DECISION AND FINDINGS

Date of adoption: 11 September 2019

Case no. 2016-28

S.H.

Against

EULEX

The Human Rights Review Panel, sitting on 11 September 2019 with the following members present:

Mr Guénaël METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member
Ms Anna AUTIO, Member

Assisted by:
Mr Ronald Hooghiemstra, Legal Officer

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

7. On 28 March 2019, the Panel declared the case to be admissible (http://hrrp.eu/docs/decisions/2019-03-28%20Admissibility%20Decision%202016-28-signed.pdf) in relation to Articles 2, 3, 8 and 13 of the European Convention of Human Rights (hereafter, the Convention). In that Decision, the Panel asked a number of questions of the parties and asked them to provide their response by 20 May 2019. The questions were as follows:

   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 the 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?

8. On 14 May 2019, the complainant asked the Panel for an extension of time based on relevant personal considerations. The Panel granted that request and gave the complainant until 20 June 2019 to file any additional submissions regarding the merit of the case and the Panel's questions (see, above, para 7). Additional submissions were received from the complainant on 20 June 2019.

9. On 17 May 2019, the HoM submitted her responses and submissions to the Panel.

II. COMPOSITION OF THE PANEL

10. Following the resignation of one of its members, the departing member was replaced by Ms Autio upon her appointment to the Panel in accordance with Rule 14 of the Panel's Rules of Procedure. In order to ensure full familiarity with the case, Ms Autio acquainted herself with the full record of the case, including as regards its admissibility, and is therefore fully able to participate in the deliberations of this case.

III. IDENTITY AND STANDING OF THE COMPLAINANT

11. 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.

12. 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, as such, as a potential victim in accordance with Rule 25(1) of the Panel's Rules of Procedure.

IV. FACTS

13. On 15 March 1999, at about 11.00 hours, the complainant's father left his house to visit his tailor in Mitrovica. He was later seen having coffee in a café in Mitrovica.

14. Later that day, at about 17.00 hours, he gave an unknown person a lift to his home in Žabare/Zhabar. He was allegedly accosted and abducted on his way back from Žabare/Zhabar to Mitrovica by persons who were driving in a number of vehicles. These persons were allegedly bearing arms and wearing uniforms with Kosovo Liberation Army (KLA) insignia. They allegedly took the complainant's father in the direction of the village of Vaganica/Vaganicë. The complainant's father disappeared then and his fate remains unknown to this day.

15. 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.

16. On 16 December 1999, the ICRC opened a tracing request for the complainant's father.

V. SUBMISSIONS OF THE PARTIES

The complainant

17. 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") submissions on admissibility

18. Some of the submissions made by the HoM in the context of the admissibility of this case are relevant to deciding its merit. The Panel will therefore outline here in brief some of the submissions made by the HoM at an earlier stage of the proceedings.

19. In her letter of 16 October 2018, the HoM explained 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.

20. 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.

21. In February 2010, a EULEX Prosecutor of the Special Prosecution of the Republic of Kosovo (SPRK) 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.

22. 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.

23. 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 Kleçkë/Klečka sometime between mid-March and early April 1999.

24. 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.

25. 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.

26. At an unspecified later date, proceedings were severed into two groups of defendants.

27. 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.

28. In May 2012, another trial panel with two EULEX Judges and one Kosovo Judge acquitted the other defendants.

29. Following appeals by the EULEX SPRK Prosecutor in November and December 2012 respectively, the Supreme Court of Kosovo quashed the judgments and remanded the cases against all ten defendants for re-trial.

30. In February 2013, the Basic Court of Pristina issued a ruling re-joining the cases.

31. In September 2013, the Basic Court of Pristina in a trial panel composed of two EULEX Judges and one Kosovo Judges 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.

32. 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.

33. 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.

34. In her submissions on admissibility, 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 on the part of the Mission 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.

HoM's submissions on the merits of the case

36. The HoM responded to the Panel's questions (see, above, para 7) by letter of 17 May 2019.

37. In response to the first question ("Why was the complainant not informed by the Mission of the existence, general tenor and course of the investigation?"), the HoM indicated that it is

> "currently unable to determine if and to what extent the complainant was involved or informed of the investigation conducted by its competent units".

The HoM's position is that whilst it is unable to exclude that the complainant was informed of the investigation, it cannot either assert that it was not. The HoM's further invites the Panel to amend the suggestion made in the Panel's admissibility decision that the complainant was not informed of the investigation.

38. The Panel declines that invitation. Based on the records available to the Panel, there is no indication that the Mission took any step to inform the complainant of the existence, tenor or course of the investigation. It is the responsibility of the Mission, in the fulfilment of its obligations, to inform victims of human rights violations subject to its investigative competence. It is also the responsibility of the Mission to ensure that it keeps full and accurate records of those efforts. Absent any indication in those records of any efforts to reach out to and inform the complainant, the Panel infers from this that the Mission has failed to inform the complainant of the existence, tenor or course of the investigation. This is further addressed below.

39. The Panel's second question was as follows:

> "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?"

