HRRP
Human Rights Review Panel

DECISION ON ADMISSIBILITY AND MERIT

Date of adoption: 26 March 2021

Case no. 2016-20

Dragica Ćerimi

Against

EULEX

The Human Rights Review Panel ("the Panel"), sitting on 26 March 2021 with the following members present:

Mr Guénaël METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member
Ms Anna AUTIO, Member

Assisted by:
Mr Ronald HOOGHIEMSTRA, Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel as last amended on 11 December 2019,

Having deliberated through electronic means in accordance with Rule 13(3) of the Panel's Rules of Procedure, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint in this case was registered on 30 June 2016.

2. By letter of 1 July 2016, the Panel informed the European Union Rule of Law Mission in Kosovo, EULEX Kosovo ("the Mission" or "EULEX") that this case had been registered.

3. On 28 June 2017, the Panel requested the complainant to provide additional information regarding her complaint. The complainant initially responded through a representative for Serb families of the Missing Persons Resource Center ("MPRC"), an NGO based in Pristina, that she had no further information in relation to this case.

4. On 20 September and 17 October 2017, the Panel sent two further requests for additional information via the MPRC.

5. On 20 October 2017, an additional document was received.

6. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission ("HoM"), EULEX Kosovo, inviting the Mission to submit answers and written observations on the complaints no later than 26 January 2018.

7. By letter of 19 January 2019, the Mission was requested to provide answers to the questions by 16 February 2019.

8. By letter of 8 April 2019, the Mission was again requested to provide answers to the questions as soon as practical.

9. By letter of 31 January 2019, the complainant was asked to submit a signed copy of the application form. It was submitted on 2 February 2019.

10. On 18 December 2019, the Acting HoM submitted his observations on the case.

11. On 30 December 2019, the Acting HoM's letter was submitted for information to the complainant, who was given time until 30 January 2020 to make any further submissions in response to that letter. The complainant did not provide a response.

12. By letter of 18 September 2020, the Panel informed the Mission that, in order to expedite proceedings, the Panel intended to deal with issues of admissibility and merit at the same time in a single decision. To that end, the Panel invited the Mission to provide its submissions on merit in those cases where it had already provided its comments on admissibility.

13. On 11 December 2020, the Mission submitted additional comments regarding the merit of the complaint.

14. On 17 December 2020, the Mission's comments on merit were forwarded to the complainant who was invited to submit her comments on the merit of the case, if any, before 31 January 2021.

15. Due to an unforeseen complication with the delivery of postal communications, the Panel decided to extend the deadline for the complainant to submit comments on the merit of the case. By letter of 11 February 2021, the complainant was informed that the deadline had been extended until 19 March 2021.

16. No further submissions were received in this case.

II. FACTS

17. The facts of the case, as they appear from the complaint, can be summarised as follows. On 10 August 1999, the complainant's son, Samet Ćerimi, went missing in the municipality of Zubin Potok, Mitrovica Region.

18. On 17 August 1999, the complainant reported the disappearance of her son to KFOR Military Police.

19. On 17 March 2000, the International Committee of the Red Cross ("the ICRC") opened a tracing request for Samet Ćerimi.

20. On 19 May 2000, the complainant reported the disappearance of her son to UNMIK Police.

21. On 26 March 2001, UNMIK Police Mitrovica Investigation Unit produced an investigative report stating that the corpse of the disappeared Samet Qerimi had been found in the Ibar river and therefore the investigation was stopped. However, the case relating to a "suspected murder" was still under investigation.

22. On 30 March 2001 the parents of Mr. Qerimi did not recognize their son in the pictures shown to them of the body that had been found. As a result, the case was kept "open".

23. The documents handed over from UNMIK do not contain the information about what investigative steps, if any, were carried out by UNMIK. UNMIK's database of cases later to be transmitted to EULEX did not indicate the status of the case.

24. On 11 April 2013, another body was found in Vushtrri/Vučitrn municipality.

25. On 19 September 2013, the body was identified by the Department of Forensic Medicine of EULEX-Kosovo, as being that of of Samet Ćerimi.

26. On 19 September 2013, the Medical Examiner's Office of the Department of Forensic Medicine of EULEX-Kosovo, issued a death certificate for Samet Ćerimi. The cause of death was verified by an autopsy and was recorded as a *'gunshot to the head'*.

27. On 20 September 2013, the mortal remains of Samet Ćerimi were handed over to the complainant by the Department of Forensic Medicine of EULEX-Kosovo.

III. COMPLAINT AND STANDING

28. The complainant alleged that there has never been any investigation into the killing of her son who went missing in August 1999 and who was found to have been murdered.

29. The Panel considers that the complaint relates to at least two particular fundamental rights reflected in the following provisions: Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"), which guarantees a person's fundamental right to life and, under its procedural head, provides for an obligation to investigate cases of suspicious deaths; and, Article 3 of the Convention which guarantees a person's right not to be subjected to torture or inhuman or degrading treatment or punishment.

30. In addition, the complaint might be relevant to the rights provided in Articles 8 and 13 of the same Convention, which guarantee, respectively, the right to a family life, and the right to an effective remedy to anyone whose rights and freedoms provided in the Convention have been violated. The same rights are protected by a number of other international treaties, including the International Covenant on Civil and Political Rights. These rights form part of a core set of fundamental human rights that are guaranteed to all as a matter of customary international law.

