HRRP
Human Rights Review Panel

DECISION AND FINDINGS

Date of adoption: 29 June 2021

Case no. 2016-16

Dobrivoje Vukmirović

Against

EULEX

The Human Rights Review Panel ("the Panel"), sitting on 29 June 2021, with the following members present:

Ms Anna AUTIO, Presiding Member
Mr Petko PETKOV 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 28 June 2017, the Panel requested the complainant to provide additional information regarding his complaint. The complainant initially responded through a representative for Serb families of the Missing Persons Resource Center (MPRC), an NGO based in Pristina, that he 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. No additional information was received.

5. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission, 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 requested to provide answers to the questions by 16 February 2019.

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

8. On 25 July 2019, the Acting Head of Mission submitted his observations on the case.

9. On 30 July 2019, the Acting Head of Mission's letter was submitted for information to the complainant, who was given until 2 September 2019 to make any further submissions in response to that letter.

10. The complainant did not avail himself of the opportunity to make additional submissions.

11. On 12 February 2020, the Panel found this case to be admissible with regard to the alleged violations of Articles 2, 3 and 13 of the European Convention on Human Rights. In that Decision, the Panel asked the parties to address the following questions:

    1. **The complainant**: Please provide information pertaining to the following:

        i. What contact, if any, did you have with the EULEX Mission during the period 2008-2016 in relation to this case? In particular, what was the nature and extent of your contacts with the EULEX's Forensic Institute?

        ii. If you did not contact the aforementioned entities regarding this case during the period 2008-2016, please describe the reasons why you did not do so.

        iii. Are you aware of any efforts by local authorities to investigate this case?

        iv. Please describe the effect – financial, legal, personal and emotional – that the disappearance of your relative has had on you.

        v. Please also describe how these effects evolved (if they did) following the discovery and identification of your brother's body in 2004.

        vi. Consider the need to make submissions regarding Article 13 of the Convention if they deviate in any material way from submissions pertaining to Articles 2 and 3 of the Convention.

    2. **The Mission**: Please provide information pertaining to the following:

        i. What steps, if any, did the Mission take to investigate this case?

        ii. Which were the elements that led the Mission to a conclusion that "it appears that the case file was handed over to EULEX as a 'closed missing person' file"?

        iii. Were the files pertaining to this case in possession of the Institute for Forensic Medicine ever shared with EULEX Prosecutors? If not, what is the reason?

        iv. What steps (if any) were taken by the Mission to ensure coordination between its various organs to centralise and share information pertaining to ongoing investigation of serious criminal offences, including cases of "enforced disappearances"?

v. Is the Mission competent to monitor this case without local authorities having initiated an investigation into it? If not, what is the Mission empowered to do when, in its view, local authorities fail to fulfil their – procedural – obligations under Article 2 or 3 of the Convention?

vi. What contacts, if any, did the Mission have with the relatives of the disappeared, and the complainant in particular?

vii. What information, if any, regarding its investigative efforts, when, and by what means, did the Mission provide the relatives of the disappeared?

viii. If the Mission did not provide any information, why not?

ix. Was the case-file pertaining to this case transmitted to local authorities? If so, when?

x. Absent an investigation of this case by the Mission, did the Mission provide any other sort of relief or remedy to the complainant?

xi. Consider the need to make submissions regarding Article 13 of the Convention if they deviate in any material way from submissions pertaining to Articles 2 and 3.

12. The parties were asked to make their submissions no later than 15 April 2020.

13. By electronic message of 10 April 2020, the Mission requested an extension of the deadline by one month for it to submit its observations.

14. On 14 April 2020, the Panel extended the deadline until 15 May 2020.

15. On 20 May 2020, the Mission submitted its responses and observations on the merit of the complaint.

16. On 8 July 2020, the Mission's comments were sent to the complainant for information.

17. Due to the corona virus pandemic and the resulting suspension of postal services in Kosovo, the complainant was unable to provide comments within the set deadline.

18. On 3 December 2020, the complainant was invited once again to submit his comments on the merit of his case by 18 December 2021. This letter was apparently never delivered.

19. By letter of 10 February 2021, the complainant was again offered a new opportunity to provide comments on the merit of his complaint by 19 March 2021.

