



## **DECISION ON ADMISSIBILITY**

**Date of adoption: 30 September 2015**

**Case No. 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16  
and 2014-17**

**D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R.**

**Against**

**EULEX**

The Human Rights Review Panel, sitting on 29 and 30 September 2015  
with the following members present:

Ms Magda MIERZEWSKA, Presiding Member  
Mr Guénaél METTRAUX, Member  
Ms Katja DOMINIK, Member

Assisted by  
Mr John J. RYAN, Senior Legal Officer  
Ms Joanna MARSZALIK, Legal Officer  
Mr Paul LANDERS, 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 15 January 2013,

Having deliberated, decides as follows:

### **PROCEDURE**

1. The complaints were registered respectively on –
  - complaints no. 2014-11 to 2014-14 on 11 March 2014;
  - complaint no. 2014-15 on 17 March 2014; and
  - complaints no. 2014-16 and 2014-17 on 19 March 2014.
2. All complainants but one asked for their identity to be withheld. In light  
of the nature of the complaints, the Panel granted the requests.

3. On 27 May 2014, the Panel decided to give notice of the complaints to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaints. The Panel also decided to examine the merits of the application at the same time as its admissibility (in accordance with Rule 30 paragraphs 1 and 2 of the Rules of Procedure).
4. The observations of the HoM were received on 1 October 2014 after which they were communicated to the complainants for additional observations.
5. On 24 November 2014, the complainants sent in their additional observations, which were in turn sent onwards to the HoM for information.
6. Considering the tenor of the complainants and great deal of overlap between the issues raised in these cases, the Panel hereby orders the formal joinder of these seven cases (2014-11 to 2014-17) pursuant to Rule 20 of its Rules of Procedure.

## **FACTS**

### **I. CIRCUMSTANCES OF THE CASES**

7. All complainants are of Serbian ethnicity and are represented by the same advocate who is not a member of the Kosovo Bar Association.

#### **Case 2014-11, D.W.**

8. On 16 June 1999, A.W. and B.W., the complainant's husband and son were visiting their family home in Obiliq/Obilić. Later on, the complainant (D.W.) heard gunshots coming from the direction of her home.
9. On 20 June 1999, the complainant was informed that her husband and son had been found dead. She later found out that they had been buried in an unmarked grave. Later on, A.W. and B.W.'s bodies were found and identified by the International Red Cross and returned to the complainant for burial.
10. On 9 April 2009, the complainant lodged a complaint with UNMIK's Human Rights Advisory Panel (HRAP). She submitted that UNMIK had failed to properly investigate the killing of her husband and son and that her rights had therefore been violated. On 6 June 2013, the HRAP found that there had been a violation of the complainant rights under Article 2 of the European Convention on Human Rights.
11. On 11 June 2013, the complainant's legal representative sent a letter to EULEX asking whether they held any records concerning A.W.,

B.W. and several other persons. On 12 July 2013, the Head of the Special Prosecution Office (SPRK) replied that, according to Article 63 par. 1 of the Criminal Procedure Code (CPC), the injured party could only be represented by a person who is a member of the Kosovo Bar Association, so that the records could not be disclosed to the complainant's representative who did not belong to the Kosovo bar.

12. On 18 July 2013, the complainant drew the attention of the Head of SPRK to Article 63 par. 3 of CPC, which provides that an injured party may represent himself or herself. She reiterated her request for information on her relatives to be disclosed to her and asked for it to be sent to her counsel's address.
13. On 9 October 2013, the complainant received a letter from the Head of the SPRK. She was informed that the investigation had been closed as the perpetrator could not be identified (*"a ruling to dismiss the criminal report dated 20 July 2009 was issued by a EULEX prosecutor since [it transpired] [...] from the criminal report there was no reasonable suspicion against a specific suspect"*). The letter further informed her that a notice of closing of the investigation had been issued and that the injured party had been informed of the right to proceed with the prosecution as a subsidiary prosecutor within eight days of receipt of the notice of dismissal. According to the letter, the ruling and the notice were required by law to be served on the family of the victim. In the same letter the complainant was informed that her representative would be permitted to inspect EULEX records of her case. She maintains that she was not able to secure an appointment with EULEX to that effect.
14. The complainant indicates that she was never formally served with the decision to dismiss the criminal report.

**Case 2014-12, E.V.**

15. The complainant's husband, S.V., was attacked in his apartment in Prishtinë/Priština on 5 July 1999. He died on the way to the hospital.
16. Later on in 2000, the complainant was interviewed by a person whom she believes belonged to the "international police force" and who assured her that an investigation was underway. She was not given any documents by the officer in question nor contact details and did not hear anything further since.
17. On 12 July 2013, in reply to the complainant's representative inquiry of 11 June 2013, the Head of SPRK informed her that he could not disclose any information to her, as she was not member of the Kosovo Bar Association.
18. On 18 July 2013, E.V. requested that records about the death of her husband be forwarded to herself at her counsel's address.

