



DECISION ON ADMISSIBILITY

Date of adoption: 28 March 2019

Case no. 2016-28

S.H.

Against

EULEX

The Human Rights Review Panel, sitting on 28 March 2019 with the following members present:

Mr Guénaél METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member

Assisted by:
Mr Ronald Hooghiemstra, Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel as last amended on 15 January 2019,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint in this case was registered with the Panel on 22 September 2016.
2. By letter of 23 September 2016, the Panel informed the Mission that this case had been registered.
3. On 28 June 2017, 9 September 2017 and 17 October 2017, the Panel requested this and other complainants to provide additional information regarding their complaints.
4. On 20 October 2017, the Panel received a response from the Representative of the complainants providing additional information in relation to two cases, including the present one.

5. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), EULEX Kosovo, inviting her to submit her answers and written observations on the complaints no later than 26 January 2018.
6. The observations of the HoM were received on 16 October 2018 after which they were communicated to the complainants for additional observations.

II. COMPOSITION OF THE PANEL AND IDENTITY OF THE COMPLAINANT

7. Following the resignation of one of its permanent member, the Panel will sit in this matter with only two members in accordance with Rules 11 and 14 of the Panel's Rules of Procedure.
8. The complainant requested not to have his identity disclosed. Having considered the matter, in particular the nature of the allegations being made, the Panel is satisfied that the request should be granted.

III. FACTS

9. On 15 March 1999, at about 11.00 hours, the complainant's father left his house to visit his tailor in Kosovska Mitrovica. He was later seen having coffee in a café in north Mitrovica.
10. Later that day, at about 17.00 hours, he gave an unknown person a lift to his home in Zabare. He was allegedly accosted and abducted on his way back from Zabare to Kosovska Mitrovica by persons who were driving in a number of vehicles. These persons were allegedly bearing arms and wearing uniforms with KLA insignia. They allegedly took the complainant's father in the direction of the village of Vaganice. The complainant's father disappeared then and his fate remains unknown to this day.
11. The complainant reported his disappearance to the Regional Office of the OSCE in Mitrovica, to the ICRC and to the Ministry of Interior of the Republic of Serbia.
12. On 16 December 1999, the ICRC opened a tracing request for the complainant's father.

IV. COMPLAINT AND STANDING OF COMPLAINANT

13. The complainants refer to two particular fundamental rights reflected in the following provisions: Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) 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.
14. In light of the allegations raised in the complaint, the Panel has decided *proprio motu* to also communicate and examine the case under Articles 8 and 13 of the Convention, which guarantees rights of potential relevance to the present case.

15. The same fundamental human rights are guaranteed by a number of other international treaties, including the International Covenant on Civil and Political Rights. These rights form part of a core set of fundamental human rights that are guaranteed to all as a matter of customary international law.
16. Considering the close family relationship between the primary victim and the complainant, the Panel is satisfied that the complainant may be regarded as a secondary victim of the alleged violations and that, as such, a potential victim in accordance with Rule 25(1) of the Panel's Rules of Procedure.

V. SUBMISSIONS OF THE PARTIES

The complainant

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

Head of Mission ("HoM")

18. In her letter of 16 October 2018, the HoM submitted that as part of the hand-over of cases and case-files from UNMIK to EULEX Kosovo during the period December 2008 – March 2009, a UNMIK police missing person unit (MPU) report referring to the complainant's father was transferred to EULEX Kosovo.
19. In addition, in November 2009, an individual approached the EULEX Kosovo War Crimes Investigation Unit (WCIU) to provide information regarding crimes allegedly committed by him and other individuals and mentioning the complainant's father as one of the victims of these crimes. From the records of the Mission, it appears that the complainant was not informed by the Mission at that stage of the existence of the case.
20. In February 2010, a EULEX SPRK Prosecutor issued a 'Ruling to Initiate Investigation' against the individual who had provided information about these crimes under several counts of war crimes. Shortly thereafter, a first 'Ruling on Expansion of the Investigation' was issued to expand the charges.
21. In July 2010, a second 'Ruling on Expansion of the Investigation' was issued against seven suspects for 'war crimes against the civilian population' and 'war crimes against prisoners of war'. The complainant's father was mentioned in this ruling.
22. The name of the complainant's father also appears in the 'Ruling on Initiation of Investigation' issued in October 2010 and pertaining to war crimes against the civilian population and war crimes against prisoners of war. In this Ruling, the complainant's father was mentioned as one of the victims allegedly killed 'in cooperation by KLA members' and as one of the individuals whose bodily integrity and health was violated through repeated beatings allegedly carried out by members of the KLA whilst detained in a KLA facility in Klecke/Klecka sometime between mid-March and early April 1999.
23. In August 2010, upon the request of the EULEX SPRK Prosecutor, the individual who had approached EULEX and provided information in 2009 was declared a 'cooperative witness' by the District Court of Pristina.