20. No responses to the Panel's questions nor observations on the merit of the case were received from the complainant.

II. COMPOSITION OF THE PANEL

21. Following the resignation of one of its permanent members and the resignation of its member who was a staff member of the Mission Monitoring Pillar, the Panel will sit in this matter with only two members, in accordance with Rules 11 and 14 of the Panel's Rules of Procedure.

III. FACTS

22. The facts, as they appear from the complaint, may be summarized as follows.

23. On or around 15 June 1999, the complainant's brother, Milivoje Vukmirović, was last seen in Kralja Petra street, in the southern part of Mitrovica.

24. On 18 June 1999, the complainant reported to the Mitrovica office of the Department of Safety of the Ministry of Internal Affairs of the Republic of Serbia that his brother, Milivoje Vukmirović, had gone missing.

25. On 17 January 2000, the International Committee of the Red Cross (ICRC) opened a tracing request for Milivoje Vukmirović.

26. On 19 July 2004, the body of Milivoje Vukmirović was found and identified by the Office on Missing Persons and Forensics of the United Nations Mission in Kosovo (UNMIK).

27. On 21 October 2004, the Office on Missing Persons and Forensics of UNMIK confirmed the identification of the body through DNA analysis.

28. On 21 October 2004, the Office of the Medical Examiner, Department of Justice of UNMIK, issued a death certificate for Milivoje Vukmirović. The cause of death was verified by an autopsy and was recorded as "a gunshot wound at the back of the head".

29. On 23 November 2004, the mortal remains of Milivoje Vukmirović were handed over to the complainant by the Office on Missing Persons and Forensics of UNMIK.

IV. SUBMISSIONS OF THE PARTIES

The complainant

30. The complainant alleges that, in the exercise of its executive mandate, EULEX Kosovo should have investigated the disappearance of his brother and culpably failed to do so, in violation of his fundamental rights.

The Mission

31. The Mission's submissions on the merit of this case were received on 20 May 2020.

32. In response to the Panel's question what steps, if any, had been taken by the Mission to investigate this case, the Mission responded that:

> "EULEX Kosovo (hereinafter: 'EULEX' or 'the Mission') did not investigate this case and it is fully aware that this must be terribly disappointing and frustrating for the complainant and the other relatives of Milivoje Vukmirović. There is no doubt that the disappearance and killing of Milivoje Vukmirović was a heinous crime. The Mission wished it could investigate all crimes committed during, in the context of, or in the aftermath of the Kosovo conflict. However, since its resources were not unlimited, EULEX had to prioritize certain cases over others, and it prioritized the 'war crimes files' inherited from UNMIK as 'active' or 'inactive' investigations, over the 'missing person files'."

33. In response to the Panel's question as to the elements that led the Mission to a conclusion that "it appears that the case file was handed over to EULEX as a 'closed missing person file", the Mission responded that,

> "During UNMIK times, 'missing person' cases appear to have been investigated by the UNMIK police only to determine the whereabouts of, or the death of those reported missing; case-files were passed over to the department dealing with criminal investigations, only after the missing person had been located either deceased or alive.
>
> The remains of Milivoje Vukmirovic were identified by the UNMIK Office of Missing Persons and Forensics – OMPF in 2004. The death certificate indicated that he had suffered a violent death. However, the *UNMIK War Crimes Unit Ante Mortem and Exhumation Section*' Case Analysis Review Report completed on 15 July 2008, indicated that information on the cause of death was not available. It also mentioned that, after checking a database, the unit realized that in the meantime the remains of Milivoje Vukmirović had been found, and that the 'missing person case' could be marked as 'closed' and turned over to the investigation section. Since in the framework of the hand-over from UNMIK, the EULEX War Crimes Investigation Unit-WCIU did not receive a file relating to a criminal investigation in this particular case, the Mission concludes that the information about the finding of Milivoje Vukmirovic and the cause of his death was not processed and sent to the investigation section. This is why in its initial observations of July 2019 EULEX made the statement quoted in the Panel's question above."

34. As to whether or not files pertaining to this case in possession of the Institute for Forensic Medicine were ever shared with EULEX Prosecutors, the Mission stated that,

> "As far as the Mission is aware, the files pertaining to this case in possession of the Institute of Forensic Medicine were not shared with the EULEX Prosecutors."