19. Despite repeated requests, no further response was received from the SPRK.
20. In its submissions, the HoM made it clear that EULEX does not possess any file concerning the complainant's husband's killing. It has, however, access to the Archive of the Basic Prosecution Office in Pristina. It would appear that documents were handed over by UNMIK to the Kosovo authorities on 22 August 2008. It also appears from the record that, on 6 February 2009, the Kosovo Public Prosecutor dismissed the criminal report in the case on the basis that there was no reasonable suspicion against a specific suspect.

**Case 2014-13, F.U.**

21. On 30 June 1999, the complainant's husband, A.U., was shot dead at the doorstep of their relative's house in Obiliq/Obilić, allegedly by men wearing KLA badges.
22. The British KFOR attended the scene and prepared a report on the incident, recording that they had interviewed several "relatives" and "family members" of the complainant.
23. However, neither the report nor any other document was handed over to the family. The complainant has received no further information regarding the death and circumstances of death of her husband.
24. On 1 December 1999, the UNMIK Police interviewed four witnesses in relation to this case. In their final report, the Police suggested that the case should be closed due to lack of information about potential suspects. In the UNMIK case report of 2003, the status of the case is recorded as closed. There is no information available whether the victim's family was kept informed.
25. On 12 July 2013, in reply to the complainant's representative inquiry of 11 June 2013, the Head of SPRK informed her that he could not disclose any information to her, as she was not member of the Kosovo Bar Association.
26. On 18 July 2013, the complainant requested that records pertaining to the death of her husband be forwarded to her at her counsel's address.
27. On 20 September 2013, the Head of the SPRK informed the complainant that a ruling to dismiss the criminal report dated 20 July 2009 was issued by a EULEX prosecutor "since [it transpired] [...] from the criminal report there was no reasonable suspicion against a specific suspect". The letter further informed her that a notice of closing of the investigation had been issued and that the injured party had been informed of the right to proceed with the prosecution as a

subsidiary prosecutor. She was also informed that her representative would be permitted to inspect EULEX records of her case. She maintains that she was not able to secure an appointment with EULEX to that effect.

28. The complainant was never formally served with the decision to dismiss the criminal report.

**Case 2014-14, G.T.**

29. On 27 July 1999, B.T., the complainant's son was killed on a road near Vushtrri/Vučitrn. The British KFOR attended the scene, but the complainant was not asked to provide personal information or testimony and has not heard from KFOR since.
30. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning her son's death. She requested that records about the death of her son be forwarded to her at her counsel's address.
31. On 19 September 2013, the Head of SPRK answered that, despite a thorough research conducted by the SPRK and the Police War Crime Investigation Unit (WCIU), no records concerning the case of her son had been found.

**Case 2014-15, Zlata Veselinović**

32. According to the complainant, her husband, S.V., was shot dead in Prizren on 13 June 1999 by German KFOR soldiers. She does not know the exact circumstances surrounding his death and says that her request for a death certificate and information about the circumstances of her husband's death remain unanswered.
33. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning her husband's death. She requested that records about the death of her husband be forwarded to her at her counsel's address.
34. On 17 September 2013, the Head of SPRK answered that the SPRK could not find any records related to the complainant's case. However, she was informed that the WCIU had found out that S.V. appeared on the International Committee of Red Cross's Missing Persons list.

**Case 2014-16, H.S.**

35. The complainant's brother, A.S., was shot outside his house in the village of Batuse on 8 July 1999 and died as a result of his injuries.

His family was not questioned, nor were their personal details taken by KFOR.

36. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning his brother's death. He requested that records about the death of his brother be forwarded to him at his counsel's address.
37. In a letter of 20 September 2013, the Head of SPRK informed the complainant that despite thorough research conducted by the SPRK and the WCIU no records concerning the case of his brother A.S. had been found.

#### **Case 2014-17, I.R.**

38. I.R., the complainant's husband, was shot dead on the outskirts of Donja Brnica on 11 March 2000.
39. On 29 March 2000, the complainant received a memorandum from an Investigator of the UNMIK Regional Investigation Unit. She was informed that the case of her husband's death was under investigation and that no suspects had been identified by that stage.
40. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning her husband's death. She requested that records about the death of her husband be forwarded to her at her counsel's address.
41. On 19 September 2013, the Head of SPRK informed the complainant that despite thorough research conducted by the SPRK and the WCIU, no records concerning the case of her husband had been found.
42. On 31 October 2013, the complainant's legal representative sent the Head of SPRK the UNMIK memorandum of 29 March 2000 (see par. 39 above) and asked him to review his position in the light of information contained therein. The complainant has received no response to that enquiry.