31. Considering the close family relationship between the primary victim - of Samet Ćerimi – and the complainant – Dragica Ćerimi (mother of Samet Ćerimi) – the Panel is satisfied that the complainant may be regarded as a secondary victim of the alleged violations and that, as such, a potential victim in accordance with Rule 25(1) of the Panel's Rules of Procedure.

IV. SUBMISSIONS OF THE PARTIES REGARDING ADMISSIBILITY

The complainant

32. As summarised above, the complainant alleges that, in the exercise of its executive mandate, EULEX Kosovo should have investigated the disappearance and killing of her son and culpably failed to do so in violation of her and her son's fundamental rights.

Head of Mission ("HoM")

33. In his submissions, the HoM indicates that, in the framework of the hand-over of cases and case-files from UNMIK to EULEX in the period December 2008 to March 2009, the War Crimes Investigation Unit – WCIU of EULEX received several documents relating to the disappearance of Samet Ćerimi. At the moment of hand-over from UNMIK to EULEX, the case of Samet Ćerimi was included in the UNMIK Missing Persons Unit – MPU database of missing persons.

34. In particular, EULEX received documents indicating that the complainant had reported the disappearance of her son to French KFOR and to UNMIK Police. The Mission states that,

> "In an investigation report dated 26 March 2001 produced by the UNMIK Police Mitrovica Investigation Unit it is stated that the investigation into the disappearance of Samet Ćerimi was being "stopped", because his corpse had been found in the Ibar river, while the case related to a 'suspected murder' was still under investigation. An UNMIK Police Mitrovica Investigation Unit report dated 30 March 2001 indicates that on the mentioned day, the UNMIK police met with the family of Samet Ćerimi (his father and the complainant) to compare his pictures with those of the body found in the Ibar river. The report states that the parents of Samet Ćerimi did not recognize their son in the pictures shown to them by the UNMIK police, and that therefore the missing person case would be kept 'open'. No further investigative steps appear to have been carried out by UNMIK after that date. The MPU Microsoft Access database handed over to EULEX does not indicate the status of the case at the moment of the hand-over."

35. The HoM notes that, according to the records available to the Mission, neither the complainant nor any other family members ever brought the disappearance and killing of the complainant's son to the attention of the Mission.

36. Regarding the recording and categorization of cases handed over from UNMIK to EULEX, the Mission indicates that besides the case-files that EULEX received from UNMIK in 2008-2009, there were also several databases in Microsoft Access that were handed over. These included one for "war crimes" police files and another for "missing persons" cases. The case of Samet Ćerimi was mentioned in this latter database, but not in the former database. There was no specific remark indicating the status of this case as either "open", "active" or "inactive".

37. Regarding the extent to which the Mission took steps to identify and investigate cases of enforced disappearances and/or murder, the Mission states, *inter alia*, that:

> "The Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, in force at the time of EULEX executive mandate in the criminal justice system, did not contain any explicit reference to 'enforced disappearances'. The Provisional Criminal Code of Kosovo (UNMIK REG. 2003/25) and the Kosovo Criminal Code (No. 04/L-082) that replaced it, as well as the current Kosovo Criminal Code (No. 06/L-074), refer to enforced disappearances as one of the offences, which, under

certain circumstances, can constitute crimes against humanity, not war crimes. Enforced disappearances were also not foreseen under the criminal law applicable in Kosovo during and just after the conflict, including the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia. EULEX, albeit indirectly, investigated and prosecuted instances of enforced disappearances in the framework of war crimes cases."

38. Regarding the involvement of organs of EULEX in the present case, the Mission points out that:

> "On 20 April 2013, the EULEX WCIU received information that human bones had been discovered in the Vushtrri/Vučitrn municipality. An autopsy was carried out by the EULEX staff of the Department of Forensic Medicine – DFM (now Institute of Forensic Medicine - IFM) on 22 April 2013. On 19 September 2013, the EULEX staff at the DFM issued a death certificate and an identification certificate for Samet Ćerimi; his remains were handed over to the complainant on 20 September 2013. According to EULEX records, there was no involvement of the Mission in investigating the killing of Samet Ćerimi."

39. Regarding the specific complaints against EULEX, the HoM states that he takes note of the fact that the Panel invited EULEX to submit observations on the admissibility and merits of the complaint only in relation to Articles 2 and 3 of the Convention, and therefore the Mission's contribution will be limited to these two articles exclusively.

40. In its submissions in respect of these provisions, the Mission takes note of the case-law of the European Court of Human Rights and of the Human Rights Review Panel in similar cases and does not dispute the admissibility of this complaint under Articles 2 and 3 of the European Convention on Human Rights.

41. The Mission further notes, that the complainant does not refer to any particular violation or violations of fundamental rights by EULEX Kosovo. The Mission points out that it is the Panel which assesses that the complaint raises issues under Articles 2 and 3 of the Convention, not the complainant. The Mission notes that the complainant does not put forward any arguments for consideration by the Panel.