24. In July 2011, the EULEX SPRK Prosecutor filed with the District Court of Pristina an indictment for 'war crimes against the civilian population and prisoners of war' against ten (10) defendants. The name of the complainant's father was mentioned as a victim in the indictment. His relatives were said to have been summoned as injured parties during court proceedings.
25. At an unspecified later date, proceedings were severed in two groups of defendants.
26. In March 2012, the District Court of Pristina in a trial panel composed of two EULEX Judges and one Kosovo Judge issued a judgment against the first group of defendants, acquitting them of all charges.
27. In May 2012, another trial panel with two EULEX Judges and one Kosovo Judge acquitted the other defendants.
28. Following appeals by the EULEX SPRK Prosecutor in November and December 2012 respectively, the Supreme Court of Kosovo quashed the judgments and remitted the cases against all ten defendants for re-trial.
29. In February 2013, the Basic Court of Pristina issued a ruling re-joining the cases.
30. In September 2013, the Basic Court of Pristina in a trial panel composed of two EULEX Judges and one Kosovo Judge again acquitted all defendants. In that judgment, the name of the complainant's father was mentioned again as a victim. This Judgment was unsuccessfully appealed and affirmed in January 2016.
31. In May 2017, the Supreme Court of Kosovo in a panel composed of two EULEX Judges and one Kosovo Judge rejected as ungrounded a Request for Protection of Legality filed by the Prosecutor in August 2016.
32. The HoM was unable to determine whether the complainant and/or other relatives of the victim had been involved in the investigation of this case by EULEX Kosovo. The HoM indicated that she was not aware of any ongoing investigation pertaining to the disappearance of the complainant's father.
33. Regarding the admissibility of this case, the HoM points to Rule 25, paragraph 1, of the Panel's Rules of Procedure, which excludes the Panel's competence over the actions of the Kosovo judiciary. The HoM does not dispute the admissibility of the case in other respects. She points out, however, that in her view, 'EULEX Kosovo police, prosecutorial and judicial authorities made considerable efforts to investigate and punish the perpetrators of the crimes of which [the complainant's father] was victim'. The HoM adds that the Mission –

 'deeply regrets that, despite its efforts, the complainant and the other close family members of the disappeared have not obtained justice'.

Finally, the HoM indicates that since Mission considers that the complaint should be declared inadmissible, it will not present observations on the merits.
34. In her submissions, the HoM also gave a detailed description of the complex process involved in the transfer of case-files from UNMIK to the Mission and the work involved in the review, organisation and categorisation of cases and case-files.

35. Regarding the Mission's efforts to investigate cases of 'enforced disappearance', the HoM noted that the notion of 'enforced disappearance' did not per se form part of the relevant normative framework underlying its work and that such crimes were investigated and prosecuted as war crimes cases.