35. In response to the question, 'What steps (if any) were taken by the Mission to ensure coordination between its various organs to centralise and share information pertaining to ongoing investigation of serious criminal offences, including cases of "enforced disappearances", the Mission responded that,

> "As a general practice, whenever the WCIU and the EULEX prosecutors in the SPRK were investigating specific cases, they were reaching out to other units to determine whether any additional information or documents existed in their respective offices."

36. To the question if the Mission is competent to monitor this case without local authorities having initiated an investigation into it, and, if not, what is the Mission empowered to do when, in its view, local authorities fail to fulfil their – procedural - obligations under Article 2 or 3 of the Convention, the Mission responded that,

> "In its current mandate, EULEX monitors selected cases and trials in Kosovo's criminal and civil justice institutions. This includes but is not limited to cases that were handed over to the competent Kosovo institutions. Selected cases are monitored from the investigative phase to the execution of the sentence. In implementing its monitoring mandate EULEX fully respects the principle of independence of the judiciary. Therefore, the Mission cannot advise Kosovo institutions on individual cases, nor can it recommend them to prioritize one case over others or to start an investigation. However it can supports the competent authorities by providing recommendations and assistance addressing systemic issues."

37. Regarding what contacts, if any, the Mission had with the relatives of the disappeared, and the complainant in particular, the Mission reiterated that it does not appear to have had direct contacts with the complainant or other family members.

38. With respect to the question whether or not the Mission had violated the complainant's rights under Articles 2, 3 and 13 of the Convention, the Mission provided the following comments,

> "First of all, EULEX does not dispute that it had as mandate to investigate the disappearance of Milivoje Vukmirović and as a matter of fact, it did not contest the competence *ratione materiae* of the Panel over this case under Article 2 of the Convention. Furthermore, EULEX fully acknowledges that the complainant has a right to an effective investigation into the disappearance of his brother and regrets that it could not conduct such investigation. However, the Mission points out that, as recognized by the European Court of Human Rights and as accepted by the Human Rights Review Panel, the procedural obligation under Article 2 of Convention, 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.'* Furthermore, the Court has specified 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'.*
>
> In light of the above, EULEX believes that the HRRP, when considering facts relevant to the examination of this complaint ('relevant facts') should take into consideration in particular two specific elements: (a) the scale of crimes committed during and in the context of the Kosovo conflict on the one hand, and (b) the state of the files inherited from UNMIK on the other.
>
> With regard to the first point, the Mission recalls 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, many as a result of heinous criminal offences. The practical realities of investigation work in the context of large scale crimes connected to a conflict situation like the one in Kosovo at that time, naturally imply that these cannot all be investigated at the same time by the relevant authorities. Therefore, the standards of effective investigation established by the European Court of Human Rights cannot be applied to this type of cases, in the same manner as with cases that did not materialize in a context of large scale crimes involving thousands of victims.
>
> With regard to the state of the files inherited from UNMIK, as already illustrated, EULEX faced enormous challenges from the very beginning of its mandate. Between 2008 and 2009 the Mission took control over a very large amount of police documents (around 800.000 pages) scattered in poorly organized case-files. Many of the files contained copies instead of original documents (many hardly readable), were missing pages, and comprised documents with nothing more than the same basic information repeated over and over again.
>
> It is EULEX understanding that in in the beginning of its mandate, in order to avoid a total stalemate, the Mission considered that the best way to move forward was to prioritize the so called 'war crimes' files based on the consideration that a comprehensive cross-check of all files would have required putting on hold at least in part the work on the open investigations inherited from UNMIK.
>
> 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 above. 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). The nature of the overall circumstances in which EULEX was called to implement its mandate required necessarily the prioritization of some cases over others. As already indicated, the Mission prioritized on the one hand the around 1,200 case-files that had already been labelled by UNMIK as 'war crimes file' over so called 'missing persons files', and within the former category, the cases that appeared more promising in terms of investigation outcomes.

Furthermore, the Mission takes note of the fact that, by declaring the complaint of Mr Vukmirović admissible in relation also to Article 3 of the Convention, the Panel has deviated significantly from the jurisprudence of the European Court of Human Rights and of the UNMIK-Human Rights Advisory Panel in similar cases.

