



DECISION ON ADMISSIBILITY

Date of adoption: 29 September 2015

Case No. 2014-34

Rejhane Sadiku-Syla

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 Guénaël 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:

PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 4 July 2014.

2. On 27 August 2014, the Panel decided to give notice of the complaint to the Head of Mission (HOM) of EULEX Kosovo, inviting him to submit written observations on the complaint. It was also decided to examine the merits of the application at the same time as its admissibility (pursuant to Rule 30 paras 1 and 2 of the Rules of Procedure of the Panel, hereafter ROP).
3. The observations of the HOM were received on 12 November 2014 after which they were communicated to the complainant for her additional observations.
4. On 1 December 2014, the complainant sent additional observations, which were in turn sent to HOM for information.

THE FACTS

I. CIRCUMSTANCES OF THE CASE

5. On 7 December 2000, at around 10:30 a.m., Mr Syle Sadiku, the father of the complainant, disappeared from his house in the northern part of Mitrovica, when he was allegedly attacked by a group of armed persons said to have been of Serbian ethnicity. The attack was witnessed by the complainant's sister who managed to escape and who was later evacuated by French KFOR troops. Since that date, the complainant has had no information about the whereabouts and fate of her father.
6. Between 8 December 2000 and 17 February 2001, French KFOR troops and UNMIK police took a number of witness statements from three unspecified family members of the disappeared. An aerial search of the area was also ordered. Those investigative steps were unsuccessful and Mr Sadiku or his remains have not been found. The case remained open but inactive.
7. In December 2008, the UNMIK database, their files and archives were transferred to the EULEX Department for Forensic Medicine (DFM). The case file concerning the disappearance of the complainant's father includes the French KFOR attendance report from the scene of the incident and UNMIK police incident report including three witness statements.
8. It would appear, however, that the case file was not handed over to EULEX Prosecutors by UNMIK. There is no information concerning the case in the EULEX Prosecutors' database.
9. On 6 December 2013, the complainant submitted a letter to the EULEX Head of Mission (HoM) asking for information on the

circumstances of the disappearance of her father and inquiring with EULEX on any investigative or prosecutorial steps taken in this case.

10. On 20 December 2013, the complainant received a reply from the EULEX Office of the Chief of Staff. It stated that the EULEX Department of Forensic Medicine had confirmed that the remains of the complainant's father were unaccounted for. Therefore, the case remained active and open in DFM. However, the letter did not address the complainant's inquiries regarding investigative or prosecutorial steps taken in this case.
11. On 5 February 2014, the complainant sent a second letter to the HoM seeking clarification on the obligation of EULEX prosecutors to conduct an effective criminal investigation into the case and submitting further questions regarding various procedural aspects of the investigation.
12. On 14 February 2014, the Office of the Chief of Staff sent a reply in which he said that he could only reiterate the information provided in his letter of 20 December 2013.
13. On 26 March 2014, the complainant submitted a letter to EULEX Prosecutors of the Special Prosecution Office of the Republic of Kosovo (SPRK) formally requesting an investigation into the circumstances of the disappearance of her father.
14. On 3 April 2014, the complainant received a reply from the Head of SPRK stating that their database did not contain any information in relation to the case. He recommended that the complainant should contact the EULEX Mobile Team or the Basic Prosecution Office in Mitrovica to verify if they had information on the case.
15. On 22 April 2014, the complainant submitted a request to the EULEX Mobile Team of prosecutors with a request to investigate the disappearance of her father.
16. On 13 June 2014, the EULEX Mobile Team of Prosecutors informed the complainant that the "*EULEX Prosecution Office in Mitrovica database does neither contain any information on the case nor information about actions that might have been carried over in this case*". The Mobile Team also indicated that the matter did not fall within the scope of competences of the EULEX Prosecution Office as it related to a criminal matter which should be reported to the Basic Prosecution Office in Mitrovica, to which they had referred the case.

II. RELEVANT APPLICABLE LAW

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 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

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 (as applicable as of 31 May 2014)

.....

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);

.....

Criminal Code of the Republic of Kosovo

Article 106 Statutory limitation on criminal prosecution

1. Unless otherwise expressly provided by this Code, the criminal prosecution may not be initiated after the following periods have elapsed.

1.1. thirty (30) years from the commission of a criminal offense punishable by life long imprisonment;

1.2. twenty (20) years from the commission of a criminal offense punishable by imprisonment of more than ten (10) years;

1.3. ten (10) years from the commission of a criminal offense punishable by imprisonment of more than five (5) years;

1.4. five (5) years from the commission of a criminal offense punishable by imprisonment of more than three (3) years.