V. THE PANEL'S ASSESSMENT REGARDING THE ADMISSIBILITY OF THIS CASE

Mandate of the Panel (Rule 25, paragraph 1, of the Rules of Procedure) and inherent limitations placed on the Mission regarding the protection of human rights.

42. As noted above, the HoM does not dispute the admissibility of this case.

43. Having reviewed the relevant requirements of admissibility, the Panel is satisfied that the case is indeed admissible.

VI. SUBMISSIONS OF THE PARTIES REGARDING THE MERIT OF THE CASE

The Complainant

44. As noted above, the complainant alleges that, in the exercise of its executive mandate, EULEX Kosovo should have investigated the disappearance and killing of her son and culpably failed to do so in violation of her and her son's fundamental rights. The Panel has determined above that the present complainant should be considered in light of Articles 2 (procedural limb), 3, 8 and 13 of the European Convention of Human Rights.

The Head of Mission

45. By letter of 11 December 2020, the Head of Mission responded to the invitation to provide additional observations on the merit of the case, beyond what was stated in its observations on admissibility.

46. The Mission makes a number of generic submissions regarding some of the practical challenges associated with the investigation of this sort of cases and acknowledges that the management of the files it received from UNMIK has been particularly challenging.

47. The Mission clarifies that under its current mandate EULEX is not authorized to disclose information on ongoing investigations that it has obtained during its monitoring activities. The Mission submits that:

> "Therefore, when inviting complainants to contact the competent institutions, the Mission is simply referring them to the authorities that are under the law, competent and authorized to release information to them in relation to any investigative steps they may have undertaken since the end of EULEX executive mandate in the criminal justice system in June 2018."

48. With regard to its human rights obligations, the Mission recalls that:

> "the procedural obligation under Article 2 of [the European Convention on Human Rights], is one *'of means'* and *'not of result'*. Crucial in the assessment of its implementation is that *'the authorities have done all that could reasonably be expected of them in the circumstances of the case.'* (See, for example, European Court of Human Rights (ECtHR) *Trivkanović v. Croatia*, no. 12986/13, Judgment of 6 July 2017, para. 78; *Borojević and others v. Croatia*, no. 70273/11, Judgment of 4 April 2017, para. 57; *Nježić and Štimac v. Croatia*, no. 29823/13, Judgment of 9 April 2015, para. 69)."

49. In addition, the Mission recalled that:

> "'*the nature and degree of scrutiny must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work.'* (See, for example, ECtHR *Cindrić and Bešlić vs Croatia*, no. 72152/13, Judgment of 6 September 2016, para.69; *Zdjelar and others v. Croatia*, no. 80960/12, Judgment of 6 July 2017, para. 83; *Velcea and Mazare v. Romania*, no. 64301/01, Judgment of 1 December 2009, para. 105; and *Armani da Silva v United Kingdom*, no. 5878/08 5878/08, Judgment of 30 March 2016, para.234)."

50. The Mission also submits that:

> "As acknowledged in the Panel's consolidated case law, as well as in the relevant case law of the UNMIK Human Rights Advisory Panel, expectations upon the ability of a rule of law mission such as EULEX to investigate and prosecute cases such as the present one should be 'realistic' and 'proportionate'. An assessment of what is 'realistic' and 'proportionate' in relation to a single case, must take into account *'all relevant facts'* and *'the realities of investigative work'* as described [in the Mission's submissions]."

51. In particular, the Mission submits that:

> "According to the 'Kosovo Memory Book' of the Humanitarian Law Centre Kosovo, more than 13,000 individuals of which over 10,000 civilians, were killed or went missing in the period 1998-2000. The scale of the crimes committed entails that expectations upon the ability of a rule of law mission such as EULEX to investigate and prosecute these cases should be realistic and proportionate."

52. Therefore, the Mission contends that:

> "The inability to investigate an alleged enforced disappearance cannot be deemed a violation of human rights, when the failure to investigate materializes in a context of large scale crimes involving thousands of victims and where it is clear that no investigative authority may be expected to resolve all cases brought before it. This consideration applies *a fortiori* to a situation where the authority responsible is not a State, but an international Mission with limited resources at its disposal and a time-limited mandate (since its inception in 2008 the EULEX mandate has been extended every two years)."

53. The Mission also acknowledged that:

> "the management of the files inherited from UNMIK was a challenge and that [the Mission] was unable to rectify many inconsistencies and duplications. It also acknowledges that its police and prosecutorial units should have ensured better communication with victims and victims' relatives, and also with the wider public. However, it maintains that it would have been simply disproportionate to expect that the Mission could investigate all killings, suspicious deaths and disappearances and reopen cases that had already been terminated by the UNMIK authorities."

54. The Mission states further that it:

> "does not dispute that the complainant has a right to an effective investigation into her son's killing. The Mission is also aware and understands that the suffering of Ms Ćerimi must be unbearable and deeply regrets that. However, the Mission deems that an assessment of the conduct of EULEX under the procedural head of Article 2 and under Article 3 of the Convention in relation to this specific case cannot disregard the magnitude of the challenge posed by the very high number of crimes related to the conflict, as well as the context and the circumstances in which the Mission was called to implement its mandate."