VI. THE PANEL'S ASSESSMENT

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

36. 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.
37. Before considering the complaint on its merits, the Panel has to decide whether to proceed with the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
38. 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.
39. The Panel has already established that the actions of the EULEX prosecutors and police form part of the executive mandate of EULEX Kosovo and therefore fall within the ambit of the mandate of the Panel, (see, for instance, *K to T against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 43; *Krlić against EULEX*, 2012-21, 26 August 2014, para. 23; *Y against EULEX*, 2011-28, 15 November 2012, para. 35). This is the case of positive acts or culpable failures.
40. It should also be emphasised for present purposes that the rights subject to the present complaint are among the most important of all fundamental rights. They touch upon core interests of the alleged victims and must be guaranteed in all circumstances. The practice of "enforced disappearance" constitutes an egregious violation of these rights. This is reflected, *inter alia*, in the fact that "enforced disappearance" is now regarded and characterised as a crime against humanity, in particular, in the Statute of the International Criminal Court (Rome Statute, Article 7(1)(i)) and in the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No.05/L-053) (Article 13(1)(i)).
41. All the considerations outlined above have been taken into consideration when deciding the admissibility of the present case.
42. Based on the above, the Panel is satisfied that the Mission was competent in the exercise of its executive mandate to investigate the circumstances surrounding the disappearance of the complainant's father and did in fact do so. Considerations pertaining to the challenges and difficulties involved in the investigation of such case, in the particular context of post-conflict Kosovo, could be relevant to the Panel's assessment of the merit of the complaint. The Panel invites the parties to address this matter in their submissions if considered relevant to the resolution of the complaint.

43. The Panel also notes that the Mission did not cease to be competent to investigate this case until 14 June 2018. Up until that point, it had the executive authority to investigate and to continue to investigate this matter. This would include, *inter alia*, the period that followed the final acquittal of the ten defendants that was upheld in January 2016 during which investigation of the case – if not of the same defendants – could have been undertaken.
44. The Panel is therefore satisfied that it is competent *prima facie* to review the conduct of the Mission in relation to the present matter. Consistent with Rule 25, paragraph 1, of its Rules, the Panel is not competent, however, to review the actions of the judiciary in relation to that case.

Sufficient temporal connection with the underlying conduct and the Panel's competence ratione temporis

45. The Panel must decide whether the case was admissible at the time when it was filed with the Panel. For reasons outlined below, the Panel is satisfied that this was the case.
46. First, the Panel notes that the Mission does not dispute that the case is sufficiently connected to the Mission's mandate and that the Panel would be competent *ratione temporis* to address this matter.
47. Secondly, the presence of the requisite temporal connection is also apparent from the fact of the Mission's direct involvement with this case – through investigation and, subsequently, prosecution of a number of suspects.
48. Thirdly, the Panel notes that the violations complained of are regarded as ongoing or continuing violations of the underlying rights concerned. See, generally, D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, para. 78; Sadiku-Syla against EULEX, 2014-34, Decision on Admissibility, 29 September 2015, paras. 35 and 42. See also, in the context of Article 3, ECtHR, Kurt v. Turkey, judgment of 25 May 1998, Reports of Judgments and Decisions 1998- III, paras. 130-34; Khadzhiyev and Others v. Russia, Application no. 3013/04, judgment of 6 November 2008, paras. 120-121; Timurtas v Turkey, Application no. 23531/94, Judgment of 13 June 2000, para. 95; and Resolution No. 828 of 1984, paragraph 3 (Parliamentary Assembly of the Council of Europe).
49. The Panel notes, furthermore, that until he filed his complaint with the Panel, the complainant was not formally disabused by any of the authorities concerned that they would not continue to investigate this case with a view to ensuring that the fate of his relative would be established and the perpetrators brought to justice.
50. In those circumstances, the Panel is competent *ratione temporis* to consider the present complaint and is satisfied that the complainant complied with the 6-month deadline set by the Rules in which to file a complaint.
51. The Panel notes that it is competent *ratione temporis* to consider the actions of the Mission until 14 June 2018. After that date, the Mission ceased to have executive responsibilities over that case. Activities carried out after that date could be relevant, however, to evaluating the extent to which the Mission could be said to have fulfilled its human rights obligations.