1.5. three (3) years from the commission of a criminal offense punishable by imprisonment of more than one (1) year; and

1.6. two (2) years from the commission of a criminal offense punishable by imprisonment up to one (1) year or punishment of a fine.

....

Article 111 Non-applicability of statutory limitation for crimes against international law and aggravated murder

1. No statutory limitation shall apply to the offenses of genocide, war crimes, crimes against humanity, or other criminal offenses to which the statutory limitation cannot be applied under international law.

2. No statutory limitation shall apply to the offense of aggravated murder.

III. COMPLAINTS

17. The complainant submits that EULEX violated her rights under Articles 2 and 3 of the European Convention on Human Rights (the Convention) under their procedural head.

18. In particular, the complainant states that EULEX SPRK and the EULEX Prosecution Mobile Team have failed to initiate an investigation in accordance with Kosovo law and EULEX's mandate, have unduly delayed the investigative process and have referred the case to local prosecutors thereby neglecting the seriousness of the case, the geographical location of the crime (northern Mitrovica) and the war crime and inter-ethnic elements of the crime. Therefore, it is suggested that the EULEX Prosecution had an obligation to fully and effectively investigate the case from the moment it was registered with the EULEX Department for Forensic Medicine and that it culpably

failed to do so. This could also raise issues pursuant to Articles 8 and 13 of the Convention.

THE LAW

Submissions by the parties

19. In his submissions, the Head of Mission (HoM) stated that the EULEX Prosecutors only became aware of the case in 2013 when the complainant made her inquiry. He explained that, from 9 December 2008, EULEX Prosecutors received from UNMIK only "active" investigative files handled beforehand by their prosecutors, that is, files related to ongoing investigations at the date of handover. Cases which had been terminated, dismissed or otherwise closed were archived in the local Kosovo Prosecution offices.
20. The HoM further submitted that EULEX did not take any investigative steps in the case, as there was no open investigation within EULEX Police or Prosecution and no open investigation file that had been transferred from UNMIK to EULEX.
21. The HoM further commented on EULEX's competence to deal with the case. He submitted that, before the 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 the case, should it be classified as kidnapping, hostage-taking or murder. According to him, due to the fact that the incident occurred after the conflict ended, the case cannot be considered a war crime, in which case EULEX would have exclusive competence. The HoM adds that the amendments to the Law on Jurisdiction reduced the possibility for EULEX Prosecutors to exercise executive functions in new cases. As no investigations was initiated in the case before the amendments came into force, the case is not considered ongoing, and therefore falls, in principle, outside of EULEX's jurisdiction.
22. The HoM noted, however, that the case remained under the competence of EULEX Department for Forensic Medicine experts in charge of the missing persons' cases.
23. In addition, the HoM provided a number of observations regarding the admissibility of the complaint. He submitted that EULEX's main task is to support local authorities while retaining some limited executive functions. Therefore, its responsibility to protect human rights cannot be equated with that of a state.
24. The HoM also submitted that the Panel is competent to examine only alleged violations of human rights by EULEX so that complaints

concerning actions or inactions of KFOR, UNMIK or Kosovo authorities fall outside its competence. According to the HoM, the present case has not been under investigation by EULEX Prosecutors or EULEX Police and should therefore be rejected in accordance with Rules 25 par. 1 of the Panel's Rules of Procedure.

25. As regards the Panel's material competence, the case did fall within the ambit of EULEX's executive mandate before it changed in June 2014, as it concerned a case of missing person. However, it never formally reached EULEX Police or EULEX Prosecutors and no executive acts have been performed by them that could have affected the complainant's rights. Currently, it is said to be within the exclusive competence of the Kosovo authorities.
26. Further, the HoM submitted that the Panel examines only complaints on alleged violations of human rights which occurred after 9 December 2009. The complainant's father disappeared in 2000. The HoM cited to the Panel's findings in *Thaqi against EULEX* case (no.2010-02) that "*there must be a genuine connection between the death and the date marking the beginning of the Panel's jurisdiction for the procedural obligations imposed by Article 2 to come into effect. In practice, this means that a significant proportion of the procedural steps required by this provision have been, or should have been, carried out after the critical date*". The HoM pointed to the fact that the case was dormant for several years and that no new information has come to light after the handover of cases from UNMIK to EULEX. The significant proportion of procedural steps required was or should have been carried out by UNMIK, before that date. 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.
27. The HoM also submitted that the case was lodged outside of the six-month time limit set out in the Panel's Rules of Procedure. The HoM relied on the case-law of the European Court of Human Rights, in particular *Varnava and Others v. Turkey* [GC], where the Court considered 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 (...)*". The HoM submitted that EULEX became operational by the end of 2008, the handover of UNMIK files was finalised at the beginning of 2009 and the Panel was established in October 2009. According to the HoM, the complainant could have contacted EULEX sooner than in December 2013. The HoM concluded that since the complainant failed to seize the Panel within the relevant 6-months limit, the case should be declared inadmissible.