With regard specifically to the question regarding a violation of the right to a remedy, EULEX recalls that in cases such as the present one, the requirements of effective remedy under Article 13 of the Convention, do not go beyond those set by the procedural obligation under Article 2. As a matter of fact, the European Court of Human Rights has stated that the requirements of Article 13 are broader than those under Article 2 to conduct an effective investigation, only if the disappearance occurred 'at the hands of the authorities', which is obviously not the case here. For these reasons the Mission does not deem that it has violated the complainant's rights under article 2 and 3 of the Convention and consequently also not under article 13 of the same Convention."

V. DELIBERATIONS

Importance of protected rights and interests

39. As a preliminary matter, the Panel wishes to underline the fact that the rights at stake in cases of enforced disappearance are among the most important of all fundamental human rights. In particular, such cases often involve issues pertaining to the right to life, the right not to be subject to cruel and inhuman treatment, the right to truth, the right to respect for family life, and the right to have access to justice.

40. The nature and extent of the measures to be adopted by the competent authorities to guarantee the effective protection of these rights must be commensurate to and be measured against the importance that attach to these rights and to the underlying interests which they seek to protect.

Conducting a realistic assessment of the Mission's actions

41. The rights and interests protected by Articles 2 and 3 of the Convention must be ensured and guaranteed in all cases. However, the circumstances in which this is to be done might impact what can be done in practice and, therefore, what can be reasonably expected of

the authorities. As a result, while the stakes could hardly be higher for victims, an assessment of the conduct of the authorities when seeking to protect their rights must account for the relevant circumstances in which those authorities found themselves at the time. However, difficulties associated with the circumstances as prevailed at the time – for instance, a conflict situation or a post-conflict situation – must be clearly distinguished from issues pertaining to available resources. While the authorities are not responsible for the former and must do as best they can in the circumstances at the time, the latter provide no valid justification to retreat from human rights obligations. Instead, it is the responsibility of those authorities to ensure that resources are organised, distributed and used in such a way as to ensure that its human rights obligations are kept and relevant rights remain effective.

42. Expectations placed upon EULEX's ability to investigate and resolve complex criminal matters should therefore be realistic and not place upon the mission a disproportionate burden that its mandate and resources is not able to meet. See, generally, *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.

43. In particular, the EULEX Mission is not a State and its ability to guarantee the effective protection of human rights cannot be compared in all relevant respects to what may be expected of a State (see, e.g., the Panel's decision in *A,B,C,D against EULEX,* 2012-09 to 2012-12, 20 June 2013, para. 50*; K to T against EULEX*, quoted above, para. 53; see also HRAP Decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 35; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 49).

44. In this regard, the Panel notes that the task given to the Mission was in many respects daunting. The number of cases that it was expected to investigate was extremely large and those cases were complex. The resources put at its disposal were in many respects insufficient and inadequate. Furthermore, the records transmitted to the Mission by UNMIK were in a poor state and required the Mission to spend a significant amount of time and resources merely trying to make sense of those.

45. The post-conflict situation in which the Mission had to operate also complicated its work even further. See e.g. *L.O. against EULEX*, 2014-32, 11 November 2015, para. 44 and references cited therein. Cooperation was often less than forthcoming.

46. The Panel notes that Articles 2 and 3 of the Convention are non-derogable rights under Article 15(2) of the Convention. However, as noted above, what the authorities might be expected to do in a given case to secure these rights will depend in part on the circumstances prevailing at the time. In the present case, the Panel is particularly mindful of the fact that post-conflict circumstances had practical consequences for the Mission's ability to carry out actions with regards to those concerned by its executive mandate. These elements and considerations have, therefore, been taken into account by the Panel to determine what, in those circumstances, could legitimately be expected from the Mission in relation to the present case.