40. In response, the HoM says that EULEX did not conduct other investigative efforts following the acquittal of all defendants in the criminal case. The HoM says that under the then applicable mandate it was only competent to investigate "ongoing cases". For other cases, the Mission submits that its competence could only be triggered by "extraordinary circumstances" following a joint decision of EULEX and Kosovo competent authorities. In addition, the HoM makes the following submissions:

> "With a view to promoting increased accountability and responsibility by the competent Kosovo institutions and also for reasons of efficiency, starting from 2014 and increasingly following the 2016 latest changes to the 'Law on Jurisdiction', EULEX implemented a 'no new case policy' and concentrated its efforts on the finalization of 'ongoing cases'. Therefore, in light of the above, and taking into consideration the considerable efforts that had already been invested in the investigation of the 'Kleçka case', given the circumstances the Mission did not deem that it was in the position to do more than it had already done to investigate the case at stake. Additionally, given that the disappearance of Mr [XX] had been investigated and prosecuted by EULEX in the framework of the 'Kleçka case', it would have been illogical to put more efforts in this case when there were others ongoing. In this sense, EULEX fundamentally disagrees with the assessment of the Panel that it had executive authorities [sic] 'to investigate and continue to investigate this matter', since this possibility was purely theoretical."

These arguments will be addressed in full below.

41. Regarding the Panel's third question ("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?), the HoM indicated that it is not aware of any ongoing investigation of this case and "invites the complainant and the Panel to address this question to the competent Kosovo institutions".

42. Regarding the Panel's fourth question ("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?"), the HoM submits that EULEX's current mandate "does not in any way entitle the Mission to provide advice on individual cases or gives it authority 'to ensure' that cases are 'elucidated by local authorities'.").

43. The Panel's fifth question to the Mission was this:

> "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?"

Addressing that question, the HoM says the following: “Under its current mandate, the Mission has no power to seek to ensure ‘that justice is done and that victims have access to a remedy for the violation of their rights’.” Its role, the Mission says, is limited to supporting selected Kosovo rule of law institutions, through monitoring activities and limited executive functions. The Mission does not specify what those “limited executive functions” would consist of. The Mission then describes its monitoring function without providing much details of what this mandate would entail although it indicates that the Mission “provides its assessments and findings to Kosovo institutions and keeps other relevant EU actors informed in order to strengthen Kosovo’s advancement on its European path”.

44. Finally, regarding the question of whether the Mission has violated or contributed to the violation of the complainant’s rights under Articles 2, 3, 8 and 13 of the Convention, the HoM says that all reasonable steps were taken in relation to the investigation of this case and points to the challenges and complexities involved in the investigation of this sort of cases.

Complainant’s submissions on the merits of the case

45. On 20 June 2019, the complainant submitted additional comments in reply to the HoM’s submissions, which were forwarded for information to the Mission. In those, the complainant specifies that he has had no contact with EULEX and did not participate in the proceedings against the ten defendants; nor was he informed of the result of these proceedings. According to the complainant, this failure on the part of the Mission to inform him of the existence and course of these proceedings forms part of the violation of his rights.

46. In response to the question of the effect – personal, financial and emotional – associated with the disappearance of your relative – the complainant explained the severity of the emotional loss on him and his mother, the fact that in fear for his own security, he decided to leave the town in which he lived and thus causing him serious financial difficulties. The complainant also believes that the disappearance of his father caused the health of his mother, the disappeared’s wife, to deteriorate. The hardest thing, he added, was to live without news of his father and what happened to him and to be denied the opportunity to bury him. He adds:

> “What did my family do wrong to anyone, and now at 57 years of age I still have a status of a displaced person in another town, taken house, and without both parents, I remained convinced that my father was a victim, as well as my mother indirectly and I directly of a collateral damage of a process in which others got everything and I lost everything.”

Finally, the complainant said:

> “I sympathize with all those who were killed in a dirty war in Kosovo while I just want justice and to find the remains of my father to bury him in a peaceful and dignified way.”

47. The HoM did not respond to those submissions.

VI. THE PANEL'S FINDINGS

Executive mandate and responsibilities of the Mission

48. The actions of the EULEX prosecutors and police form part in principle of the executive mandate of EULEX Kosovo in the justice, police and customs sectors. As such, they 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 whether the underlying conduct in question consists of a positive act or a culpable failure by the Mission. See *Krlic against EULEX*, 26 August 2014, par 25.

49. 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, e.g., the Panel's decision in *A,B,C,D against EULEX,* 2012-09 to 2012-12, 20 June 2013, para. 50*; K to T against EULEX*, quoted above, para. 53; see also Human Rights Advisory Panel of UNMIK (HRAP) decision in cases nos. 248/09, 250/09 and 251/09, 25 April 2013, para. 35).

50. Expectations placed upon the ability of EULEX to investigate and resolve complex criminal cases should therefore be realistic and not place upon EULEX a disproportionate burden that its mandate and resources could not reasonably be expected to meet (L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, paras. 43 and 45, and its references to: Panel's decision in A,B,C,D against EULEX,2012- 09 to 2012-12, 20 June 2013, para 50; K to T against EULEX, 2013-05 to 2013-14, 21 April 2015, para. 53; Sadiku-Syla against EULEX, 2014-34, Decision on Admissibility, 29 September 2015, paras. 35-37; D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, paras. 72-74; see also HRAP decision in cases nos. 248/09, 250/09 and 251/09, 25 April 2013, para. 35 and paras 70-71). In each case, the Panel is therefore expected to review whether there were concrete and real obstacles that might have undermined the capacity of 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. (L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, para. 44).