The Panel's competence ratione materiae

52. The HoM underlined in its submissions that the Panel was not competent to evaluate the conduct of the Kosovo judiciary. This is correct and in line with the limitations placed upon the Panel's mandate. The HoM does not raise any other objection – *ratione materiae*, *personae* or *temporis* – regarding the Panels' competence *ratione materiae* over the present complaint.
53. The Panel is satisfied that, as illustrated by this case, the Mission was competent to investigate and prosecute acts of 'enforced disappearance' in the exercise of its executive mandate. See, e.g., D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015; Sadiku-Syla against EULEX, 2014-34, Decision on Admissibility, 29 September 2015; L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015.
54. The Panel notes that acts of enforced disappearance could qualify legally, *inter alia*, as war crimes, crimes against humanity or ethnic-based crimes which the Mission was competent in principle to investigate and prosecute. See, generally, Article 3 (d) of the Council joint action. See also Sadiku-Syla against EULEX, 2014-34, 19 October 2016, paras. 44-46. In *D.W. et al*, the Panel said the following, which would also apply to the present case:
- 'there was a very real possibility that those crimes and the accompanying violations of rights were based on ethnic or religious considerations thereby going further into the jurisdictional territory over which the Mission has competence. In a post-conflict environment where ethnic and religious relations might still be tense and fragile, such cases are obvious investigative priorities. This, again, does not appear from the record to have been considered relevant to the Mission's determination of "exceptional circumstances".'
- D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX, 2014-11 to 2014-17, 19 October 2016, paras. 83 *et seq*, in particular para. 85.
55. The Panel must also reiterate that the investigation of this sort of cases did not only form part of the Mission's executive mandate, but was a core and essential element thereof. In *L.O. against EULEX*, the Panel thus underlined that 'there can be little argument that investigating the fate of the 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' (*L.O. against EULEX*, case No. 2014-32, Decision and Findings, 11 November 2015, para. 47).
56. Based on the above, the Panel is satisfied that the matter came until 14 June 2018 within the competence *ratione materiae* of the Mission in the exercise of its executive mandate. As noted above, consistent with Rule 25, paragraph 1, of the Panel's Rules of Procedure, this does not include any of the acts and activities attributable to the Kosovo judiciary.

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;

ASKS THE PARTIES TO ADDRESS THE FOLLOWING QUESTIONS as part of their submissions on the merit of this case, without prejudice to the views and conclusions of the Panel:

- i. For the Mission:
 - a. Why was the complainant not informed by the Mission of the existence, general tenor and course of the investigation?
 - b. Following the acquittals of all defendants in the case, were other investigative efforts made to identify and prosecute those responsible for the disappearance of the complainant's relative? If not, why? Was any effort made, in particular, to seek to obtain other evidence?
 - c. To the Mission's knowledge, are Kosovo authorities still investigating this case? If so, at what stage is it at? Is the Mission monitoring this case?
 - d. Has the Mission taken any step (before or since 14 June 2018) in the exercise of its (new) mandate to ensure that this case should be elucidated by the local authorities?
 - e. Where it becomes apparent to the Mission that local authorities are unable or unwilling to investigate a criminal case, what are the powers and means of the Mission (if any) to seek to ensure that justice is done and that victims have access to a remedy for the violation of their rights?
 - f. Has the Mission violated or contributed to the violation of the complainant's rights under Articles 2, 3, 8 and 13 of the Convention?
- ii. For the complainant:
 - a. Where you involved in the proceedings against the ten defendants? If so, did you have any contact with the EULEX Mission or its representatives in that context?
 - b. Following the acquittal of these defendants, did you have any further contact with EULEX Kosovo in relation to this matter?
 - c. Has the Mission violated or contributed to the violation of the complainant's rights under Articles 2, 3, 8 and 13 of the Convention? If so, in what manner?
 - d. What are the consequences – personal, financial and emotional – associated with the disappearance of your relative?

ASKS THE PARTIES to make any submission on the merit of this case no later than 20 May 2019 or, if more time is needed, make a timely request to have more time by that date.

For the Panel,


Guénaél METTRAUX
Presiding Member




Anna BEDNAREK
Member