47. Certain preliminary issues should be addressed here first. It should be noted that the guarantee contained in Article 2 of the European Convention is one of *means* and not

result. It is indeed correct as a State or relevant authorities could not be faulted for failing to protect an individual's rights if they have done their utmost and what the law expected to protect those rights. However, as an obligation of means, the law expects that the means invested to guarantee the effective protection of fundamental rights are commensurate to the importance of the right concerned and the gravity of the potential violation which the authorities seek to prevent and remedy. In particular, in the case *Mustafa Tunç and Fecire Tunç* v. Turkey (Application no. 24014/05, Judgment, 14 April 2015 (Grand Chamber), paras 172, which the Panel adopted in case 2016-12 (para 63)), the European Court of Human Rights said this:

> 172. In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.
> 173. The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 186, ECHR 2014; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).
> 174. In any event, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011)

The Panel will take due account of these considerations in assessing the Mission's response in this case.

48. The Panel will also review whether there were concrete and real obstacles that might have undermined the possibility for EULEX to conduct a prompt and effective investigation of a case. Such an evaluation is not intended to justify operational shortcomings unrelated to concrete and demonstrable challenges, nor to affect the standard to which the Mission should be held in the light of its human rights obligations. See *L.O. against EULEX*, 2014-32, 11 November 2015, para. 44; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 73-74; and *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 54; *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 31; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, par 57.

Absence of investigation

49. In the present case, there was no investigation by the Mission, interview of witnesses or relatives, request for documentation, contacts with UNMIK, or any apparent efforts to obtain documents that UNMIK had collected in relation to it. As discussed below, there was also no contact, or attempted contact with the relatives of the disappeared.

50. The reason advanced by the Mission for this situation is that it gave priority to cases that were classified by UNMIK as 'war crimes' rather than 'missing persons cases', and that were 'more promising in terms of investigative outcome'. The Panel finds such argument problematic for a number of reasons.

51. Firstly, the right to an investigation in cases of enforced disappearance is not optional and is unqualified. The Mission has failed to explain why the complainant would have had less of a right to truth and justice than any other victim in the same position.

52. Secondly, practical considerations (such as the number of cases and the limited resources of the authorities concerned) might mean that some cases could be prioritised over others. This does not, however, under any circumstances, erode the essence of that right, i.e., remove or lessen the obligation to carry out an effective investigation. Even where difficult circumstance prevail, the authority must take all reasonable steps in the circumstances. Therefore, where an investigation is temporarily not possible, other means and mechanisms must be put in place to ensure that the rights in question are sufficiently preserved and their essence guaranteed. In particular, steps must be taken to ensure that the possibility of an investigation, even if delayed, is preserved and not lost by reason of delays in formally commencing it.

53. In this case, the Panel notes that the absence of investigation was compounded by the absence of communication with the relatives of the disappeared. Furthermore, the Mission took no steps to provide for alternative remedies to alleviate the effect of this absence of investigation upon their rights. Its 'prioritisation' therefore resulted in a complete absence of investigation, remedy and truth as far as this case is concerned. The Panel notes in this context that the post-conflict situation in which the Mission had to operate did not in any way prevent the Mission to do these things. Nor does a lack of resources appear to provide a valid explanation for its failure to even look into this case.

54. In this respect, the Panel would wish to add the following. Firstly, it was the Mission's responsibility to ensure that it organised itself and distributed its resources in a manner consistent with its human rights obligations. As a 'rule of law' Mission, it is clear that responsibilities having to do with the rule of law should have been institutional and operational priorities.

55. Secondly, where necessary to prioritise certain activities over others, it should have ensured, at the very least, that (a) a clear strategy and policy to that effect was devised and publicised (and which, to the Panel's knowledge, never existed) and (b) that prioritisation did not result in the abandonment of its human rights obligations, in particular in respect of those rights that are absolute in character.

56. Considering that the Mission was replacing local authorities in many of its executive responsibilities, it was for the Mission to ensure that this was done in full compliance with those human rights responsibilities that were associated to that role. A lack of resources provides no justification for a failure to do so. If anything, this should have required the Mission to request resources it was lacking or, where this was refused, to clearly and candidly publicise the fact that it would only be able to deal with a narrow set of executive responsibilities. Transparency, while not a substitute for conducting an effective investigation or meeting other human rights obligations, is indeed an important element of accountability and victims of human rights violations were entitled to know what the Mission was *really* able to do to redress the violations of their rights. While challenging, the post-conflict situation in which the Mission had to operate does not provide a satisfactory explanation for the large-scale failure to deal with cases of this sort. The European Court of Human Rights has made it clear – albeit in relation to states – that human rights obligations are to be met also in the context of an ongoing armed conflict, including the procedural requirements under Article 2 of the Convention to carry out an effective investigation (see, e.g., *Al-Skeini v United Kingdom*, Application no 55721/07, Judgment, 7 July 2011; *Jaloud v Netherlands*, Application no 47708/08, Judgment, 20 November 2014).