28. In reply to the HoM's submissions, the complainant dismissed his argument that the disappearance of her father could not be considered a war crime. She quoted Article 1 of the Law no.04/L-023 on Missing Persons in Kosovo, which states that a person "*reported missing during the period [between] 1 January 1998 [and] 31 December 2000*" is considered a missing person "*as a consequence of the war in Kosovo during 1998-1999*". As the applicant's father disappeared prior to 31 December 2000, she submitted that there was a statutory presumption that his disappearance was sufficiently connected with the conflict in Kosovo to amount to a war crime. Furthermore, she pointed to a letter of 20 December 2013 in which EULEX declared: "*We understand the pain felt by the families and friends of the victims and the missing persons from the war ...[and] the adjudication of war crimes remain[s] one of EULEX's key priorities*". The complainant regards this as an indication of the Mission's understanding that this act could constitute a war crime. The complainant also argued that the crime against her father was part of a systematic campaign of enforced disappearances in Kosovo and, as such, constituted a crime against humanity falling within the competence of EULEX. It also had a character of an inter-ethnic crime, which EULEX is obliged to investigate and prosecute under Article 3 of the Council Joint Action and Article 11 of the Law on Jurisdiction.
29. The complainant submitted that any possible division of tasks between various offices of EULEX and the lack of communication between them could not justify EULEX's evading its obligation to effectively investigate the case from the moment it became aware of it. Furthermore, an effective investigation by EULEX remains essential in remedying the violation of the complainant's rights.
30. The complainant concluded that, unless EULEX uses all possible means at its disposal in order to comply with its obligation of investigation, the applicant's rights under Articles 2 and 3 of the ECHR, as well as the procedure before the Panel for protection of those rights would remain theoretical and illusory. The complainant therefore requested the Panel to instruct EULEX to make use of Article 7 (a) of the Law on Jurisdiction, which speaks of the possibility of a case being assigned to EULEX and other means available to investigate the case effectively. The complainant also seeks compensation for the harm done to her.

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

31. 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.

32. 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.
33. 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.
34. 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).
35. The Panel has also 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*, cited above, § 53; compare also HRAP decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, §35).
36. The Panel also takes notice of the difficulties necessarily involved in the investigation of serious 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, cited above, pars 44 and 62 et seq.). Those difficulties should not, however, serve to camouflage or explain failures that are not in any meaningful manner connected with the shortcomings of an investigation. The Panel will, therefore, evaluate in each case whether a particular investigative step that was normally open would have been rendered impossible or impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation.
37. Expectations placed upon EULEX's ability to investigate and to resolve complex criminal cases should therefore be realistic. The Panel would therefore resist placing 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, cited 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, but to ensure that the Mission is not expected to do more than what its mandate and resources would reasonably allow for.

38. In every case, in particular in cases of this seriousness, the investigative authorities are expected to act with reasonableness 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, they are expected in every case 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*, cited above, § 63). A strict commitment and attachment to those standards is particularly important for a Rule of Law mission such as EULEX that is intended to serve as example of society's commitment to ending impunity and to building a strong sense of accountability for serious violation of human rights. Any standard short of that one would risk creating a sense of acquiescence with impunity and disregard for victims' legitimate search for justice and accountability (see HRAP decision in cases nos 248/09, 250/09 and 251/09, cited above, § 80).
39. In the present context, there can be little argument that investigating the fate of the disappeared – regardless of religion or ethnicity – must remain an operational priority for EULEX as a Rule of Law mission for which it must be provided with adequate resources.

Compliance with the 6-months rule

40. 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).
41. As noted above, the HoM submitted that the complainant had failed to comply with this procedural requirement.
42. The HoM's submissions on that point appear to be based on a misunderstanding as to what the complaint pertains to. Whilst the complainant's relative disappeared on 7 December 2000, the alleged violation of rights relevant to the present complaint does not pertain to that event but to an alleged subsequent – and on-going – failure on the part of the authorities to properly investigate the circumstances of that disappearance.