51. In the assessment of the present complaint, the Panel has taken into account the difficulties necessarily involved in the investigation of war-related crimes in a post-conflict society such as Kosovo (see L.O. against EULEX, 2014-32, 11 November 2015, para. 44 and references cited therein; see also *Palić v. Bosnia and Herzegovina*, application no. 4704/04, ECtHR Judgment of 15 February 2011, para. 70; and HRAP

decision in cases nos. 248/09, 250/09 and 251/09, quoted above, paras. 44 and 62 *et seq*). Those difficulties should not, however, serve to camouflage or justify investigative failures that are not in any meaningful manner connected with the said difficulties. The Panel will, therefore, evaluate in each case whether a particular investigative step that was normally open to EULEX would have been rendered impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation (L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, para. 44).

52. Particularly relevant in assessing the adequacy of the Mission's response is the fact that its ability to fulfill its – investigative – obligations was affected by both the general circumstances in which crimes were committed and by UNMIK's conduct in the aftermath of these crimes. Crimes committed in the context of an armed conflict are almost always a challenge to investigate. The challenge often remains in the immediate aftermath of a conflict because evidence might be destroyed and the willingness and ability of witnesses to provide information might be considerably reduced in such context. The Panel has duly taken into account these challenges when making its own assessment of the Mission's response.

53. The Panel has also taken into consideration the fact that EULEX Kosovo had to confront and address the investigative legacy of UNMIK. It is apparent from the record of this case – and other cases that have come before the Panel – that UNMIK failed in many respects to fulfill its human rights obligations in relation to victims of "enforced disappearances". This was duly noted by the Human Rights Advisory Panel of UNMIK, which determined that UNMIK had violated the rights of victims of such acts on a number of occasions. It is also apparent from the Mission's submissions in the present case, where it draws attention to the poor and inadequate nature of many of the case-files that were transmitted by UNMIK to EULEX at the beginning of EULEX's mandate. The proper, diligent and organised accounting of information pertaining to the commission of such serious violations of rights is an important element of the effective protection of those rights. In light of the nature and gravity of the acts under consideration, UNMIK's record-keeping practices was inadequate. The Panel will not impute to the Mission shortcomings and defects that are to be placed at the feet of UNMIK. The Panel has taken into consideration those circumstances when assessing the conduct of the Mission and the challenges it faced.

54. In every case, in particular instances of this seriousness, 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 authority may be expected to resolve all cases brought before it, it is expected to act with such diligence, promptness and effectiveness as reflects the gravity of the matter under investigation (L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, paras. 46 and 59; see also *Varnava and Others v. Turkey*, Application no. 16064/90 et al, ECtHR Judgment of 18 September 2009, para. 191; *Palić v. Bosnia and Herzegovina*, Application no. 4704/04, ECtHR Judgment of 15 February 2011, para. 63).

55. A strict commitment and attachment to those standards is particularly important for a Rule of Law Mission, such as EULEX Kosovo, that is intended to serve as an example of society's commitment to ending impunity and building into it a sense of accountability for serious violations of rights. Any standard short of the one mentioned above would risk creating a sense of acquiescence with impunity and disregard for a victims' search for justice and accountability (L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, para. 46; Sadiku-Syla against EULEX, 2014-34, Decision and Findings, 19 October 2016, para. 37; see also *Varnava and Others v. Turkey*, Application no. 16064/90 et al, ECtHR Judgment of 18 September 2009, para. 191; *Palić v. Bosnia and Herzegovina*, Application no. 4704/04, ECtHR Judgment of 15 February 2011, para. 63; HRAP decision in cases nos. 248/09, 250/09 and 251/09, 25 April 2013, para. 80).

56. Regarding the issue of expeditiousness, the Panel wishes to note the following. Regarding its investigative obligations, the Mission is required to investigate credible allegations of human rights violations with diligence and expeditiousness, and to ensure in all cases that the investigative response of the Mission is commensurate to the gravity of the matter. In sum, the response must be such that it guarantees the effective protection of the rights at stake. See, generally, Sadiku-Syla against EULEX, 2014-34, 19 October 2016, para. 36. See also *Varnava and Others v Turkey*, Application no. 16064/90 et al, ECtHR Judgment of 18 September 2009, para. 191; *Oğur v. Turkey*, Application no. 21594/93, ECtHR Judgment of 20 May 1999, para. 88; *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, ECtHR Judgment 4 May 2001, paras. 105-09; *Douglas-Williams v. the United Kingdom*, Application no. 56413/00, ECtHR Decision of 8 January 2002.

57. When the obligation of the state or authority involves a duty to investigate, the requirement of expeditiousness applies to all stages and aspects of the investigation: its instigation, its conduct and its completion. The requirement of expeditiousness is relative in nature: it depends on the circumstances of each case, in particular the challenges posed by the case, the difficulties to access witnesses or to collect information. But investigative challenges and difficulties do not authorise procrastination, delays or unjustifiable slowness in the performance of investigative duties. This is an expression of the broader right to proceedings without undue delay, which is guaranteed to all parties to judicial proceedings. The Panel has thus pointed out that –

> "The right to a fair and public hearing within a reasonable time as understood under Article 6 (1) of the Convention is designed to protect "all parties to court proceedings….against excessive procedural delays …In addition, in criminal cases the right is designed to avoid that a person charged should remain too long in a state of uncertainty about his fate" [...]" (Maksutaj against EULEX, 2014-18, 12 November 2015, para. 57, it's quotes are from *Stogmuller v Austria*, Application no. 1602/62, ECtHR Judgment of 10 November 1969, para 5).