57. The failure of the Mission to deal with cases such as the present one might have been affected by its limited resources and by the challenges posed by the post-conflict situation in which it had to operate. But a failure to plan properly and develop detailed and transparent strategies to deal with those cases is at least if not more significant in explaining the fact that the present case was not investigated and that no effort was made to reach out to the victims.

58. Thirdly, while prioritisation of cases might be reasonable where cases demanding the authorities' actions are too numerous for its capacities, the decision to prioritise must at least fulfil two basic requirements. It should not discriminate on impermissible grounds prohibited by human rights law. See, generally, Article 14 ECHR; Articles 2 and 7 Universal Declaration of Human Rights; Articles 4(1) and 26 ICCPR; and Article 1(3) of the UN Charter. Further, as was made clear by the ECtHR (cited, *supra*, in paragraph 30), the obligation to conduct an effective investigation requires the authorities to take the reasonable measures available to them to secure evidence concerning the incident at issue (*Mustafa Tunç and Fecire Tunç* v. Turkey, Application no. 24014/05, Judgment, 14 April 2015 (Grand Chamber), paras 173-174). In this case, the Mission did not engage in <u>any</u> process of evidence collection. In fact, it did not even ask UNMIK or other authorities for the dormant files which they had or might have in their possession. This leads the Panel to a fourth concern associated with the course of action taken by the Mission.

59. To explain its failure to investigate this case, Mission suggests that it had to prioritize cases that appeared 'more promising in terms of investigation outcomes'. In the absence of any preliminary investigation of this case, the Panel is not convinced that such an evaluation could have been carried out fairly, in an informed manner and in a manner that guaranteed the effective protection of the rights of those concerned. The Panel is unconvinced that the Mission could have been in a position to make such an assessment without asking for the UNMIK file and without conducting any interviews or contact those closest to the disappeared. The Panel is, therefore, not satisfied that the Mission's priority assessment was based on a sufficient and reliable basis to secure and guarantee the rights of those concerned.

60. Furthermore, before making the above judgment call that would have such significant consequences for the rights of the complainant, the Mission would have reasonably been expected to seek the assistance and cooperation of other authorities if and when the latter might have in their possession information and/or resources of relevance to the former's efforts to conduct an effective investigation. See, generally, *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 64, referring to: *Case of Güzelyurtlu and Others v. Cyprus And Turkey*, Application no. 36925/07, Judgment, 29 January 2019, paras 229 and 232-233. The Mission failed to reach out to those with (potential) information about this case and it has provided no explanation for that failure.

61. In light of the above, even if the Mission had been authorised to give priority to certain cases of this nature (at least temporarily), it did not act in this case in a manner that would be compatible with the effective preservation of the rights of the complainant. Its complete failure to investigate this case and to take even the most basic of steps to have in its possession all available information before deciding not to investigate it constitutes a serious violation of its human rights obligations under Article 2 (procedural limb) of the European Convention on Human Rights. It reveals a lack of diligence and propriety in the exercise of a critical element of its mandate.

Regarding Article 3 of the Convention

62. International human rights law demands that in a case such as the present one, relatives of the disappeared should be kept sufficiently informed of the course of the investigation of the case and the course of proceedings. See, generally, *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 97; *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; *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-73; HRRP, *Case-Law Note on the Duty to Investigate Allegations of Violations of Rights*, pp 28-30; 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.

63. This requirement is intended to ensure that relatives can meaningfully contribute and participate and it seeks to diminish the strain and pain of not knowing what happened to their loved one. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 66; *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 96.

64. The Panel also 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 emphasise 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)."