55. The Mission submits that the circumstances in which EULEX was called to implement its mandate required the prioritization of some cases over others. Nevertheless, the Mission does acknowledge in its submissions that its police and prosecutorial units could have done more outreach efforts to keep victims and the wider public informed about its strategies and approaches, with a view to manage expectations more adequately and be more transparent.

56. However, the Mission insists that in the present case, and considering the fundamental obstacles with which it was presented, it does not believe that the complainant's rights were violated.

Submissions in reply

57. On 17 December 2020, the Mission's submissions on the merit of the case were forwarded to the complainant, who was invited to submit her comments on the merit of the case, if any, no later than 31 January 2021.

58. Due to an unforeseen complication with the delivery of postal communications, on 1 February 2021, the Panel decided to extend the deadline for the complainant to submit comments on the merit of the case until 19 March 2021.

59. No further submissions were received in this case.

VII. THE PANEL'S ASSESSMENT REGARDING THE MERIT OF THIS CASE

General considerations

60. The Mission was required to fulfill its executive responsibilities in a manner consistent with relevant human rights standards. This implied, *inter alia*, that it would investigate cases within its jurisdictional competence that involved the violation of rights guaranteed under Articles 2 and 3 of the European Convention of Human Rights. Regarding the relevant legal standards applicable, see: HRRP, *Case-Law Note on the Duty to Investigate Allegations of Violations of Rights*, pp. 3-5 (and cited case-law); and *Sadiku-Syla against EULEX*, 2014-34, Decision and Findings, 19 October 2016, para. 36; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, para. 88; *Sadiku-Syla against EULEX*, 2014-34, Decision on Admissibility, 29 September 2015, para. 58. See also ECtHR: *Nachova and Others v Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment of 6 July 2005, para. 110; *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, Judgment 4 May 2001, para. 105; *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A no. 324, para. 161; *Assenov and Others v. Bulgaria*, Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para. 102.

61. It also required the Mission to keep relatives of the missing adequately apprised of its efforts to investigate this case. HRRP, *Case-Law Note on the Duty to Investigate Allegations of Violations of Rights*, pp. 28-30 (and cited case-law); and *L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015, paras 61-63; U.F. Against EULEX, 2016-12, Decision and Findings, 12 February 2020, para 97; *Milijana Avramović against EULEX*, Decision and Findings, Case no. 2016-17, 4 June 2019, para 55; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 66; *Desanka and Zoran Stanisić against EULEX*, 2012-22, 11 November 2015, para. 66; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314; *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167).

62. The present case, as well as other cases of enforced disappearance/missing persons, fell right within the scope of those competences and responsibilities.

63. The Mission advances a number of arguments to try to explain its failure to investigate the present case (and other similar cases) and to keep the relatives of the disappeared in this case properly informed.

64. The Panel notes that many and most of those arguments have already been raised and rejected in earlier cases of the same sort. The Panel will therefore limit its considerations of those to what is strictly necessary to the resolution of the present case.

Challenges associated with the investigation of missing persons/enforced disappearance cases

65. The Head of Mission suggests that the Mission's conduct in relation to individual cases should be considered in light of the overall challenge, which the investigation of all missing persons cases represented for the Mission. The Panel shares this view only up to a point.

66. It is correct, as the Panel has repeatedly acknowledged, that the task facing the Mission was daunting. At the beginning of its mandate, there were hundreds of cases involving serious violations of human rights for the Mission to investigate. It is also correct that its resources – in expertise, finances and personnel – were limited. In addition, these difficult investigations were to be conducted with only limited support from local authorities and in a post-conflict situation that would have rendered a difficult situation even more challenging. Furthermore, the Mission inherited records from UNMIK had been poorly kept and organised. This required the Mission to conduct its own, repeated, review of those records. Regarding these difficulties, see also: *U.F. Against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 60; *L.O. against EULEX*, 2014-32, 11 November 2015, pars 43-45; *A,B,C,D against EULEX*,2012- 09 to 2012-12, 20 June 2013, para 50; *K to T against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 53; *Sadiku-Syla against EULEX*, 2014-34, Decision on Admissibility, 29 September 2015, paras. 35-37; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, paras. 72-74; see also *Human Rights Advisory Panel of UNMIK (HRAP)* Decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 35 and paras 70-71.

67. The argumentation contained in the submission of the Head of Mission pointing at its limitations does not relate however to this specific case. Instead, it reflects systemic shortcomings of the Mission, including these: a general lack of adequate planning for investigations and prosecutions; a lack of policy of prioritisation of cases; a lack of focus on cases involving serious human rights violations; a lack of prompt and effective investigations; a general failure to inform relatives of missing persons; no clear policy on cases of enforced disappearances and no prioritisation thereof; meagre number of "resolved" missing persons cases; unreasonable reliance on records and determination of UNMIK (see, e.g. *Q.J. against EULEX*, 2016-23, Decision and Findings, 11 December 2020, paras. 45-47; *Vesko Kandić against EULEX*, 2016-24, Admissibility Decision and Decision and Findings, 11 December 2020, paras 80-84); questionable practices by prosecutorial staff (See e.g. *W. against EULEX*, 2011-07, Decision and Findings, 10 April 2013, paras. 34-35; F. and Others against EULEX, 2011-27, Decision and Findings, 5 December 2017, paras. 60-63); acts carried out without clear legal basis (See e.g. *W. against EULEX*, 2011-07, Decision and Findings, 10 April 2013, paras. 41-43; *G.T. against EULEX*, 2019-01, Decision and Findings, 11 December 2020, para. 70); failure to request relevant records from potential sources of information (e.g., ICRC; Serbian authorities; OSCE). These factors, and others, are all apparent from cases that have come before the Panel. These are not the consequences of challenges associated with the Mission's mandate or with a lack of resources. They are the consequence of poor planning, inadequate operational management of investigations and prosecutions, absence of clear policy of cases prioritisation, failure to put in place a system of communication with relatives of missing persons and failure to have a clear investigative and prosecutorial policy in respect of this sort of cases. They also demonstrate an inability by the Mission to ensure that the planning and implementation of its activities consistently take into account the Mission's human rights obligations.

