DECISION ON ADMISSIBILITY AND MERIT OF THE CASE

Date of adoption: 26 March 2021

Case no. 2016-21

Milanka Čitlučanin

Against

EULEX

The Human Rights Review 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") that this case had been registered.

3. On 3 October 2016, the complainant submitted a number of additional documents.

4. On 20 September 2017, the Panel sent a request for additional information via the representative for Serb families of the Missing Persons Resource Center (MPRC), a non-

governmental organisation based in Pristina. No further information was received in relation to this case at that stage.

5. 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.

6. By letter of 19 January 2019, the Mission was again requested to provide answers to the questions, this time no later than 16 February 2019.

7. By letter of 31 January 2019, the complainant was asked to submit a signed copy of the application form. The signed application form was submitted on 11 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. On 20 June 2019, the complainant was informed that the Panel was still in the process of examining her complaint.

10. On 26 February 2020, more than two years after first being asked, the HoM submitted his observations on the admissibility of the complaint.

11. On 4 March 2020, the HoM's letter was submitted for information to the complainant, who was given until 4 April 2020 to make any further submissions in response to that letter. The complainant did not provide any 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, on 1 February 2021, the Panel decided to extend the deadline for the complainant to submit comments on the merit of the case until 26 February 2021. The deadline was then further extended until 19 March 2021. No further submissions were received.

II. FACTS

16. The facts of the case, as they appear from the complaint, can be summarised as follows. On 21 October 1999, the complainant's brother, Milorad Daničić, together with a number of colleagues, travelled by bus from his home in Leposavić, to the office of the Trepča Industrial Complex on the southern side of Mitrovica in order to collect his salary.

17. Apparently, Milorad Daničić had gone into his office to collect something while his colleagues were entering the bus in order to be transported back home. Reportedly, a group of Kosovo Albanians approached the bus in a threatening manner and the bus

departed, leaving Milorad Daničić and some other colleagues behind. A group of colleagues managed to walk back home, but Milorad Daničić was not heard of or seen again.

18. The complainant reported the disappearance of her brother to the International Committee of the Red Cross (ICRC) in Belgrade, where a tracing request was opened.

19. On 23 November 1999, the Mitrovica Regional Investigation Unit of the United Nations Interim Administration Mission in Kosovo (UNMIK) opened a criminal case, and on 25 November 1999, the UNMIK Missing Persons Unit – MPU opened a missing persons file.

20. On 24 April 2000, the complainant made a witness statement to the investigating judge of the "Municipal Court of Kosovska Mitrovica" of the Republic of Serbia, in criminal proceedings against a third party. In her statement, the complainant alleges that she had information that her brother had been held in an illegal prison in the village of Likovac/Likovc. She had informed the Organization for Security and Cooperation in Europe (OSCE) Mission in Kosovo about this. Apparently, the OSCE investigated this allegation but found no trace of Milorad Daničić at that location.

21. Reportedly, the UNMIK War Crimes Unit – WCU, also had information that Milorad Daničić had been detained for several days after his disappearance, but it was not able to confirm this information.

22. The archives of the Institute of Forensic Medicine (IFM), operating under the Kosovo Ministry of Justice, with support from the Mission, contain a Victim Identification Form for Milorad Daničić.

III. COMPLAINT AND STANDING

23. The complainant alleges that there has never been any investigation into the disappearance of her brother who went missing in October 1999 and never heard of again. She does not specify any particular right(s) said to have been affected by this alleged failure.

24. 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.

25. In addition, the complaint might be relevant to the right provided in Articles 8 and 13 of the same Convention, which guarantee, respectively, the rights to family life and access to an effective remedy to anyone whose rights and freedoms provided in the Convention have allegedly been violated.

26. 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 international law.

27. Considering the close family relationship between the primary victim - of Milorad Daničić – and the complainant – Milanka Čitlučanin (sister of Milorad Daničić) – 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

28. 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 brother and culpably failed to do so in violation of her and her brother's fundamental rights.

Head of Mission ("HoM")

29. In his submissions of 26 February 2020, the Head of Mission submitted the following. Regarding the Mission's awareness of this case, the Head of Mission indicated that within the framework of the transfer of cases and case-files from UNMIK to the Mission, the latter had become aware of the existence of this case. The Head of Mission said that EULEX War Crimes Investigation Unit (WCIU) received 'only a handful of documents relating to the disappearance of Milorad Danicic'. This included an Ante-Mortem Investigation Report of the UNMIK War Crimes Unit – Missing Persons Section and an English translation of the minutes of a hearing of 24 April 2000 before an investigative judge at the Municipal Court in Kosovska Mitrovica where the complainant appeared as a witness. The Mission adds that EULEX has 'no knowledge of where the original minutes may be'.