58. In evaluating, in a particular case, the reasonableness of time taken by the authorities to investigate alleged rights violations, a number of factors have been identified as particularly important, including these: (1) the complexity of the case, (2) the conduct

of the applicant, and (3) the conduct of the competent administration (Maksutaj against EULEX, 2014-18, 12 November 2015, para. 58, and its references to *Konig v FRG*, Application no. 6232/73, EctHR Judgment of 28 June 1978, para. 99, *Pedersen and Baadsgaard v. Denmark*, Application no. 49017/99, EctHR Judgment of 17 December 2004, para. 45; see also, Thomas Rüsche against EULEX, 2013-21, 11 January 2017, para. 59-65). An examination of the consequence of the delays on the parties involved might also provide relevant evidence of the reasonableness or otherwise of delays in the process (Maksutaj against EULEX, 2014-18, 12 November 2015, paras. 64-66 and references cited).

59. It should also be emphasized 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 the practice of "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 (Republic of Kosovo Law No.05/L-053) (Article 13(1)(i)).

60. The implications of the changes in the mandate of the Mission following the closure of the Mission in June 2018 and the implications thereof for the purpose of this case are addressed briefly below.

"Enforced disappearance" as a grave violation of the victims' fundamental rights

61. The practice of enforced disappearance is one of the most egregious sort of human rights violations. They involve the violation of not one type of right but many, including in many instances, the right to truth, the right to recognition as a person before the law, the right to liberty and security of the person and the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment, the right to an effective remedy and such conduct violates or constitutes a grave threat to the right to life. See, e.g., Sadiku-Syla against EULEX, 2014-34, Decision and Findings, 19 October 2016, para. 33; Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992; International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006.

62. Particularly important in that context is the complainant's right to truth, i.e., the right of victims to know what happened to their close relatives and the circumstances under which their relatives were made to disappear. See, in general, Desanka and Zoran Stanisić against EULEX, 2012-22, 11 November 2015, para. 67; see also *El-Masri v The Former Yugoslav Republic of Macedonia*, Application no. 39630/09, ECtHR Judgment of 12 December 2012, paras 191-193; *Orhan v. Turkey*, Application no. 25656/94, ECtHR Judgment of 18 June 2002, para. 358; *Imakayeva v. Russia*, Application no. 7615/02, ECtHR Judgment of 9 November 2006, para 164; *Velásquez Rodríguez v. Honduras*, IACtHR Judgment of 29 July 1988, para. 181; *Heliodoro Portugal v. Panama*, IACtHR Judgment of 12 August 2008, para. 244; *Anzualdo Castro v. Peru*, IACtHR Judgment of 22 September 2009, paras. 116-118; General

Comment on the Right to the Truth in Relation to Enforced Disappearance, Report of the Working Group on Enforced or Involuntary Disappearances, 2010, in particular, para. 1 (*'The right to the truth in relation to enforced disappearances means the right to know about the progress and results of an investigation, the fate or the whereabouts of the disappeared persons, and the circumstances of the disappearances, and the identity of the perpetrator(s).'*), Document A/HRC/16/48; *Set of principles for the protection and promotion of human rights through action to combat impunity* (E/CN.4/2005/102/Add.1), in particular, Principles 2-4; and, also, International Convention for the Protection of All Persons from Enforced Disappearance, adopted 20 December 2006, in particular, Preamble and art. 24(2); and, for an illustration, case of *Gudiel Alvarez et al.("Diario Militar") v. Guatemala,* IACtHR Judgment of 20.11.2012; Merits, Reparations and Costs, para. 301 (and references cited).

63. For almost two decades, the complainant has lived with the uncertainty regarding the fate of his father, what happened to him and in what circumstances he disappeared. The psychological suffering resulting from this is not just immense. It is ongoing. See 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*, EctHR Judgment of 25 May 1998, Reports of Judgments and Decisions 1998- III, paras. 130-34; *Khadzhialiyev and Others v. Russia*, Application no. 3013/04, EctHR Judgment of 6 November 2008, paras. 120-121; *Timurtas v Turkey*, Application no. 23531/94, EctHR Judgment of 13 June 2000, para. 95; Resolution No. 828 of 1984, paragraph 3 (Parliamentary Assembly of the Council of Europe); and General Comment on article 17 of the Declaration, Report of the Working Group on Enforced or Involuntary Disappearances 2000. Document E/CN.4/2001/68 (referring and commenting upon Article 17(1) of the Declaration on the Protection of All Persons from Enforced Disappearance).

64. The continuous nature of the violation of rights involved in such practice explains that the duty of the competent authorities to investigate these is a pressing and important obligation that can only be set aside or delayed in the narrowest of circumstances.

65. When it comes to investigating cases of enforced disappearance, an investigation should be started as soon as possible and delays avoided as much as possible. That is not just because of the effect of the uncertainty upon surviving relatives. It is also because evidence will disappear or get lost and memory fades. Delays in investigations are therefore likely to negatively affect the possibility of an investigation establishing the circumstances under which a person has disappeared and bring culprits to justice. For illustrations of the application of this guarantee in different contexts, see generally: *Gürtekin and Others v. Cyprus*, ECtHR Inadmissibility Decision of 11 March 2014; *Al-Skeini and Others v. the United Kingdom* [GC], Application no. 55721/07, ECtHR Judgment of 7 July 2011; *Jaloud v. The Netherlands [GC]*, Application no. 47708/08, ECtHR Judgment of 20 November 2011; *Jelić v. Croatia*, Application no. 57856/11, ECtHR Judgment of 12 June 2014; *B. and Others v. Croatia*, Application no. 71593/11, ECtHR Judgment of 18 June 2015; *Palić v. Bosnia and Herzegovina*, Application no. 4704/04, ECtHR Judgment of 15 February 2011;

Lejla Fazlić and Others v. Bosnia and Herzegovina and 4 Others, Applications nos. 66758/09, 66762/09, 7965/10, 9149/10 and 12451/10, ECtHR Judgment of 3 June 2014; *Mujkanović and Others v. Bosnia and Herzegovina*, Applications no. 47063/08 et al., ECtHR Inadmissibility Decision of 3 June 2014; *Nježić and Štimac v. Croatia*, Application no. 29823/13, ECtHR Judgment of 9 April 2015.