43. 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 (...).*”
44. 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 Kargılı and Others v. Turkey* (dec.), nos. 75527/01 and 11837/02, 28 March 2006.
45. In this particular case, the complainant does not appear to have taken any meaningful steps between 2001 and 2013 to pursue all remedies available to her. No explanation has been put forth to justify that inactivity.
46. Three factors have led the Panel, however, to consider this matter further: first, the rights involved in this case 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; *Vo v. France* [GC], no. 53924/00, § 88, ECHR 2004-VIII). 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. 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. On that basis, the Panel considers that it is in the interests of justice that it should consider the complaint as regard its admissibility.
47. In addition, the Panel considers that the complainant might have had a good faith basis to believe (albeit wrongly) that the case was still being investigated during this period of time. Between December 2000 and February 2001, statements were taken from witnesses. Starting in December 2013 and all the way through to 13 June 2014, the complainant endeavored to obtain from EULEX information about this case and about the state of the investigation. During that period, the complainant could legitimately assume that something was being

done about this case. The answer of 20 December 2013 from the Office of the Chief of Staff would have given her hope that the case was still open and under investigation. Only through the 13 June 2014 letter from the EULEX Mobile Team of Prosecutors would the complainant have been informed of the Mission's position that it did not regard itself as competent in this matter. This, in the Panel's view, could fairly be regarded as the point from which the 6-month deadline started to run.

48. For the reasons stated above, the complaint has been filed on time.

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

49. The HoM submits that the Panel lacks jurisdiction *ratione temporis* over this case absent a sufficient temporal connection between the underlying conduct and the filing of the complaint with the Panel. The Panel disagrees.
50. The HoM points to the fact that the complainant's husband disappeared long ago and before EULEX was created. This, however, does not mean that the Panel would not be competent to investigate this case. The conduct that is indeed under scrutiny in this case (an alleged failure on the part of the Mission to investigate this case) is one that started at least in December 2013 (if not earlier) and which is said to be on-going up to this point. In that sense, it falls right within the temporal scope of competence of the Panel
51. The Mission's connection to this case is further highlighted in the present case by the fact that its forensic arm has been and continues to be seized of this matter since 2008 when the case file was communicated by UNMIK to EULEX Department for Forensic Medicine (DFM). At no point since that time up until 13 June 2014 was the complainant told that the Mission was not and would not be investigating this case. Up until that point, the complainant could legitimately consider that the Mission would be investigating this case and she pressed for this to happen.
52. Based on the above, the Panel is satisfied that there is a sufficient and genuine connection between the underlying conduct relevant to this case and the mandate of the Mission (and competence of the Panel) so that the Panel declares itself competent *ratione temporis* to consider the merit of this case.

*EULEX's competence over the alleged crime and the Panel's *ratione materiae**

53. The HoM also challenges the admissibility of this case based on the view that this case did not come within the competence of EULEX

Prosecutors so that no act or failure could be imputed to the Mission that contributed to the violation of the complainant's rights. The Panel does not agree with this analysis.

54. As a preliminary matter, the Panel notes that, contrary to the HoM's submissions (Response, p 11), the present complaint pertains, not to the acts/inaction of KFOR/UNMIK, but to those said to be attributable to the Mission. The Panel's competence is likewise limited to those alleged acts and omissions that are attributable to the Mission in the exercise of its executive mandate.
55. Regarding its competence *ratione materiae*, the Panel notes as a preliminary matter the HoM's submissions which clearly provide for the fact that EULEX Prosecutors have a general competence over this sort of cases:
- The HoM has taken notice of the importance of protecting the rights guaranteed by 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" (response, p 10) 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" (ibid)).
 - EULEX's general competence over cases of disappearance is in fact conceded by the HoM (Response, p 4: "Missing person as such are not mentioned in the provision [Article 3(d) of the 2008 Joint Action], but naturally EULEX experts working in the DFM have been involved in finding and solving the fate of the Missing Persons.").
 - The HoM has also pointed to the fact that the Mission has been engaged in this matter through the DFM ("In practice the EULEX experts within DFM have been responsible for the work of the Identification, Coordination and Outreach Division in charge of the cases of 'Miss[ing] Persons'." (Response, p 6); and Response, p 7 (noting that the case "has been under the competence of the EULEX DFM experts in charge of the missing persons cases and it continues to be under their competence even after the change of the mandate").
 - The HoM has also made it clear that, had new information become available, the Mission could have 'activated' this case, thereby implicitly acknowledging the Mission's general competence over the case (HoM's response, p 11: "In practice the case has been inactive for years due to lack of any reasonable suspects or leads to find the complainant's father before the case has been handed over to EULEX. The case could become active again within DFM in a situation where some mortal remains would be found which would match the information and DNA examples contained in the database of this particular case. However, as it was argued above, the criminal case has fallen within the primary competence of the

Kosovo police and prosecutor and [is] currently in the exclusive competence of the Kosovo authorities.”).

