of aspects should be highlighted here as they were repeatedly noted by the Panel. Firstly, the recruitment policy formulated in the Standard Operating Procedure (SOP) of giving priority always to seconded staff over contracted staff, regardless of the merit of the competing candidates, *even if the merit was in favour of contracted staff*, could not ensure recruitment of best qualified staff, human rights specialists or otherwise. The rule should have been that only in case of two candidates of *equal* merit should the seconded staff be preferred. Secondly, on a number of occasions the Panel insisted that recruitment procedure be conducted allowing contracted staff to be recruited, fearing on the basis of the past experience that competition for seconded staff only would not yield qualified candidates. The Mission insisted on going through the seconded stage first, which resulted in very serious waste of time as no qualified seconded candidates applied or could be found. Thirdly, the policy of reducing the Mission staff by default firing all staff and hiring a smaller number from among the same staff for the coming new period of the Mission, by way of internal competitions, is perceived negatively. Staff's efficiency is undermined for long periods of submitting applications and doing interviews. Further, competing within the Mission for the staff's own posts held previously is not conducive to good working atmosphere. A policy of simple firing of staff as a result of reduction of the Mission's size on the basis of performance would also have the merit of conferring on the performance appraisal the necessary weight and seriousness. Fourthly, in order for the Mission to meet its human rights obligations, it is essential that all staff

should have a minimum (common) understanding of what these obligations imply. Clear guidelines should be issued and adequate training provided to ensure that all new staff have a clear (and common) understanding of the implications of these obligations.

- xiv. Systemic human rights issues (falling outside the Panel’s competence):** A number of complaints that were declared inadmissible on procedural grounds reflected a number of systemic human rights issues affecting the Mission and/or the functioning of local authorities. Whilst the Panel was not able to address those as part of its jurisdiction, it has sought to bring those to the attention of relevant authorities in a variety of ways, including a) its Annual Reports, b) thematic “White papers” such as the present one (in particular, one pertaining to the issue of “enforced disappearance”), c) meetings with relevant officials and outreach efforts, d) training and conferences attended by Panel members or its Secretariat. It is important that human rights mechanisms, such as the Panel, not be constrained in too tight a jurisdictional straight-jacket so that they are able and permitted to serve a general accountability function where appropriate and necessary.
- xv. Linguistic issues:** At least a modest element of linguistic overview of written decisions handed down by international judges and prosecutors is called for, in the light of the Mission’s experience. The prosecutorial and judicial staff and legal officers have been recruited from various legal traditions and cultures and they have apparently been given no initial training in legal drafting that would show a common style and patterns for the mission. It resulted sometimes in texts heavily marked with individual styles and national drafting models and which were difficult to follow.
- xvi. Coordination among human rights bodies:** It would be desirable that greater efforts be made at Mission level to ensure regular meetings and effective cooperation between the various bodies tasked with human rights responsibilities to ensure consistency of approach and coordination in joint efforts.
- xvii. Training of staff:** As noted above, international staff of the Mission comes from all kinds of professional and legal backgrounds. It is essential to ensure at least a minimum level of fundamental legal notions relevant to the

protection of human rights, especially in the context of rule of law mission, by way of initial training common for all. The Panel has been involved in such training of EULEX staff. Human Rights training was ensured also by the Human Rights and Legal Office. However, it is primordial that there should be a consistent training approach over the years as to which human rights standards are most relevant to the Mission, in which areas of its functioning relevant problems may arise – so as to avoid that the Panel’s decisions are perceived as coming out of nowhere, instead of being rooted in the standards transmitted to the Mission staff early on in their mandate and later reinforced by continuous in-house training.

**xviii. Transitional period:** In its relevant part, the Accountability Concept Paper states: “3. The Panel will examine complaints relating to such alleged violations that occurred since 9 September 2008 in Kosovo. A complaint must be submitted to the Panel within six months from the date of the alleged human rights violation occurred, whichever is more favourable to the Complainant. (...) The role of the Panel is linked to the duration of the executive mandate of EULEX Kosovo. The Panel may act for a supplementary period of time after transformation of/transition from the executive mandate of EULEX Kosovo, to the extent necessary for examining complaints still pending at that time.” It is recommended that the Panel’s mandate be expressly expanded to apply to any future EU Mission in Kosovo with a view to ensure the Mission’s continued human rights accountability. This would also ensure continuity of approach and avoid waste of resources and expertise that would ensue from the creation of a new structure. Existing practice and caselaw would also be readily available (with the necessary adaptation that could ensue from a change in the substance or scope of the Mission’s mandate). Consideration should also be given by the EU to the need to adapt the Panel’s mandate to any of the “lessons” outlined above.

#### **IV. CONCLUSION**

It is the hope of the Panel that the present paper will be of assistance to the Mission in ensuring its continued commitment to upholding relevant standards of human rights.

As stated in the opening paragraphs, the Panel is available to discuss the present document and to assist the Mission fulfilling its human rights obligations.