30. UNMIK's *Ante Mortem* Investigation Report stated that the disappearance of Mr Daničić had been reported to the ICRC in Belgrade; that the Mitrovica Regional Investigation of UNMIK had opened a missing person file two days later on 25 November 1999; that an UNMIK staff had contacted the complainant at some point although she was unable to provide additional information; and that it contained the name of the owner of the place where Mr Daničić was suspected to have been detained, although he could not be traced by UNMIK. The Report concluded that the case should remain 'open inactive'.

31. The archives of the Institute of Forensic Medicine (IFM) contained a copy of an OSCE document bearing the marking 'confidential'.

32. At the time of hand-over of cases and case-files from UNMIK to the Mission, the case of Milorad Daničić was included in the UNMIK Missing Persons Unit database.

33. The Mission made it clear that documents pertaining to this case were transmitted by UNMIK during the period April to December 2008 along a large number of similar files. The Mission also provided a lengthy explanation of the process of recording, storing and categorisation of case-files received from UNMIK. The Mission does not make it clear how this process affected its handling of the present case. It does, however, point to a number of shortcomings affecting the manner in which UNMIK had organised and registered its cases. As a result, the Mission had to undertake several reviews of its records. It also points out that certain cases were forward to the District Prosecution Office and that WCIU prioritized the review of the so-called 'war crimes files' over the 'missing persons files'.

34. Asked what steps the Mission took to investigate cases of enforced disappearance dating back to the Kosovo conflict (or its immediate aftermath), the Mission provides a detailed account of certain steps it took in that regard. The Mission briefly responds that 'indirectly, [it] investigated and prosecuted instances of enforced disappearances in the framework of war crimes cases'.

35. Regarding the present case, the Mission said that

> 'it appears that EULEX did not investigate this disappearance due to the lack of obvious investigative leads and the need to prioritize cases for which evidence was more significant.'

36. The Mission did not answer the Panel's question regarding efforts to contact other institutions (e.g, the OSCE; UNMIK; the ICRC; Serbian authorities) to obtain information regarding that case.

37. Asked if it knows of any other authority investigating this case, the Mission invited the complainant to address this question to the competent Kosovo institutions. The Panel notes here that the question was not that of the complainant, but that of the Panel. The Panel notes further that the Mission's failure to respond must be taken to mean that the Mission has no such knowledge.

38. Asked whether relatives of the missing were informed and involved at any point in time, the Mission responds that the complainant provided information to various organisations but not to EULEX. This submission does not answer the Panel's question. The Panel infers from this that the Mission did not seek to contact any of the relatives of the missing person. Nor does the record suggests that it provided any of them with information in its possession regarding the fate of Mr Daničić.

39. The Mission also conceded that no witness or potential suspect was ever questioned by the Mission in relation to this case.

40. Regarding the Panel's question as to whether the Mission had violated the rights of the complainant under Articles 2 or 3 of the European Convention of Human Rights, the Mission responded that in its view no such violation occurred. In particular, the Mission submitted:

> 'EULEX does not dispute that the complainant has a right to know what happened to her brother and that the case raises issues under the Convention. However, it 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 disappearance, cannot disregard the magnitude of the challenge posted by the very high number of crimes as well as the context and the circumstances in which the Mission was called to implement its mandate.

On that basis, the Mission invites the Panel to evaluate the Mission's actions in a realistic and proportionate manner.

41. The Mission added that '[t]he nature of the overall circumstances in which EULEX was called to implement its mandate required the prioritization of some cases over others'. It added:

> 'Constrained by the limited resources at its disposal as well as the short timeframe of its mandate (since its inception in 2008, the EULEX mandate has been extended every two years), the Mission was compelled to take rapidly difficult decisions in order to avoid a total stalemate. The Mission trusted that the initial qualification of the alleged criminal offenses by UNMIK must have been sound and decided to prioritize the review and examination of the around 1,200 case-files that had already been labelled by UNMIK as 'war crimes' over the so called 'missing persons files'. Within the 'war crimes' category, it identified those cases that

appeared more promising in terms of investigation outcomes and dismissed the others. EULEX did not undertake a systematic effort to locate all possible files, part of files, or documents which may have been held by other organizations and focused on the material that it had received from UNMIK. As explained above, EULEX prosecutors considered that they should focus on alleged criminal offences that were committed during the armed conflict and leave the post-conflict cases to the basic prosecution offices.'