66. Because of the effect of such acts upon the relatives of a disappeared, it is of fundamental importance that they should be involved in the investigation of such cases to the greatest possible extent. Investigative authorities are required as a matter of human rights law to keep victims of such violations informed of the course of their investigation. In effect, this requires that they balance the rights and interests of victims to be kept informed of the progress of the investigation with the necessary degree of confidentiality that an investigation may legitimately require. Subject to legitimate considerations of confidentiality and security, victims are entitled to be sufficiently involved in- and informed of the process of investigation. Whilst the exact tenor of what must be provided to them is hard to determine in the abstract, the information provided to those most directly concerned by the investigation must be such as to enable them to satisfy themselves that the matter is being duly and properly looked into and that all relevant and reasonable efforts are being made to establish the fate of their relative and identify those responsible for it. See, generally, Desanka and Zoran Stanisic against EULEX, 2012-22, 11 November 2015, para. 66; L.O. against EULEX, 2014-32, 11 November 2015, paras. 60-61, 72-73; HRRP, Case-Law Note on the Duty to Investigate Allegations of Violations of Rights, pp 28-30; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.

67. This obligation to keep victims abreast of investigative efforts is particularly important in a case involving acts of enforced disappearance as surviving relatives might have no other source of information regarding the fate of their relative(s) and they will continue to live in the hope that the fate of their relative(s) will one day be elucidated. This, therefore, constitutes an obligation that competent investigative authorities will not easily be permitted to disregard or ignore.

Cases of "enforced disappearance" in the context of the Mission's mandate

68. The HoM does not dispute that the Mission was competent to investigate this case. It is apparent already from the various steps taken by the Mission that it in fact considered itself competent to investigate and prosecute this case. This also transpires from the fact that it kept custody of the case-file pertaining to this case until the end of the Mission's executive mandate.

69. The Panel has already determined that this sort of cases comes within the executive mandate and investigative/prosecutorial competence of the Mission. 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.

70. Where such acts are committed in the context of an armed conflict, as was the case in this instance, the conduct in question could qualify as a war crime, crimes against humanity or ethnic-based crimes over which the Mission had specific and express jurisdictional competence under its then applicable mandate. 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 in relations to this matter:

> '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".'

See 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.

71. The investigation of this sort of cases did not only form part of the Mission's 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'

See L.O. against EULEX, case No. 2014-32, Decision and Findings, 11 November 2015, para. 47. The present case will be assessed in that light.

72. In contrast, it is apparent from the record of cases coming before the Panel – including the present one – that EULEX has failed in many instances to treat this sort of cases as investigative priorities or, at the very least, to commit the time and resources necessary to conduct timely and effective investigations of those cases. See, e.g., Sadiku-Syla against EULEX, 2014-34, Decision on Admissibility, 29 September 2015, paras. 34- 39; D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, paras. 72-76; L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, paras. 43- 47, and 59-65; Sadiku-Syla against EULEX, 2014-34, Decision and Findings, 19 October 2016, paras.47; D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, Decision and findings, 19 October 2016, paras. 58, 60, 62-65, 81-82.

73. The above considerations will serve to assess the efforts made by the Mission in relation to the present case and whether these efforts may be said to be consistent with the Mission's overall mandate and its human rights obligations.

The Mission's conduct in relation to the present case

74. For reasons outlined above, the Mission is not to be assessed against standards of perfection. It faced at the time a challenging post-conflict environment. Its resources were limited and, in some respects, inadequate to the task and expectations. This required the Mission to make choices and to prioritise certain efforts over others. Furthermore, the manner in which UNMIK conducted its own "investigative" efforts and the transfer of case-files from UNMIK to EULEX greatly complicated the work of the Mission. In response, the Mission invested time, resources and energy into reviewing those records and trying to make sense of them. For these efforts, the Mission must be commended.

75. These efforts did not, however, do much to protect and guarantee the effectiveness of the fundamental rights of the complainant and his father. The Panel has identified two principal shortcomings in the Mission's conduct that have resulted in or contributed to the violation of the rights of the complainant and that of his father:

    i. Failure to fully and diligently investigate the case; and
    ii. Failure to sufficiently involve and inform victims.

Failure to inform relatives of the victim

76. It has been noted above that there is no indication on the record of the Mission having fulfilled its obligation to inform the complainant of the existence, course, and tenor of the investigation (see, para. 38 above).

77. Such a requirement is a necessary element of the protection of the rights of the victims in the investigation of such a case. See, e.g., Desanka and Zoran Stanisic against EULEX, 2012-22, 11 November 2015, para. 66, referring to L.O. against EULEX, 2014-32, 11 November 2015, paras. 60-61, 72-74; Zufe Miladinović against EULEX, 2017-02, 19 June 2019, para. 86; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.