## **II. COMPLAINTS**

43. The complainants refer to two particular fundamental rights reflected in the following provisions: Article 2 of the European Convention on Human Rights (the Convention) under its procedural head, which guarantees a person's fundamental right to life and provides for an

obligation to investigate cases of suspicious deaths; Article 3 of the Convention which guarantees a person's right not to be subject to torture or inhuman or degrading treatment or punishment.

### **III. RELEVANT APPLICABLE LAW**

#### **Joint Action**

***COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO***

#### **Article 2 Mission Statement**

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

#### **Article 3 Tasks**

In order to fulfil the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(...)

(h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and

#### **Law on Jurisdiction**

***Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (as applicable until 30 May 2014)***

#### **Article 3 Jurisdiction and competences of EULEX judges for criminal proceedings**

(...)

3.3. Before the commencement of the relevant stage of the proceeding, upon petition of the EULEX Prosecutor assigned to the case or working in the mixed team identified in Articles 9 and 10 of this law, or upon petition of any of the parties to the proceeding, or upon a written request of the President of the competent court or of the General Session 5 of the Supreme Court of Kosovo where the provisions related to the disqualification of a judge or lay judge foreseen by the PCPCK (Article 40-44 of the PCPCK) are not applicable, the President of the Assembly of EULEX Judges will have the authority, for any reason when this is considered necessary to ensure the proper administration of justice, to assign EULEX judges to the respective stage of a criminal proceeding, according to the modalities on case selection

and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law, for the following crimes, when the investigation or prosecution is not conducted by the SPRK:

(...)

h) violating equal status of residents of Kosovo (Art. 158, PCCK)

**Article 12 Authority of EULEX prosecutors in case of unwillingness or inability of Kosovo Public Prosecutors**

12.1. At any stage of any criminal proceeding, if a Kosovo Public Prosecutor is unwilling or unable to perform his or her duties and this unwillingness or inability might endanger the proper investigation or prosecution of a criminal offence, or whenever there is a grounded suspicion of attempts made to influence the investigation or prosecution of a criminal offence, the Chief EULEX Prosecutor will have the authority to request the Chief Prosecutor of the competent office to assign the case a) to another Kosovo Public Prosecutor working within the same prosecution office, b) or to any EULEX prosecutor who will take the responsibility over the relevant investigation or prosecution.

12.2. If the Chief Prosecutor of the competent office rejects the request of the Chief EULEX Prosecutor, the Chief EULEX Prosecutor will inform the Chief Public Prosecutor of Kosovo and they will find a joint decision which will be respected by the Chief Prosecutor of the competent office.

12.3. In urgent situations, or when the delay might affect the conduct or the result of the investigation, prosecution or the fairness of the proceeding, the Chief EULEX prosecutor will be entitled to undertake any urgent procedural activity or to assign any EULEX prosecutor or Kosovo Public Prosecutor to the case for such purpose.

***Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (as applicable as of 31 May 2014)***

**Article 3 Amending and Supplementing the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo**

.....

3. After Article 1 of the basic Law, a new article 1.A is added with the following text:

**Article 1.A Ongoing cases**

For purpose of this law an ongoing case means:

1. Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law;
2. Cases that are assigned to EULEX judges before 15 April 2014.

.....

9. Article 7 of the basic Law is reworded as following:



Article 7            General authority and competences of EULEX  
prosecutors

7.1. EULEX prosecutors will have the authority and responsibility to perform their functions, including the authority to conduct criminal investigations as stipulated in Article 2.1 of this Law, unless foreseen different by this Law.

7.2. The EULEX prosecutors will be competent to investigate and prosecute the crimes that fall under the competence of the SPRK in accordance with the law on SPRK.

7.3. EULEX prosecutors are integrated into Kosovo Prosecutorial system and will discharge their functions in compliance with the applicable legislation in Kosovo.

7.4. Cases conducted by EULEX prosecutors as stipulated in Article 2.1 of this Law will continue to be managed in accordance with relevant provisions of the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (2008) and Law on SPRK (2008).

7.5. EULEX KOSOVO will appoint prosecutors to assist in the implementation, according to the agreement, of the EU-facilitated Dialogue between Kosovo and Serbia.

7.6. In carrying out their functions, EULEX prosecutors will closely consult and coordinate their activities with the Chief Prosecutor in charge of the office, where they are assigned.

....

10. After Article 7 of the basic Law, two new Articles 7.A and 7.B are added with the following text:

Article 7.A            Authority of EULEX prosecutors in extraordinary  
circumstances

In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority.