65. The obligation to keep victims abreast of investigative efforts is particularly important in a case involving acts of enforced disappearance as surviving relatives might have no other source of information regarding the fate of their relative(s) and they will continue to live in the hope that the fate of their relative(s) will one day be elucidated. As a result, close relatives of the disappeared victims suffer emotionally from the absence of information regarding the fate of their loved one. See *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 98; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 87; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 78. Such a requirement is a necessary element of the protection of the rights of the victims in the investigation of such a case. See, e.g., *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 98; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 77; *Desanka and Zoran Stanisić against EULEX,* 2012-22, 11 November 2015, para. 66, referring to *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-74; *Zufe*

Miladinović against EULEX, 2017-02, 19 June 2019, para. 86; 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.

66. Competent authorities will not easily be permitted to disregard or ignore this obligation. See *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 67; *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 98.

67. The Panel also notes that the right to truth in relation to human rights violations is not only an individual right. It is also a collective right, serving to preserve memory at the level of society and acting as a safeguard against the recurrence of violations. See *General Comment on the Right to the Truth in Relation to Enforced Disappearance*, Report of the Working Group on Enforced or Involuntary Disappearances (2010), Document A/HRC/16/48, Preamble. In the post-conflict context of Kosovo, investigations of enforced disappearances contributed – and continue to contribute – to promoting truth, to the collective memory of such human rights violations, and to ensuring their non-recurrence. This is essential for the victims, but also equally important for society at large.

68. Adding to the gravity of the matter is the fact that the violation of the said rights has been ongoing for almost two decades – half of which was under the responsibility of the Mission. In that sense, the complainant would have been entitled to assume that those with the responsibility of investigation were derelict in the fulfilment of their responsibilities and contributed in so doing to their suffering. (See also, *Dragica Čerimi against EULEX*, 2016-20, Decision on Admissibility and Findings, 26 March 2021, para. 103; *Svetlana Đorđević against EULEX*, 2016-30, Decision on Admissibility and Findings, 26 March 2021, para.93.)

69. In the present case, the complainant's brother, Milivoje Vukmirović, disappeared in the summer of 1999. In July 2004, his body was found and it was identified in October 2004. An autopsy determined that the cause of death was „a gunshot wound to the back of the head". In November 2004, the body of Milivoje Vukmirović was returned to his family.

70. Based on this sequence of events, it would have been reasonable for the complainant to assume that an investigation into his brother's disappearance and murder would be ongoing. However, there had apparently been no steps taken by UNMIK to investigate his brother's case. Through the communications between the Panel and the Head of Mission has it now become clear that there was, in fact, no ongoing investigation into the disappearance and murder of Milivoje Vukmirović. From the legal point of view, the discovery of his remains did not put an end to the Mission's obligations. Instead, it had to investigate the matter in order to establish the circumstances in which he had disappeared and so as to try to identify those responsible for his disappearance in order to bring them to justice.

71. There has been no investigation since at least 2008, when the Mission took over responsibility for the UNMIK investigation files.

72. While the return of his brother's body in 2004 may have served to alleviate to some extent the complainant's suffering, in the absence of any information regarding the circumstances of his brother's abduction and death, the uncertainty surrounding his brother's fate will have remained. That is valid especially in the context of the identified cause of death as indicated in the autopsy being "a gunshot wound to the back of the head".

73. This uncertainty is revealed to be all the more complete given the alleged total ignorance of the Mission of his brother's case, and the entire absence of any investigative steps following the establishment of the Mission in Kosovo.

74. Asked by the Panel why the Mission did not seek to contact relatives of the disappeared, the Mission responded that it could not reasonably have contacted the relatives in all of the approximately 5,000 'missing persons cases', and that, therefore, it did not seek to contact the relatives in this case. The Panel considers this explanation to be unsatisfactory. Even if the Mission's decision not to investigate had been acceptable, that did not qualify its obligation to keep relatives informed as they reflect two separate obligations arising from the same right(s). Instead, the absence of information on the part of the Mission might have continued to feed the family's hope that the matter would eventually be brought to justice, as they were entitled to expect.

75. In these circumstances, the Panel considers that the complete disregard by the Mission for its obligation to conduct an investigation into the disappearance and death of Milivoje Vukmirović, its serious and ongoing nature despite the existence of preliminary evidence of a crime combined with the Mission's failure to communicate with relatives of the disappeared, constitutes precisely such special factors which warrant the conclusion that the Mission's attitude towards the complainant amounts to a violation of his right to freedom from inhuman treatment, as guaranteed by Article 3 of the Convention.