78. This obligation is particularly important in the context of incidents of enforced disappearance where victims suffer emotionally from the absence of information regarding the fate of their loved one. See Zufe Miladinović against EULEX, 2017-02, 19 June 2019, para. 87. Highlighting the victims' right to truth in this context, the *General Comment* of the Working Group on Enforced Disappearance says the following about this matter:

> "Article 13 of the Declaration recognizes the obligation of the State to investigate cases of enforced disappearances. Paragraph 4 of Article 13 specifies that "the findings of such an investigation shall be made available upon request to all interested persons, unless doing so would jeopardize an ongoing criminal investigation." In light of the developments that happened since 1992, the Working Group deems that the restriction in the last part of this paragraph should be interpreted narrowly. Indeed, the relatives of the victims should be closely associated with an investigation into a case of enforced disappearance. The refusal to provide information is a limitation on the right to the truth. Such a limitation must be strictly proportionate to the only legitimate aim: to avoid jeopardizing an ongoing criminal investigation. A refusal to provide any information, or to communicate with the relatives at all, in other words a blanket refusal, is a violation of the right to the truth. Providing general information on procedural matters, such as the fact that the matter has been given to a judge for examination, is insufficient and should be considered a violation of the right to the truth. The State has the obligation to let any interested person know the concrete steps taken to clarify the fate and the whereabouts of the person. Such information must include the steps taken on the basis of the evidence provided by the relatives or other witnesses. While the necessities of a criminal investigation may justify restricting the transmission of certain information, there must be recourse in the national legislation to review such a refusal to provide the information to all interested persons. This review should be available at the time of the initial refusal to provide information, and then on a regular basis to ensure that the reason for the necessity that was invoked by the public authority to refuse to communicate, remains present."

See General Comment on the Right to the Truth in Relation to Enforced Disappearance, Report of the Working Group on Enforced or Involuntary Disappearances (2010), Document A/HRC/16/48, para 3; Zufe Miladinović against EULEX, 2017-02, 19 June 2019, para. 87; and, also, *I. case of the Rio Negro Massacres v. Guatemala*, IACtHR Judgment of 4.09.2012, Preliminary objection, merits, repair and costs, para. 265.

79. The Mission did not provide an explanation for its failure to keep the complainant (or any other close relative of the primary victim) informed about this case. The fact that its records are silent on that point speaks for itself.

80. This failure contributed to the violation of the complainant's rights insofar as it added to the state of uncertainty in which he found himself all through the relevant period.

Failure to investigate

81. As mentioned above, the HoM's position is that all steps that could reasonably be taken to investigate this case were indeed taken. The HoM also submitted that after the acquittal of defendants in May 2017, the Mission did not take any further investigative steps because "[a]t that moment, in line with its mandate and as reflected under the applicable Kosovo legislation, in particular, Law No. 03/L-053 – as amended, EULEX prosecutors only had authority and competence to investigate 'ongoing cases'.

Under the same law, the competence of EULEX prosecutors to investigate cases other than 'ongoing cases', could only be triggered in 'extraordinary circumstances' following a joint decision of EULEX and Kosovo competent authorities."

82. The Mission also suggested that, having investigated and prosecuted a case pertaining, *inter alia*, to the disappearance of the complainant's father, "it would have been illogical to put more efforts in this case when there were others ongoing" and expressed disagreement with the suggestion of a need to further investigate the matter "since this possibility was purely theoretical." The Panel cannot agree with these submissions.

83. As a preliminary matter, the Panel wishes to highlight the distinction between the question of *competence* to investigate and that of an *obligation* to do so. The *competence* of the Mission to investigate crimes that involve the violation of certain human rights – and the scope thereof – has been determined by a succession of domestic laws, in particular, the Law on Jurisdiction in its various iterations. As for the Mission's *obligation* to investigate these, it arises *not* from these provisions which set out EULEX Prosecutors' jurisdictional competence over these cases, but from Articles 2 and 3 of the European Convention on Human Rights (and similar human rights provisions), which mandates the Mission to guarantee the effectiveness of these rights in the context of its executive function. See e.g. D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, 30 September 2015, paras 84 *et seq*. See also, for an illustration of the application of that general notion: *case of Gudiel Alvarez et al.("Diario Militar") v. Guatemala*, IACtHR Judgment of 20.11.2012; Merits, Reparations and Costs, in particular, paras 192, 231-232.

84. In fulfilling its executive mandate, the Mission is therefore required to interpret its competence – the nature and scope thereof – in line and in a manner consistent with its human rights obligations. The Panel will first consider the issue of the Mission's competence to investigate cases such as the one under consideration.

85. Until 15 April 2014, EULEX Kosovo had unfettered competence to investigate this sort of cases (see Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo, Article 3, and Law No. 03/L-052 on the Special Prosecution Office of the Republic of Kosovo). The Panel has already pointed out in past decisions that this sort of crimes could – and, indeed, in some cases, were – investigated as war crimes or ethnically-motivated crimes. Therefore, from the beginning of its mandate until April 2014 (i.e., including the period post-acquittal, 2007-2014), the Mission was indeed competent to investigate or continue to investigate this case.