56. These submissions and the necessary conclusion that EULEX Prosecutors were competent in principle and empowered to investigate this case are further supported by the relevant legal provisions. First, leaving aside the question of whether this act could have qualified as a war crime, the conduct in question does *prima facie* bear indications that it was ethnically motivated so that it would have come within the realm of “other serious crime” under article 3(d) of the 2008 Joint Action over which EULEX Prosecutors have competence.
57. Article 8 of the Law on Jurisdiction pertaining to kidnapping, hostage-taking and murder and Art 11-12 of the Law on Jurisdiction pertaining to hate-motivated crimes would also have provided a valid legal basis for EULEX prosecutors to investigate this case. This is in fact conceded by the HoM (Response, p 7: “EULEX prosecutor would have had either a shared competence or could have had a subsidiary competence over the present case, if it were classified as a kidnapping, hostage-taking or a murder.”).
58. The HoM argues, however, that these provisions do not “establish an inherent obligation on EULEX Prosecutors to act”. However, the question here is not one of “obligation”, but of jurisdiction or competence of EULEX Prosecutors to investigate this matter. And the provisions cited above clearly provided a sufficient legal basis giving EULEX Prosecutors authority to investigate this case. The Mission’s *obligation* to do so arises, for present purposes, not from these provisions, but from Articles 2-3 of the European Convention, which mandates those bound by the Convention to investigate allegations of violations of these rights (*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). In that sense, the jurisdictional competence (“possibility”) that these provisions provide are sufficient for the purpose of establishing the Panel’s competence over this case.
59. The HoM raises another “exception” to the competence of EULEX Prosecutors, namely, the application of the statute of limitation over acts that would amount to kidnapping or hostage-taking. The statute of limitations over such acts appears to be 10 to 20 years depending on the circumstances of the case (Articles 106, 175 and 194 of the Criminal Code of Kosovo). The Panel first notes that the HoM does not raise such an exception in relation to conduct that would amount to murder and/or ethnically-motivated crimes so that this aspect of the case would not be affected. Secondly, even if the underlying conduct was considered in whole or in part to amount to kidnapping or hostage-taking, EULEX’s responsibility to investigate would only have been extinguished some time in 2010. Its failure to investigate the

case up to that point would still raise issues under Articles 3, 8 and very possibly Article 13 of the Convention. Moreover, the Panel considers that it is extremely unlikely that a person kidnapped or taken hostage and missing for 16 years would still be alive. Aggravated murder (aggravated because of potential ethnic motive) does not fall under any statutory limitation (see Article 111 of CPC). It follows, the murder and inter-ethnic aspects of this case would remain un-affected with the passage of time. In those circumstances, the Panel does not accept that the statute of limitations would provide any bar to its competence to consider this matter on its merit.

60. Two other arguments must be considered. The first is that EULEX Prosecutors never formally became competent to investigate this matter as the case file did not formally reach them on time. 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.
61. Secondly, the claim that the case never reached the Mission is contradicted by the fact that the record of this case has been within the custody of the DFM since at least December 2008. Since the case was in a database to which EULEX Prosecutors had access, this information may be said to have been constructively in their custody. In the diligent exercise of their responsibilities, they should and could have obtained information pertaining to that case. 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). Furthermore, in a case of that importance, it is not unreasonable to expect that EULEX experts in charge of that file should have brought it to the attention of the competent investigative authorities with a view to ensure that the case was duly investigated.
62. Lastly, the HoM submits that the new legislation that entered into force on 317 May 2014 has “considerably reduced the possibility for EULEX Prosecutors and Judges to exercise executing functions in new cases” (Response, p 6, referring to the Omnibus Law that amended the Law on Jurisdiction). The Panel notes, however, that Article 7(A) 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 a case such as the present one where the local authorities do not appear to be investigating. The Panel would invite the parties to address this matter should they wish to make additional submissions in regard to the merit of this case.

63. Based on the above, the Panel is satisfied that all relevant jurisdictional requirements are met for the case to be declared admissible.

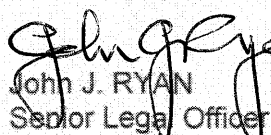
FOR THESE REASONS, THE PANEL UNANIMOUSLY

DECLARES ADMISSIBLE, without prejudging the merit of the matter, the complaint 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 this case 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