68. The Panel wishes to point out in passing that the Mission realised already during the hand-over process that the conditions of the files transferred were far from adequate. Hence, the Mission should have been alerted that the need to approach and rely upon those records with caution. It should also have alerted it to the need to ensure that its ability to fulfil its obligations was not negatively affected by those records. As the newly established Mission, EULEX Kosovo was expected to act with due diligence and in compliance with its human rights obligations. For the purpose of understanding the extent of its tasks in

the post-conflict environment it was necessary to get acquainted with the actual content of all case files so that the rights of those concerned could be preserved. That seems not to have taken place in every instance to the detriment of the victims of human rights violations such as the complainant.

69. Based on the above, the Panel would invite the Head of Mission to conduct a full review of the investigative and prosecutorial records of the Mission over its lifespan to have a clear, complete and informed understanding of the causes and circumstances of its inability to fulfil this part of its mandate effectively and in a manner consistent with its human rights obligations. This should help the Head of Mission address the outstanding human rights legacy of these failings with a view to ensuring that the Mission is able to remedy those human rights violations it committed over the course of its existence.

Legal labelling and human rights

70. In its submissions (see, *supra*, para 55), the Head of Mission suggested that the EULEX WCIU prioritized the review of the so-called 'war crimes files' over the 'missing persons files'. The Panel notes that the proposed distinction cannot be regarded as material here. First, the distinction is legally artificial: instances of enforced disappearance or missing persons can constitute a war crime and have been prosecuted under various categories of war crimes since at least the Second World War. See *Vesko Kandić against EULEX*, 2016-24, Admissibility Decision and Decision and Findings, 11 December 2020, paras.86-92. The Panel notes in that respect that it was the 'war crime' unit of the Mission that dealt with such cases, thereby making it clear that, even from the institutional point of view, there was no conflict between missing persons and war crimes cases.

71. Secondly, from the point of view of human rights law, the distinction is meaningless. The obligation to investigate that arises in such a case from Articles 2 (procedural limb) and 3 of the European Convention of Human Rights is indifferent to the legal characterization given to the act under local laws. In other words, from the point of view of its human rights obligations, the Mission was no less obliged to investigate such a case if it regarded it as a "war crimes case" or as a "missing person case". See, e.g., *Inter-American Convention on Forced Disappearance of Persons* (1994); UN General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc A/RES/47/133, 18 December 1992 (hereafter 1992 Declaration on Enforced Disappearance), art. 1(1); UN Economic and Social Council, *Report of the Working Group on Enforced or Involuntary Disappearances*, UN Doc E/CN. 4/1996/38, 1 January 1996; UN Human Rights Committee, CCPR General Comment No. 6: Article 6 (Right to Life), 30 April 1982 (hereafter General Comment No. 6), s. 4; UN General Assembly, Disappeared Persons, UN Doc A/RES/33/173, 20 December 1978 (hereafter UN Doc A/RES/33/173); UN General Assembly, *Question of Enforced or Involuntary Disappearances*, UN Doc A/49/610/Add.2, 23 December 1994.

72. Furthermore, the Panel observes that the claimed priority given to "missing persons" cases does not appear to be supported by concrete evidence. Instead, it is apparent from the cases that have come before the Panel that cases involving missing persons failed to be properly investigated, whether labelled "war crimes", "missing persons", "active" or "closed". In that sense, the failure appears to be the result of a failure to prioritise this sort of cases rather than having been caused by inadequate, and ultimately irrelevant, legal labelling.

73. The Panel notes that findings similar to the above have already been made in a number of past cases before the Panel. Nevertheless, the Mission has continued to suggest that the legal characterization of the case would validate its failure to meet its human rights obligations. It does not and the Panel invites the Mission not to reiterate these submissions in the future.

The lack of evidence of a pre-existing investigation

74. In its submissions regarding the admissibility of this complaint (see, *supra*, para. 38), the Mission admits that:

> "there was no involvement of the Mission in investigating the killing of Samet Ćerimi."

75. The Mission notes that there were several databases in Microsoft Access that were handed over from UNMIK to the Mission. These included one for "war crimes" police files and another for "missing persons" cases. The case of Samet Ćerimi was mentioned in the database for "missing persons" cases, but not in the database for "war crimes" police files. The Mission states also that there was no specific remark indicating the status of this case as either "open", "active" or "inactive".