86. On 15 April 2014, the scope of competence of EULEX prosecutors was narrowed down and limited to "ongoing cases", i.e., cases that had been opened by EULEX prior to that time (see Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of EULEX, Article 3.3). The Panel notes the following regarding the period between April 2014 and June 2018: First, the decision whether or not to open a new case laid with EULEX prosecutors (in cooperation with competent local authorities) where exceptional circumstances exist. Therefore, the decision not to open

or re-open an investigation of this case was one taken – expressly or implicitly – by EULEX prosecutors. This is apparent also from the Mission's submissions in this case where it seeks to explain its decision not to further investigate the matter (see below, para. 90). See also X. and 115 Others Against EULEX, Case No. 2011-20, Decision and Findings, 22 April 2015, paras. 60-67.

87. Secondly, in line with the Mission's obligations under the OPLAN, that obligation must be interpreted in light of the Mission's human rights obligations. Considering that the violation of the victims' rights and those of the complainant was ongoing (see, above, para. 64), it fell to the Mission to ensure that those rights were effectively protected and their violation duly remedied. The acquittal of those initially charged with this crime did not put an end to the Mission's obligation in that regard. Considering, in particular, the gravity of the violation of the complainant's rights and the ongoing nature of this violation, the continued investigation of this case was neither "illogical" nor "theoretical" as the Mission seeks to portray it but a legal obligation of the Mission that was further heightened by gravity of the case at hand.

88. Furthermore, the Law on Jurisdiction applicable during that period (April 2014-June 2018) contained a clause whereby the Mission could exercise competence over cases (i.e., those not "ongoing" as of May 2014) where "extraordinary circumstances" existed. The Panel has already had occasion to interpret this notion. It has interpreted it in a manner that gives effect to the Mission's overall responsibility to guarantee the effective protection of human rights in the context of its executive mandate. Thus, in *Sadiku-Syla*, the Panel said the following:

> "[T]he HoM submits that the new legislation that entered into force on 17 May 2014 has "considerably reduced the possibility for EULEX Prosecutors and Judges to exercise executing functions in new cases" (Response, page 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."

See Sadiku-Syla against EULEX, 2014-34, 29 September 2015, para. 62. See also, D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11 to 2014-17, 30 September 2015, para. 90; Sadiku-Syla against EULEX, 2014-34, 19 October 2016, paras. 23 et seq.

89. Considerations pertaining to the gravity of the acts in question as well as the ongoing nature of the violations would be considerations directly relevant to interpreting the notion of "extraordinary circumstances" in a manner consistent with the human rights obligations of the Mission. Based on this, the Mission *could* have acted in accordance

with the "extraordinary circumstances" clause to investigate – or re-investigate – this case during the period between June 2014 and June 2018. The record suggests that it did not give consideration to that possibility.

90. Instead, the Mission submits that this would have been overly onerous and unjustified. The Panel disagrees. The Mission was of course required to make choices regarding the cases that it could investigate as its resources were not limitless. It would also have been reasonable for EULEX Prosecutors to evaluate the likelihood of a new investigation *bearing fruit*. In evaluating the Mission's submission, the Panel first notes that the Mission did in fact investigate and prosecute this case in the first place. The fact that this ended up in the acquittal of all defendants is no evidence of a failure on the part of the Mission. Nor is it an indication of its failure to protect the rights of the complainant up to that point. Instead, it is a clear indication of the Mission's efforts to fulfill its mandate and to meet its human rights obligations.

91. The Panel notes, however, that the 2007 final acquittal of the defendants did not put an end to the Mission's obligations. The fate of the complainant's father had yet to be established and those responsible for his disappearance brought to justice. The violation of the complainant's rights was therefore ongoing and is, in fact, ongoing to this very day.

92. There is no indication on the record available to the Panel that, after the 2007 acquittal, the Mission actually discussed or considered the possibility of conducting further investigation of this case. Nor is there any indication of any actual investigation taking place. The ongoing nature of the violation of the rights of the complainant and the gravity of these violations do not appear to have triggered any consideration of the possibility of EULEX Prosecutors using their "extraordinary circumstances" powers under the Law of Jurisdiction applicable after May 2014. The Panel notes that this inaction must also be placed in the context of the relatively large number of other "enforced disappearance" cases of which the Panel is aware in relation to which no or little investigative measures were adopted during the same period. This suggests a worrying failure on the part of the Mission during that period to treat these cases as operational priorities, as they should have been.

93. Expeditiousness is an important consideration here. Expeditiousness in the investigation of this sort of cases is pre-requisite to the effective protection of the rights involved. See, *supra*, paras. 56-57. See also I against EULEX, 2013-01, decision of 27 November 2013, para. 15; L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, Disposition; Sadiku-Syla against EULEX, 2014-34, Decision and Findings, 19 October 2016, Disposition. In every case, in particular a case of this seriousness, the investigative authorities are expected to act with reasonable promptness and expeditiousness (L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015, para. 46).

94. As noted above, the passing of time is likely to result in a loss of evidence and thus undermine the very possibility of establishing the fate of the disappeared and the possibility of bringing the perpetrators to justice. In this case, the Mission does not appear to have taken or attempted to take any investigative steps following the

acquittal of the original suspects, thus further undermining the possibility of the fate of the complainant's father being established and those responsible for his disappearance being punished for it. The passing of time without news of the fate of the disappeared also contributed to the harm and hardship done to the surviving relatives of the disappeared.

95. Based on the above, following the end of judicial proceedings in this case, the Mission remained competent to investigate and was required, in accordance with its human rights obligations, to investigate this case. While there is little doubt that the Mission did its best to bring those believed to be responsible for the disappearance of the complainant's father up until that point, it desisted thereafter from any further action, in violation of the complainant's rights. The Panel therefore finds the Mission's failure to act to be limited to the period May 2017-June 2018.