42. The Mission further submitted:

> 'The Mission does acknowledge that its police and prosecutorial units could have done more to keep victims and the wider public informed about its strategies and constraints with a view to manage expectations more adequately and be more transparent. However, it maintains that it would have been simply disproportionate to expect that the Mission could investigate all killings and disappearances at the same time as well as maintain all victim's relatives informed of the states of any investigations. Therefore, in the present case and in considering the fundamental obstacles presented, the Mission does not believe that the complainant's rights were violated.'

43. Finally, the Mission said this:

> 'EULEX would like to point out, like it did in relation to other similar cases pending before the Panel that under its reconfigured mandate the Mission retains an executive capacity to support the Kosovo IFM. Should new credible information come to light the Mission stands ready to support Kosovo institutions in any efforts to find Mr Milorad Daničić and other missing persons.'

V. THE PANEL'S ASSESSEMENT REGARDING THE ADMISSIBILITY OF THE CASE

44. In effect, the Mission does not challenge the admissibility of this case and it takes note of the fact that the Panel has in the past declared cases of a similar nature to be admissible.

45. The Panel has indeed satisfied itself that all conditions of admissibility are met in relation to this case.

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

The complainant

46. 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 brother and culpably failed to do so in violation of her and her brother'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.

Head of Mission ("HoM")

47. By letter of 11 December 2020, the Head of Mission indicated that there was 'no need' for additional submissions on the merit of this case and submits that 'the Mission does not believe that the complainant's rights were violated'.

48. However, the Mission made a number of generic submissions regarding some of the practical challenges associated with the investigation of this sort of cases and acknowledged that the management of UNMIK file had caused problems.

Submissions in reply

49. 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, before 31 January 2021.

50. 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 26 February 2021. No further submissions were received.

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

General considerations

51. 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 caselaw); 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.

52. It also required the Mission to keep relatives of the missing adequately apprised of its efforts to investigate this case. See HRRP, Case-Law Note on the Duty to Investigate Allegations of Violations of Rights, pp. 28-30 (and cited caselaw); 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).

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

54. The Mission advances a number of arguments 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.

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

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

56. 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. This is correct, but only up to a point.

57. It is correct, as the Panel has repeatedly acknowledged, that the task facing the Mission was daunting, in particular in the immediate aftermath of the conflict. 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.

58. 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.

59. Where the submission of the Head of Mission finds its limitations is in the fact that the shortcomings and failings identified by the Panel in the present case (and other cases of the same sort that have come before the Panel) are not specific to this case. Instead, they reflect systematic and 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 of the nature and scope of the Mission's efforts to find their relatives (or their remains) and circumstances in which they disappeared; 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 HRRP. These are <u>not</u> 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.

60. The findings that are made above will hopefully enable the Head of Mission to evaluate the need for adequate measures being adopted to remedy the violations of rights identified by the Panel in this sort of cases and to consider these in the general context of the Mission's conduct over the years.

Legal labelling and human rights

61. In its submissions (see, *supra*, paras 33 and 35), the Head of Mission suggested that 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. *Firstly*, 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, e.g., *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.

62. *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 characterisation given to the act under local laws (or international law). 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.

63. 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 characterisation of the case would validate its failure to meet its human rights obligations. As has been made clear in earlier cases, it does not.

Prioritising and availability of evidence

64. In its submissions regarding the admissibility of this complaint (see, *supra*, para 35), the Mission submitted:

> '[I]t appears that EULEX did not investigate this disappearance due to the lack of obvious investigative leads and the need to prioritize cases for which evidence was more significant.'

65. These submissions fail to convince for the following reasons. Contrary to the suggestion that there was a 'lack of obvious investigative leads', there were in fact several such leads. The Mission was in possession of information pertaining to the owner of a house where, it was alleged the missing had been detained. Other people who had been present with the disappeared at the time could readily be identified; there was also the record of the minutes of the complainant; and an OSCE file pertaining to the case. The Panel does not suggest that this information would have been sufficient to bring a case to court. It was enough, however, to start an investigation and verify whether any of these could serve as a lead to additional information. From the record, it is apparent that no such efforts were made.

66. 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.

67. Regarding the alleged 'need to prioritize cases for which evidence was more significant' (see, *supra*, paras 33-35), the Panel would note the following. The human rights obligations of the mission are not qualified in such a way. 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 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 finding 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.