***Law No. 03/L-052 on Special Prosecution Office of the Republic of Kosovo***

Article 5            Exclusive competence of the SPRK

5.1 The SPRK will have exclusive competence to investigate and prosecute the following crimes, also in the forms of attempt, and the various forms of collaboration to the crimes of:

.....

e) crimes Against Humanity (Art. 117, PCCK);

f) war Crimes in Grave Breach of the Geneva Conventions (Art. 118, PCCK), War Crimes in Serious Violation of Laws and Customs Applicable in International Armed Conflict (Art. 119, PCCK), War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions (Art. 120, PCCK),

War Crimes in Serious Violation of Laws and Customs Applicable in Armed Conflict not of an International Character (Art. 121, PCCK);

...

n) organized Crime (Art. 274, PCCK), Intimidation during Criminal Proceedings for Organized Crime (Art. 310, PCCK);

.....

#### Article 9 Subsidiary competence of the SPRK

9.1 The SPRK will have subsidiary competence, according to the modalities set forth in Article 10 of this Law, to investigate and prosecute the following crimes, also in the form of attempt, and the various forms of collaboration to the crimes of:

.....

b) inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance (Art. 115, PCCK);

.....

h) murder (Art. 146, PCCK), Aggravated Murder (Art. 147, PCCK);

i) hostage Taking (Art. 143, PCCK);

j) violating equal status of residents of Kosovo (Art. 158, PCCK);

k) kidnapping (Art. 159, PCCK);

.....

## THE LAW

44. The complainants allege that EULEX infringed their rights protected under Articles 2 and 3 of the Convention. These provisions, in so far as relevant, read as follows:

#### **Article 2 Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

...

#### **Article 3 Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

45. In addition to these provisions, the Panel decided *proprio motu* to also communicate and examine the case under Articles 8 and 13 of the Convention, which read as follows:

#### **Article 8 Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

**Article 13 Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

**Submissions by the parties**

***Head of Mission (“HoM”)***

46. The HoM submitted that EULEX’s main task is to support local authorities while retaining some limited executive functions. Therefore, he submitted, the responsibility of the Mission to protect human rights cannot be equated with that of a state.
47. The HoM further commented on EULEX’s prosecutors’ competence to deal with the cases. He submitted that cases 2014-12, 2014-13, 2014-14 and 2014-16 related to killings which could not be considered war crimes (and, as such, falling under exclusive competence of EULEX prosecutors) as they happened after 20 June 1999, the date when the Yugoslav Army was officially certified to be out of the territory of Kosovo. They would therefore be investigated and prosecuted under the *regular* chapters of the Criminal Code (e.g. as murder). Therefore, before legislative amendments of April 2014 to the Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (Law on Jurisdiction) EULEX Prosecutors would have had shared or subsidiary competence over such cases.
48. He further explained that, from 9 December 2008, EULEX Prosecutors received from UNMIK only “active” investigative files handled beforehand by their prosecutors or police, that is, files related to cases ongoing at the date of handover. Cases which had been terminated, dismissed or otherwise closed by UNMIK were archived in the local Kosovo Prosecution offices. According to the HoM, it would therefore be incorrect to assume that EULEX has received all police and prosecution files. Moreover, EULEX would not have been able to locate all police and prosecution files handled by Kosovo authorities, let alone those where KFOR was the first respondent.

***Observations on cases 2014-12, 2014-14, 2014-15, 2014-16 and 2014-17***

49. As regards cases nos 2014-12, 2014-14, 2014-15, 2014-16 and 2014-17, EULEX contacted the local authorities to find out if they had files relating to these incidents. Only the case file concerning complaint 2014-12 was found in the Archives of the Basic Prosecution Office in Pristina (see par. 20 above).

50. On that basis, the HoM argued that cases subject to the complaints were never in the possession of EULEX and, therefore, EULEX has not exercised any sort of executive powers over them. Those complaints should therefore be rejected in accordance with Rules 25 par. 1 of the Panel's Rules of Procedure, as falling outside the material and personal competence of the Panel.

*Observations on cases 2014-11 and 2014-13*

51. As regards cases 2014-11 and 2014-13, the HoM stated that the EULEX Prosecutors became aware of them in 2009 while reviewing files handed over by UNMIK. EULEX Prosecutors assigned to review these cases considered that all relevant investigative steps had been taken by UNMIK investigators and that all leads had been exhausted. Therefore, the cases were dismissed due to lack of any reasonable investigative strategy or indication of possible suspects.
52. The HoM acknowledged that actions of EULEX prosecutors before the initiation of judicial proceedings fall in principle within the Panel's jurisdiction. Nevertheless, these cases had been inactive for years and practically closed by UNMIK investigators due to lack of any potential suspects before being handed over to EULEX. The EULEX Prosecutor merely gave a formal ruling to close the cases as no other investigative steps were considered to be available. According to the HoM, there is therefore no genuine connection between the initial incidents of killings and the actions taken by EULEX Prosecutors in 2009.
53. Further, the HoM submitted that the Panel examines only complaints on alleged violations of human rights which occurred after 9 December 2009. The deaths of the complainants' relatives took place in 1999. According to the HoM, the "genuine connection" between the disappearance and the 9 December 2009 jurisdictional commencement date was therefore lacking so that the Panel was not competent to review this matter. The significant proportion of procedural steps required was or should have been carried out by UNMIK before that date. The initial investigation and recording of the events was not without flaws, but EULEX should not be considered responsible for failing to investigate the cases which had been practically dormant for years.
54. The HoM also submitted that the cases were lodged outside of the six-month time limit set out in the Panel's Rules of Procedure. According to the HoM, the complainants could have contacted EULEX sooner than in 2013 and lodge their complaints with the Panel before 2014. Also, the last communication between SPRK and the complainants occurred in September 2013 and the complaints to the Panel were lodged in March 2014, which is roughly over six months later.