76. The Mission suggests that this was because:

> "In an investigation report dated 26 March 2001 produced by the UNMIK Police Mitrovica Investigation Unit it is stated that the investigation into the disappearance of Samet Ćerimi was being "stopped", because his corpse had been found in the Ibar river, while the case related to a 'suspected murder' was still under investigation. An UNMIK Police Mitrovica Investigation Unit report dated 30 March 2001 indicates that on the mentioned day, the UNMIK police met with the family of Samet Ćerimi (his father and the complainant) to compare his pictures with those of the body found in the Ibar river. The report states that the parents of Samet Ćerimi did not recognize their son in the pictures shown to them by the UNMIK police, and that therefore the missing person case would be kept 'open'. No further investigative steps appear to have been carried out by UNMIK after that date."

77. Therefore, the Mission effectively claims to have had no knowledge of the case as an ongoing criminal investigation.

78. On the other hand, the Mission submits that:

> "On 20 April 2013, the EULEX WCIU received information that human bones had been discovered in the Vushtrri/Vučitrn municipality. An autopsy was carried out by the EULEX staff of the Department of Forensic Medicine – DFM (now Institute of Forensic Medicine - IFM) on 22 April 2013. On 19 September 2013, the EULEX staff at the DFM issued a death certificate and an identification certificate for Samet Ćerimi; his remains were handed over to the complainant on 20 September 2013."

79. The Mission failed to explain how it was that its own WCIU received information about a dead body, and that its own staff members at the Department of Forensic Medicine conducted an autopsy where it was determined that the cause of death was a 'gunshot to the head' (see, supra, para. 38). This cause of death would have certainly warranted the opening of an investigation. As noted by the Panel in prior cases, the fact that relevant information is in possession of one organ of the Mission means that the Mission itself is on notice of it. It is for the Mission to organise itself in a way that ensures the effective flow of information and so as to ensure that it is able to fulfil its human rights obligations.

80. Furthermore, the Mission's own staff members at the Department of Forensic Medicine were able to positively identify the body as that of Samet Ćerimi. Having made that identification, it would have been clear that this death was very likely related to his disappearance in August 1999, and, therefore, also very likely connected with the conflict. The Mission was therefore fully informed of the general circumstances pertaining to this

case and the fact that it was required, as part of its mandate, to investigate the circumstances under which the victim had been killed and been disappeared.

81. The Mission's explanations fail to convince for other reasons. Irrespective of whether or not UNMIK had been engaged in an ongoing investigation into the disappearance and death of Samet Ćerimi at the time of the hand-over of case-files to EULEX, by its own admission, in 2013 the Mission itself had all the information it required to justify the opening of an investigation into the violent death of Samet Ćerimi. Its responsibility to investigate flowed directly from its mandate – it was not dependent on the view or consideration of UNMIK. Nor was it dependent on UNMIK having regarded that case as open or closed.

82. Therefore, even not knowing which were the investigative steps (if any) undertaken by UNMIK after 30 March 2001, obtaining the information in 2013, while having executive mandate until mid-June 2018 the Mission was in a position to investigate the case.

83. From the record, it is apparent that no such efforts were made. Moreover, the Mission could have dedicated attention to this case even after the present complaint was communicated to the HoM in 2016. Instead, the Mission concentrated on complaining about the imperfections of the process of the handing over of the files rather than on constructive, victim-oriented activities. While those shortcomings would have been relevant to evaluating how or how long it took the Mission to get into motion, it cannot excuse or explain its failure to act.

84. The Mission cannot use its own failure to investigate to justify an absence of information. Information arises from investigation, not the other way around. It was therefore the responsibility of the Mission to try and obtain such information. While its obligations in that regard were one of means not of result, it is apparent from the record that it did not even try to seek and obtain information aside from what it inherited from UNMIK.

85. The Mission's submission also suggests that there must have been some serious deficiencies in its own internal communication mechanisms. How else can it be explained that the WCIU receives information about a dead body, where subsequently the Department of Forensic Medicine identifies a violent cause of death, and yet this information apparently does not feed back to the WCIU, and it does not lead to the opening of an investigation into the death? Either the Mission's staff did not fulfill their functions diligently or the Mission had failed to put in place an internal system of information sharing that would ensure that information relevant to one part of the Mission is passed on to another. Either way, the Mission is at fault.

86. The reasoning contained in the HoM's submissions proves that the Mission did not understand the fact that as long as the case-files handed over by UNMIK remained in EULEX's possession the Mission was seized of those cases, thus competent and responsible to initiate or continue the investigative activity, until the very moment the Kosovo authorities were formally informed about those cases and the files transferred or until it had fulfilled all of its obligations in relation to that case.

87. The Panel notes that the human rights obligations of the Mission are not qualified. Obligations arising from Articles 2 and 3 of the Convention to investigate this sort of cases must be met regardless of the quality of the evidence. Furthermore, as noted above, there was evidence on which an investigation could have been started. It would be absurd if an authority could absolve itself of its investigative obligations because of a lack of information before it has even started to investigate. Obtaining information is the very point of an investigation. If, after an effective and reasonable effort to investigate commensurate to the importance of the rights at stake, no or insufficient information could be obtained, the authorities cannot be held responsible for failing to find more. That,

however, is not the case here. The Mission did not even try or start to investigate. It therefore cannot use an absence of (adequate or sufficient) information as a basis for its failure to commence an investigation.