68. The Panel also notes in this context that the Mission has stated in relation to several cases of enforced disappearance that the circumstances forced it to prioritise certain categories of cases and that it could not be expected to investigate all such cases. As a result, and to evaluate the merit to these claims, in the context of *Miomir Krivokapic against EULEX*, Case no. 2016-13, Decision and Findings, 12 February 2020, the Panel asked the Mission to provide information regarding the number of cases of 'enforced disappearance' that were investigated and/or prosecuted by the Mission over the course of its existence. Having failed to respond to the Panel's request for that information, the Mission was again reminded by the Panel of its request to receive that information. See *Miomir Krivokapic against EULEX*, Case no. 2016-13, Decision on the Implementation of the Panel's Recommendations, 12 February 2021. At the time of the present Decision, the requested information has not yet been received. The Panel notes in this respect that there is no evidence before it that the Mission treated cases of 'enforced disappearance' as a priority or that cases before the Panel happen to be oddities that evaded the Mission's attention. Instead, it would appear that they reflect the failure of the Mission to treat such cases as priorities and to invest adequate time and resources in trying to resolve them.

69. The panel also notes that in other cases, the Mission had suggested that it had prioritised and focused on cases classified as 'open' by UNMIK (over those characterised by UNMIK as 'closed'). See, e.g., *L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015, para. 65; *Milorad Trifunović against EULEX*, 2016-09, 11 December 2019, para. 96; *Dragiša Kostić against EULEX*, 2016-10, 13 February 2020, para. 88; *U.F. against EULEX*, 2016-12, 12 February 2020, para. 111; *Miomir Krivaković against*

EULEX, 2016-13, 12 February 2020, para. 108; *Milan Ađančić against EULEX*, 2016-14, 11 December 2019, para. 96; *Milijana Avramović against EULEX*, 2016-17, 4 June 2020, para. 54; *S.H. against EULEX*, 2016-28, 11 September 2019, para. 83, *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 99; *Q.J. against EULEX*, 2016-23, Decision and Findings, 11 December 2020, paras. 40-41.

70. The present case was characterised as 'open' when transmitted to the Mission. Why, in that light, it was not given the priority which the Mission claimed to have given to those in other cases is not clear. Instead, in the present case, the Mission focuses on the purported distinction between 'missing person' and 'war crimes' cases, a classification which has no bearing on its human rights obligations. See, *supra*, paras 33-34, 61-63.

71. As mentioned above (para 41), the Mission also noted the following:

> 'EULEX prosecutors considered that they should focus on alleged criminal offences that were committed during the armed conflict and leave the post-conflict cases to the basic prosecution offices.'

72. Such an explanation provides no justification for the Mission's failure to investigate this case and to keep relatives of the missing duly informed. First, no such restriction limited the Mission's mandate in relation to cases over which it was responsible. Nor were its human rights obligations limited in such a way. In this sense, to the extent that prosecutors made such a determination, they acted a) without a proper legal basis and b) in contradiction to the Mission's human rights obligations. Furthermore, it is apparent from the practice of the Mission that they did in fact in some instances look into post-conflict incidents.

Notification of relatives of the missing person

73. 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.

74. 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.

75. Based on the above, the Panel finds that the Mission failed to fulfil its obligation under Article 2 (procedural limb) and Article 3 of the Convention to keep the close relatives of Mr Daničić adequately informed of the course of action taken to investigate his disappearance.

No delegating of human rights obligations to third parties

76. The Mission also suggests that it trusted UNMIK's legal characterisation of cases and acted on that basis.

77. 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 it work and diligence accorded to its investigative responsibilities. Even if did not, the Mission's human rights responsibilities were its own. They could not be delegated to third parties, including UNMIK. The inactivity of other international organisation that dealt with the case (or failed to do deal with the case) before EULEX became involved does not diminish the responsibility of the Mission when it comes to the assessment of the fulfilment of the Mission's own human rights

obligations. 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 classification of cases as open/closed or missing person/war crime by UNMIK therefore had no legal bearing on the Mission's own responsibilities.

Continued executive mandate

78. 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.

79. The Panel has already 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. It is not. Furthermore, as already noted, the Mission knows, of course, that without an investigation, such information is unlikely to become available. It is therefore necessary for the Mission to add substance to its words and to now try to remedy the fact that it failed in its obligations towards the complainant for a long period of time during which it was competent and required to investigate the case of her relative. See *Q.J. against EULEX*, 2016-23, Decision and Findings, 11 December 2020, paras. 60-64.

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

81. 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

82. 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 and ongoing.

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

84. Based on those findings, the Panel consider 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.

85. 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 and negatively assessed. 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.

86. 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), 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, as part of monitoring activity, 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 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

Human Rights Review Panel HRRP Kosovo

Anna BEDNAREK
Member

Anna AUTIO
Member