55. Based on the fact that he considered that any investigative failure in these cases were not attributable to EULEX, the HoM declined to take a position as regard the merit of the complaints under Articles 2 and 3 of the Convention.
56. As to alleged violations of Articles 8 and 13 of the Convention, the HoM argued that the dismissal of criminal reports did not constitute a final decision, meaning that the cases could be reopened, should new information or evidence appeared. The complainants have a right to request a review or reopening of an investigation, or the case can be reopened *ex officio*. An effective remedy is therefore theoretically available to them under the Kosovo law and no issue arises under Article 13.
57. According to the HoM, there was also no interference with the complainants' right under Article 8 which could be attributed to the Mission. The complainants had not been formally informed about the dismissal of criminal reports in 2009 because their addresses and whereabouts were not known to EULEX. This was corrected in 2013 when information became available. The complainants have a right to access to their case file, but they have to do it personally or authorize a representative who is a member of the Kosovo Bar. Such access was granted by SPRK in 2013 but, the HoM suggests, the complainants made no use of it.

### ***The complainants***

58. In their reply to the HoM's observations, the complainants reiterated that EULEX has effectively continued to violate their Article 2 rights and, by its conduct, has subjected the complainants to inhuman and degrading treatment in violation of their rights protected by Article 3 of the Convention.
59. The complainants alleged that there was compelling evidence that the crimes against their relatives were conducted in an organised fashion and were sanctioned by the top level of the KLA leadership. The widespread or systematic nature of these crimes in the period after the conflict ended in June 1999 justifies in their view prosecutions for crimes against humanity.
60. The complainants disagreed with the HoM's observations regarding the time-limit for crimes to be investigated as war crimes which, according to HoM, should be 20 June 1999. In their opinion, the designation of crimes committed against the complainants' relatives as offences to be investigated and prosecuted under the *regular* chapters of the Criminal Code and outside the exclusive competence of EULEX would amount to a failure by EULEX to fulfil its executive mandate.

61. As regards complaints nos 2014-11, 2014-12 and 2014-13, the complainants maintained that the original investigations were flawed and, therefore, the cases must be re-opened and an effective investigation conducted, by competent and impartial international investigators.
62. With regard to the above cases, the complainants clarified that the victims' families had not been informed of the outcome of the original investigations. They dismissed the HoM's explanation that, because they lived in Serbia, the serving of the rulings was not possible due to "the political situation". They maintained that their representative, based in London, was readily able to communicate with her clients. Had it attempted to do so, EULEX would have been able to communicate with the complainants without difficulty or hindrance.
63. As regards the remaining cases, the complainants submitted that they reflect EULEX's general failure of EULEX to adequately investigate such cases. When EULEX was informed about these cases by the complainants in June 2013, it could and should, as a minimum, have contacted the British or German authorities or, in case no 2014-17, UNMIK for their records.
64. With regards to the issue of admissibility *ratione temporis*, the complainants submitted that the fact that EULEX was established in 2008 does not negate its duty to fulfil its mandate and ensure that war crimes and inter-ethnic crimes are effectively investigated. In the context of Kosovo, the duty and continuing failure to investigate such cases amounts to continuous Article 2 and 3 violations. Further, following the conflict, the complainants and their families became displaced persons in Serbia living in abject conditions, whilst coping with the grief of losing their loved ones. To expect them to pursue three international bodies in these circumstances would be to place too onerous a burden on them. The complainants reiterated that the case law of the European Court of Human Rights requires that the authorities conduct an investigation of their own motion, that the family are informed of the steps being taken and that the investigation is open to public scrutiny.
65. Replying to the HoM's observations on the complainants' compliance with the six-month rule, they stressed that all complaints were lodged within 6 months from the date when they received information that gave rise to their realising that EULEX had violated their human rights.
66. As regards the merits of the case, the complainants submitted that the ongoing violation of their rights under Articles 2 and 3 is attributable to EULEX. They point to the fact that EULEX has taken no action to investigate the crimes committed and has relied on the investigative work of UNMIK, which in turn has been found to violate the Article 2 rights in all, but one, of the cases that came before HRAP. The failure of UNMIK and EULEX to effect a proper hand-over of all UNMIK files

to EULEX cannot be held to be a justification or excuse for the ongoing violation of the complainants rights.