88. As mentioned above, the Mission also suggests that it had no knowledge of the case because there was apparently no ongoing investigation being carried out by UNMIK prior to the hand-over of case-files.

89. The Panel cannot accept this as justification for the Mission's failure to act. First, as the Mission has repeatedly underlined, it knew UNMIK's records to be unreliable. This should have raised concerns about the quality of its work and diligence accorded to its investigative responsibilities. Even if it did not, the Mission's human rights responsibilities were its own. They could not be delegated to third parties, including UNMIK. It was therefore the responsibility of the Mission to review those records (as it did) so as to form its own opinion of the course of action to be taken in relation to each individual case. The apparent absence of an investigation by UNMIK therefore had no legal bearing on the Mission's own responsibilities.

90. Such an explanation, therefore, provides no justification for the Mission's failure to investigate this case and to keep relatives of the missing duly informed.

Notification of relatives of the missing person

91. The Mission has not put forward a cogent explanation for its failure to inform the relatives of the missing in this case of its actions or decision not to investigate this case. This despite the fact that, in 2013, the relatives must have been informed about the identification of the body of Samet Ćerimi, and must have been contacted in order to arrange for the receipt of his body.

92. In this context, the supposedly inadequate quality or sufficiency of information had no bearing on the Mission's obligation to inform the relatives. With or without such information, it was required to inform the relatives of the missing of their actions and efforts. It failed to do so and has not provided cogent reasons for that failure.

93. Based on the above, the Panel finds that the Mission failed to fulfill its obligation under Article 2 (procedural limb) of the Convention to keep the close relatives of Samet Ćerimi adequately informed of the course of action taken to investigate his disappearance and death.

Regarding Article 3 of the Convention

94. The Panel recalls the case-law of the European Court of Human Rights regarding the circumstances wherein the right to freedom from inhuman treatment may be violated in cases of enforced disappearance. In its Judgment in *Basayeva and Others v. Russia* (nos. 15441/05 and 20731/04, Judgment of 28 May 2009, para. 159), the Court observed that:

> "the question whether a member of the family of a "disappeared person" is a victim of treatment contrary to Article 3 will depend on the existence of special factors which give the suffering of the applicants a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries. The Court would further emphasize that the

essence of such a violation does not mainly lie in the fact of the "disappearance" of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention. It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct (see *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva v. Russia*, no. 7615/02, § 164, 9 November 2006)."

95. In the present case, the complainant's son, Samet Ćerimi, disappeared in the summer of 1999. Although a body potentially matching his description was found in March 2001, it proved not to be the complainant's son. The fact that it was presented – wrongly, it turns out – as such to the family would have been traumatizing. It created false hopes and disappointed expectations.

96. It was not until September 2013 that the body of Samet Ćerimi was identified and his body returned to his family. This does not appear to have been accompanied by any sort of explanation or undertaking that the matter would be investigated by the Mission.

97. In the interim, complainant had reported her son's disappearance to the investigative authorities of UNMIK, and she had been consulted about the identification of the body found by UNMIK in 2001. She received no information in return from the Mission.

98. Subsequently to the identification of her son's body in September 2013, the body was returned to her. In addition, a death certificate had been issued that indicated the cause of death as being a 'gunshot to the head'. The identification of the body, performing of an autopsy, and the issuing of a death certificate, had all been performed by EULEX staff members. The circumstances described in the certificate would have been such as to create a reasonable expectation on her part that the death of her relative would be investigated. It wasn't to be. To the fact that her relative had disappeared and his fate unknown, she now had to live with the knowledge that nothing was being done about it.

99. As just noted, based on this sequence of events, it would have been reasonable for the complainant to assume that an investigation into her son's disappearance and murder would be ongoing. There had clearly been steps taken by UNMIK to investigate her son's case. A cause of death had been established and forensic evidence recovered in the form of the victim's body. Only through the communications between the Panel and the Head of Mission has it now become clear that there was, in fact, no ongoing investigation of UNMIK into the disappearance and murder of Samet Ćerimi.

100. Following the return of her son's body in September 2013, it would have been even more reasonable for complainant to assume that an investigation into her son's death was being undertaken. That the Mission provides no explanation why this was not the case is, frankly, alarming.

101. While the return of her son's body in 2013 may have served to alleviate to some extent complainant's suffering, in the absence of any information regarding the circumstances of her son's abduction and death the uncertainty surrounding her son's fate will have remained. And so with the knowledge that her son's murderer(s) would get away with it.

102. This uncertainty is revealed to be all the more complete given the alleged total ignorance of the Mission of her son's case, and the entire absence of any investigative steps undertaken by the Mission following the Mission's own discovery and identification of her son's body in 2013.