Right to a remedy

76. This case reflects a much broader reality and a larger institutional problem, which the Panel has observed in this and other cases that have come before it. The record of the proceedings in these cases suggests that most cases of enforced disappearance dating back to the Kosovo conflict and its aftermath have been left un-investigated and un-resolved. They first came under the responsibility of the United Nations. Then of the Mission. And now local, Kosovo, authorities. Despite the involvement of multiple authorities over the course of two decades, most of those cases have remained un-investigated or in a state of limbo. As a result, victims have had little justice and truth, and little visibility over what was being done by those with a responsibility to act to protect and guarantee their rights.

77. At every stage, victims would have been entitled to believe, expect and hope that the new authorities would do better than the previous one. They must have been greatly disappointed that their hopes did not materialise. Most cases of enforced disappearance remain, incredibly and unforgivably, un-investigated. Literally hundreds of them passed through the hands of the Mission without their being investigated.

78. When asked about the current state of some of the cases – including the present one – that spent 10 years under EULEX responsibility, the Mission now refers to the Kosovo authorities. The Mission had, for a decade, the responsibility to investigate these cases – including the present one – and it failed to do so. It must now repair the consequences of its own actions and decisions. It cannot delegate its own human rights obligations to a third party.

79. In that light, the Panel considers that the Mission has violated and is currently violating another right of the complainant, namely, his right to an effective remedy as guaranteed, *inter alia*, by Article 13 of the European Convention of Human Rights, Article 8 of the Universal Declaration of Human Rights, and Article 2(3) of the International Covenant on Civil and Political Rights. See also *Kudla v. Poland*, Application no. 30120/96, Judgment, 26 October 2000, in particular, para. 152.

80. The Panel invites the Head of Mission to give careful consideration to the consequences of these findings and what measures should be put in place to provide an effective remedy for the violation of the complainant's rights. The fact that the complainant's rights have been violated for two decades, one of which under the responsibility of the Mission, should justify that the steps taken should be such as to reflect the gravity and duration of these violations as well as the need for effectiveness in remedying those. See, generally, *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, Application no. 7552/09, Judgment, 4 March 2014, in particular, para. 41; *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, Judgment, 24 July 2014, para 540; *Kaya v. Turkey*, Application no. 158/1996/777/978, Judgment, 19 February 1998, para. 106; *Mahmut Kaya v. Turkey*, Application no. 22535/93, Judgment, 28 March 2000, in particular, para. 124.

Miscellaneous

81. At some point in the second half of 2018, the case file pertaining to Milivoje Vukmirović was handed over to the competent Kosovo institutions. The Mission notes that it retains an executive capacity to support the Kosovo Institute of Forensic Medicine. In addition, the Mission states that, while it cannot advise Kosovo institutions on individual cases, it does provide recommendations addressing systemic issues, and it is supporting the administration of criminal investigations, as well as providing relevant training to Kosovo Police.

82. There is no indication of an investigation having been started by the local authorities into the present case.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS that the Mission has violated the fundamental rights of the complainant as guaranteed under Articles 2 (procedural limb), 3, and 13 of the European Convention of Human Rights;

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

INVITES THE HEAD OF MISSION, in particular, to give consideration to the following:

i. Acknowledge the violation of the complaint's rights by the Mission;

ii. Provide a copy of the present decision to
   a) relevant organs of the Mission,
   b) relevant political authorities in Brussels covering matters related to Kosovo, the Balkans region, human rights, and rule of law, and
   c) the local authorities competent to investigate this case;

iii. Order that this case be monitored by the competent organs of the Mission;

iv. Query with the competent local authorities what steps, if any, have been taken to investigate this case and what future steps are being planned, and if no steps have been taken, why not;

v. Reach out to the complainant with a view to finding a way to remedy the violation of his rights.

THE PANEL RESPECTFULLY ASKS THE MISSION to report upon the implementation of these recommendations and to response to its enquiries at its earliest convenience and no later than 30 November 2021.

For the Panel:

Anna AUTIO
Presiding member

Petko PETKOV
Member