67. The complainants concluded that their cases should be declared admissible and asked for permission to lodge an amended reply following consideration of the files.

### **The Panel's assessment**

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

68. As a matter of substantive law, the Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Of particular importance to the work of the Panel are the European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, which set out minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.
69. Before considering the complaint on its merits, the Panel has to decide whether to accept the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
70. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate.
71. The Panel has already established that the actions of the EULEX prosecutors and police are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate (see, for instance, *K to T against EULEX*, cases nos 2013-05 to 2013-14, 21 April 2015, § 43; *Krlić against EULEX*, no. 2012-21, 26 August 2014, § 23; *Y against EULEX*, no. 2011-28, 15 November 2012, § 35).
72. The Panel has already had occasion to note that the EULEX mission is not a State and that 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 the Panel's decision in *A,B,C,D against EULEX* nos 2012-09 to 2012-12, 20 June 2013, § 50; *K to T against EULEX*, quoted above, § 53; compare also HRAP decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, §35).
73. The Panel also takes notice of the difficulties necessarily involved in the investigation of crimes in a post-conflict society such as Kosovo (see *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February

2011, § 70; HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, pars 44 and 62 et seq.). Those difficulties should not, however, serve to camouflage or justify failures that are not in any meaningful manner connected with those. The Panel will, therefore, evaluate in each case whether a particular investigative step that was normally open would have been rendered impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation.

74. Expectations placed upon EULEX's ability to investigate and resolve complex criminal matters should therefore be realistic and not place upon the mission a disproportionate burden that its mandate and resources is not able to meet (see HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, §§ 70-71). In each case, the Panel is therefore expected to review whether there were concrete and real obstacles that might have undermined the possibility for EULEX to conduct a prompt and effective investigation of a case. Such an evaluation is not intended to justify operational shortcomings unrelated to concrete and demonstrable challenges.
75. In every case, in particular cases of this seriousness, the investigative authorities are expected to act with reasonable diligence and expeditiousness and to invest resources commensurate with the necessity and possibility of resolving the case. Whilst no investigative authorities may be expected to resolve all cases brought before it, it is expected to act with such diligence, promptness and effectiveness as reflect the gravity of the matter being investigated (see *Varnava and Others v. Turkey* [GC], § 191, ECHR 2009; *Palić v. Bosnia and Herzegovina*, quoted above, § 63). A strict commitment and attachment to those standards is particularly important for a Rule of Law mission that is intended to serve as example of society's commitment to ending impunity and building into it a sense of accountability for serious violation of rights. Any standard short of that one would risk creating a sense of acquiescence with impunity and disregard for victims' search for justice and accountability (HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, § 80).
76. In the present context, there is no question that investigating the fate of the killed and disappeared – regardless of religion or ethnicity – must be and must remain an operational priority for EULEX as a rule of law mission for which it must be provided with adequate resources.

*Sufficient temporal connection with the underlying conduct – The Panel's competence *ratione temporis**

77. As noted above, the HoM submits that the Panel lacks jurisdiction *ratione temporis* over the cases nos 2014-11 and 2014-13, as there is no sufficient temporal connection between the underlying conduct and



the filing of the complaint with the Panel (see para. 52 above) For reasons outlined below, the Panel rejects this line of argumentation.

78. First, the complaints pertain not to the actual killings of the complainants' relatives but to what they consider to be an on-going failure to fully and effectively investigate their cases. In that sense, the complaints pertain to alleged violations of the procedural, as opposed to substantive, limbs of Articles 2 and 3 (in addition to violations of Articles 8 and 13 of the Convention).
79. Secondly, the Panel notes that the complainants never desisted from pursuing their claim. For that purpose, they solicited various authorities (domestic and international, including UNMIK, the British Government, various branches of EULEX), which they thought could help them obtain relevant information. The fact that a succession of authorities followed each other in investigating their cases, not always with great clarity as regards their respective responsibilities under the successive complex legal situations of the international authorities and the emerging authorities in Kosovo cannot in fairness be laid at the door of the complainants.
80. Thirdly, the Panel notes that, even though no investigations in the cases at issue are pending at the moment and the competence of EULEX Prosecutors to investigate may have been limited under the amended Law on Jurisdiction, EULEX was involved in the investigations of this matter (see pars 13 and 27 above). Such conduct indisputably comes within the competence, *ratione temporis*, of the Panel. For the purpose of guaranteeing the effective protection of the complainant's rights, this period cannot meaningfully be separated from the investigation that has been conducted up to this point (compare *Thaqi against EULEX*, no. 2010-02, 14 September 2011, § 85-89). It was therefore for the Mission to ensure that, whilst competent over these cases, they made diligent and timely use of their resources to investigate these.
81. Based on the above, the Panel is of the view that it has jurisdiction *ratione temporis* over the cases as there exists a "genuine connection" between the alleged violation of the complainants' rights and the Panel's jurisdiction (*Thaqi against EULEX* case, quoted above).