103. In these circumstances, the Panel considers that complete disregard by the Mission of its obligation to conduct an investigation into the disappearance and death of Samet Ćerimi and the apparent casualness with which they dealt with this case constitutes precisely

such special factors which warrant the conclusion that the Mission's attitude towards complainant amounts to a violation of her right to freedom from inhuman treatment, as guaranteed by Article 3 of the Convention. As it was indicated in a judgment by the Inter American Court of Human Rights, "the violation of those relatives' mental and moral integrity is a direct consequence of his forced disappearance. The circumstances of such disappearances generate suffering and anguish, in addition to a sense of insecurity, frustration and impotence in the face of the public authorities' failure to investigate" (see case of Blake v. Guatemala, Judgment of January 24, 1998, Merits, para 114).

Continued executive mandate

104. The Mission has reiterated a submission that it had already made in earlier cases to the effect that it stands ready to help should new information regarding the complainant's relative become available.

105. The Panel has previously expressed its circumspection about such submissions, in particular, as it could give the complainant the impression that the Mission is still involved in the investigation of this case, while it is not. Such a statement is moreover inconsistent with the approach of the Mission while insisting that it may not do anything in those cases due to lack of executive mandate and respect for the independence of the authorities of Kosovo. Furthermore, as already noted, the Mission knows that without an investigation, such information is unlikely to become available. It is therefore necessary for the Mission to add substance to its words. See *Q.J. against EULEX*, 2016-23, Decision and Findings, 11 December 2020, paras. 60-64.

106. The Panel is still awaiting a response to its invitation that the Head of Mission should give consideration to adopting a full and effective strategy for the Mission to finally make the issue of the disappeared a priority of the Mission.

107. Until this occurs, the Panel would invite the Mission to refrain from reiterating its 'readiness to help', which has already been recorded by the Panel and which does not provide any form of remedy to the complainant but rather may create false expectations in a situation of ongoing suffering due to the unresolved disappearance of a close relative.

Conclusions and findings

108. Based on the above, the Panel finds that the Mission has violated the rights of the complainant under Article 2 (procedural limb) and 3 of the Convention by failing to investigate the disappearance of her relative and failing to provide her and other close relatives with any information regarding this case. Considering the seriousness of the rights concerned, the gravity of the Mission's failure and the length of time concerned, the violation must be regarded as particularly serious. The violation is also ongoing.

109. The Head of Mission is therefore invited to take steps and measures that are commensurate with this fact.

110. Based on those findings, the Panel considers it unnecessary to make additional findings regarding Articles 8 and 13 of the Convention. It is quite apparent, however, that the conduct of the Mission has had a negative effect on the rights of the complainant as are protected by those provisions. In his assessment of what measures or steps should be taken to remedy the violations recording in the present decision, the Head of Mission is invited to account for this fact.

111. In this context, the Panel invites the Mission to give due consideration to the necessity and effectiveness of raising repeatedly the same arguments and points, which have already been addressed in earlier cases. The Panel invites the Mission to anchor its future

submissions in an analysis of the Mission's activities as viewed from the perspective of its human rights obligations.

112. The Panel would also invite the Head of Mission to give consideration to the necessity for the Mission to conduct a transparent and effective review of its activities and legacy – in particular, from the point of view of its human rights obligations – so that lessons are learnt from the experience of the Mission for future such endeavours.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS that the complaint is admissible pursuant to Articles 2 (procedural limb), 3, 8 and 13 of the European Convention of Human Rights;

FINDS that the Mission has violated the rights of the complainant as protected under Articles 2 (procedural limb), and 3 of the Convention;

FINDS FURTHER that the violations are serious and ongoing and that they, therefore, call for the adoption of remedial measures commensurate to those;

CALLS UPON the Head of Mission to adopt remedial measures commensurate to the gravity of the violations involved;

FINDS that it does not need to make findings on the merit in respect of Articles 8 and 13 of the Convention;

INVITES THE HEAD OF MISSION, in particular, to review the interpretation currently given to the nature and scope of the Mission's human rights obligations and to give consideration to the following:

1. The Panel invites the Head of Mission to consider formally acknowledging the violation of the rights of the complainant by the Mission and to offer adequate relief for it.

2. The Panel invites the Mission to continue looking for and to identify the prosecution office responsible for the investigation of this case.

3. The Panel further invites the Mission to inquire with the competent prosecutor whether the matter is being investigated and, if not, why that is.

4. The Panel invites the Mission to consider what concrete and meaningful steps should be taken to contribute to moving forward the investigation of cases of enforced disappearance/missing persons. The Panel is willing to continue to engage with the Head of Mission in trying to find solutions for that purpose. The Panel wishes to note, however, that steps taken thus far by the Mission are inadequate from the point of view of the Mission's human rights obligations and incapable of contributing meaningfully to resolving those cases. It is high time for the Mission to do more.

5. The Panel invites the Head of Mission to carefully consider what remedies are still available to the Mission in a case such as the present one where the Mission has been found to have violated the rights of a relative of a missing person and to inform the Panel of its conclusions.

6. The Panel invites the Mission to distribute the present Decision to

    i. Relevant personnel within the Mission;

ii. Relevant officials of the European Union who have responsibility for Kosovo, the Balkans region, Common Security and Defense Policy (CSDP) missions, or human rights issues.

INVITES the Mission to report to the Panel regarding the above recommendations at its earliest convenience and no later than 30 November 2021.

For the Panel:

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member