#### *The Panel's competence ratione materiae*

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

83. As a preliminary matter, the Panel notes that, the present complaints pertain not to the acts or inaction of KFOR or UNMIK, but to those said to be attributable to the Mission. The Panel's competence is limited to those alleged acts and omissions that are attributable to the Mission in the exercise of its executive mandate.
84. Regarding its competence *ratione materiae*, the Panel first notes the HoM's submissions which provide that EULEX Prosecutors have a general competence over the sort of cases underlying the complaints (see para. 47 above) The Panel also takes notice of the HoM's acknowledgement of the importance of the rights guaranteed under Articles 2 and 3 of the Convention as are alleged to have been violated in this case ("EULEX is committed to ensuring that all of its activities respect international standards of human rights" and recognizes "the fundamental character and importance of the rights protected under Articles 2 and 3 of the ECHR as well as the procedural obligations related to those rights").
85. Regarding the Mission's competence to investigate these particular cases, the Panel notes the following. Article 5 of the Law on Jurisdiction provides for exclusive competence of EULEX Prosecutors to investigate and prosecute, among others, war crimes and crimes against humanity. Whilst there could be some discussion as to whether crimes committed in the aftermath of an armed conflict could qualify as war crimes, there is no dispute that they could legally amount to crimes against humanity. On that basis already, these crimes would have come within the competence of EULEX Prosecutors on the basis of Article 5 of the Law on Jurisdiction.
86. Moreover, Article 8 of the Law on Jurisdiction pertaining, *inter alia*, to kidnapping and murder and Art 11-12 of the Law on Jurisdiction pertaining to hate-motivated crimes would have provided an alternative legal basis for EULEX prosecutors to investigate these cases. This is in fact conceded by the HoM's response, who noted that EULEX prosecutors would have had shared competence over cases which could not be considered war crimes but which would fall under regular chapters of the Criminal Code.
87. In the Panel's opinion, the provisions cited above clearly provided a sufficient legal basis giving EULEX Prosecutors (exclusive or shared) competence to investigate the cases.
88. The Mission's *obligation* to investigate these cases arises not from these provisions which set out EULEX Prosecutors' jurisdictional competence over these cases, but from Articles 2-3 of the European Convention, which mandates the Mission to guarantee the effectiveness of these rights in the context of its executive function (*McCann and Others v. the United Kingdom*, cited above, §161; *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, § 102).

89. The HoM also argued that the EULEX Prosecutors never became competent to investigate these cases where the case file did not formally reach them. The Panel cannot accept these submissions for at least two reasons. The first is that it is the responsibility of the Mission to ensure that it organises itself in such a way as to guarantee the effective protection of human rights in the exercise of its executive mandate. The Panel has already noted in earlier cases that a mission such as EULEX is expected to organise its records and the transfer thereof in such a way that it is able to guarantee in all circumstances the effective protection of the rights of those concerned by those files (*Becić against EULEX*, 2013-03, 12 November 2014, §§ 58–60). The second reason is that the effective protection of these rights cannot depend on the particular arrangement put in place by UNMIK and EULEX in regard to the transfer of case file. The Mission was duly informed by the complainants of the existence of such cases. From the point of view of human rights law, the Mission’s responsibility to investigate these cases did not and could not depend on the formal submission of a case “live” case file by UNMIK. It was the Mission’s own responsibility to effectively review and investigate these cases when they were brought to its attention.
90. Lastly, the HoM submits that the new legislation that entered into force on 7 May 2014 has “considerably reduced the possibility for EULEX Prosecutors and Judges to exercise executing functions in new cases”. The Panel notes, however, that Article 7(a) of the Law on Jurisdiction provides for “authority of EULEX prosecutors in extraordinary circumstances”: “In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority.” The HoM has failed to explain why this provision would not provide an adequate legal basis on which EULEX Prosecutors should act, in particular in cases of this sort where neither UNMIK nor local authorities conducted effective investigations of the cases.

#### *Compliance with the 6-months rule*

91. Pursuant to Rule 25, paragraph 3, of the Panel’s Rules of Procedure, a complainant is required to file a complaint within six months from the act, decision or conduct which is said to amount to or involve a violation of his/her rights (see, e.g., *Gashi v EULEX*, no. 2013-22, 7 April 2014, § 10; *Thaqi v EULEX*, cited above, § 51).
92. As noted above, the HoM submitted that the complainants in cases 2014-11 and 2014-13 had failed to comply with this procedural requirement.
93. The HoM’s submissions on that point appear to be based on a misunderstanding as to what the complaints pertain to. Whilst the complainants’ relatives were probably killed in 1999, the alleged

violations of rights relevant to the present complaints do not pertain to those events but to an alleged subsequent – and on-going – failure on the part of the authorities to properly investigate the circumstances of those deaths.

94. The HoM also refers to case-law from the European Court of Human Rights which, he says, supports his position. In particular, the HoM refers to the case of *Varnava and Others v. Turkey* [GC], where the Court specified that “*where a death has occurred, applicant relatives are expected to take steps to keep track of the investigation’s progress, or lack thereof, and to lodge their applications with due expedition once they are, or should have become, aware of the lack of any effective criminal investigation (...). The same principles have been applied, mutatis mutandis, to disappearance cases (...)*”.
95. The Panel notes that complainants are expected in principle to pursue remedies available to them with some vigour and to lodge their complaint with due expedition (see, e.g. *Bulut and Yavuz v. Turkey* (dec.), no. 73065/01, 28 May 2002 and, *a contrario*, *Eren and Others v. Turkey* (dec.), no. 42428/98, 4 July 2002, and *Üçak and Kargili and Others v. Turkey* (dec.), nos. 75527/01 and 11837/02, 28 March 2006).
96. In this particular case, the complainants do not appear to have taken any meaningful steps until 2013 to pursue all remedies available to them. No explanation has been put forth to justify that inactivity.
97. Four factors have led the Panel, however, to consider this matter further: first, the rights involved in these cases are among the most important fundamental rights guaranteed by international human rights law. Some of them are absolute and suffer no exception (Article 15 (2) of the Convention; see also *McCann and Others v. the United Kingdom* judgment of 27 September 1995, Series A no. 324, §147; *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, § 163). Secondly, the competence of EULEX Prosecutors to investigate alleged violations of these rights is independent of any complaint filed by the victims or their relatives so that there was a legally-grounded expectation that they would look into this case regardless of the complainant’s actions, which they, in fact did. Thirdly, the thorough and effective investigation of this category of cases is central to building a sense of accountability and care for the rule of law in any post-conflict society. The responsibility to deal with these cases belongs to society as a whole and not just to those most directly affected by them. Finally, the Panel recalls that according to the established case-law of the European Court of Human Rights, relating to cases where a complainant first avails themselves of a domestic remedy and only at the later stage becomes aware, or should have become aware, of the circumstances which make that remedy ineffective. In such a situation, the six-month period might be calculated from the time when the complainant becomes aware, or should have become aware, of these circumstances (see *Brunner v.*

*Turkey* (dec.), no. 10/10; *Varnava and Others v. Turkey* [GC], cited above, § 157). On that basis, the Panel considers that it is in the interests of justice that it should consider the complaint as regard its admissibility.

98. In addition, complaints nos 2014-11 and 214-13 were lodged with the Panel on 11 March 2014. The complainants received their last communications from SPRK, respectively on 9 October and 20 September 2013. These, in the Panel's view, could fairly be regarded as the points from which the six-month deadline started to run as it is from that date that the complainants could realise that no effective investigation would be conducted concerning their relatives' death.
99. For the reasons stated above, the complaint may be said to have been filed on time.
100. Based on the above, the Panel is satisfied that all relevant jurisdictional requirements are met for the case to be declared admissible.

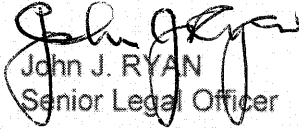
**FOR THESE REASONS, THE PANEL UNANIMOUSLY**

**DECLARES ADMISSIBLE**, without prejudging the merit of the matter, the complaints with regard to alleged violations of Articles 2, 3, 8 and 13 of the European Convention of Human Rights; and

**SEEKS THE FOLLOWING CLARIFICATIONS** from the parties and invites them to make further submissions in relation to those if they wish:

1. Would EULEX Prosecutors be competent to investigate and, as the case may be, prosecute these cases pursuant to the "exceptional circumstances" of Article 7(A) of the amended Law on Jurisdiction and, if so, what factors should be relevant to their decision whether to act in a particular case?
2. Did the Mission take steps to review cases transmitted by UNMIK that were "inactive" and, if so, what steps? Did EULEX Prosecutors have any means to access the records or files of cases regarded by UNMIK as "inactive"?
3. Have any of the rights of the complainants under Article 2, 3, 8 and 13 of the Convention been violated by EULEX?

For the Panel,

  
John J. RYAN  
Senior Legal Officer



  
Magda MIERZEWSKA  
Presiding Member