The Mission's new, reduced, mandate since June 2018

96. The Mission's new mandate, which entered into force in June 2018, has significantly reduced the Mission's ability to affect the investigation of criminal cases, including this one. Its new monitoring role does not enable it to request the commencement of an investigation, nor does it give it power to decide its course.

97. In its submissions, the Mission has also submitted that it cannot advise Kosovo authorities in relation to such matters and has no role in regard to the course of any investigation.

98. Unless it is meaningless, the Mission's "monitoring" role must however permit the Mission to report upon unexplained, arbitrary or unjustified failures by the authorities to fulfil their basic human rights obligations. Investigating cases such as the present one falls right within that basic expectation. The Panel is concerned that unless that mandate is read and interpreted in light of the Mission's over-arching human rights obligations, the Mission's ability to comply with those obligations and its ability to guarantee the effectiveness of the rights concerned might be open to question.

99. The Panel considers that the change in nature of the Mission's mandate does not relieve the Mission from its obligation to redress as far as possible the effects of violations for which it is determined to be responsible.

100. On that basis, the Panel will recommend that the Mission should further take active steps to inquire with the authorities what measures, if any, are being taken to investigate this case and to report to the competent authorities in Brussels if it becomes apparent that local authorities are not fulfilling their obligations in that regard. Having failed to protect the complainant's rights, the Mission must now take steps to seek to remedy these violations.

Existence of an investigation into this case by local authorities

101. In its letter of 17 May 2019, the Mission indicated that it was not aware of any investigation of this case and "invite[d] the complainant and the Panel to address this question to the competent Kosovo institutions".

102. The Panel first notes that the human rights obligations arising from the OPLAN are those of *the Mission itself*, not the Panel. Therefore, the Mission cannot delegate to others what has been determined to form part – and an important part – of the Mission's legal obligations.

103. Secondly, the Panel notes that in case 2017-02, the Mission took to advising the Kosovo authorities of certain investigative steps that should be pursued by those authorities when it transferred the file of the case to them. It is apparent from this that a) there is no prohibition on the Mission advising or making recommendations to the Kosovo authorities regarding possible investigative courses of action in relation to cases that were in the custody and under the responsibility of the Mission in the past and that b) where appropriate, the Mission has already done so. Similarly, in 2016-17, when transferring the case-file to the authorities, the Mission's hand-over note invited local authorities to reach out to them regarding the possible investigation of this case.

104. Thirdly, authorities given the responsibility to exercise certain executive or quasi-governmental competencies over a territory during a period of time cannot merely pass on the associated human rights obligations to the next authority in line. This is readily apparent from the Panel's observations concerning the conduct of UNMIK. It is equally applicable to this Mission. While its role and responsibilities have now been much reduced under its new mandate, this cannot enable it to evade its responsibilities for failures associated to an earlier time.

105. Based on the above, the Panel will recommend that the Mission should carefully consider anew what steps it is permitted and able to take under its current mandate to ensure that it contributes to remedying violations attributed to it, in particular in relation to cases where the violation of the complainant's rights is ongoing.

Consequences upon the rights of the complainant and his father's rights

106. Article 2 of the Convention protects one of the most fundamental of human rights, namely, the right to life. That right is protected under a variety of human rights instruments and it constitutes a core, basic, element of the minimum human rights protection owed to any individual. It knows of only few, limited, exceptions. See, generally, General Comment No. 36 (2018) on Article 6 of the International Covenant on Civil and Political Rights, on the right to life, CCPR/C/GC/36, 30 October 2018 (https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf) (hereafter, "General Comment 36").

107. Most importantly for present purposes, this right imports a procedural obligation on the part of the state or authority competent to investigate where they know or should have known of potentially unlawful deprivations of life, to investigate and, where appropriate, prosecute such incidents including allegations of excessive use of force with lethal consequences. See, generally, Sadiku-Syla against EULEX, 2014-34, Decision and

Findings, 19 October 2016; 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; see also *Nydia Erika Bautista de Arellana v. Colombia*, Communication No. 563/1993, Views of the Human Rights Committee, 27 October 1995 para. 8.6; *McCann and Others v. the United Kingdom,* ECtHR Judgment of 27 September 1995, Series A no. 324, para. 161; *Assenov and Others v. Bulgaria*, ECtHR Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para. 102; *Nachova and Others v Bulgaria*, Application nos. 43577/98 and 43579/98, ECtHR Judgment of 6 July 2005, para. 110; *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, ECtHR Judgment 4 May 2001, para. 105; General Comment 36, para. 27; Human Rights Council, Concluding Observations: Kyrgyzstan (2014), para. 13.

108. Investigations and prosecutions of potentially unlawful deprivations of life should be undertaken in accordance with relevant international standards, including the *Minnesota Protocol on the Investigation of Potentially Unlawful Death (2016)*, and must be aimed at ensuring that those responsible are brought to justice, at promoting accountability and preventing impunity, at avoiding denial of justice and at drawing necessary lessons for revising practices and policies with a view to avoiding repeated violations. See, generally, General Comment 36, para. 27 and references cited.

109. Also relevant to the present case is Article 3 of the European Convention of Human Rights, which provides that no one shall be subjected to torture or to inhuman or degrading treatment or punishment. A similar prohibition and guarantee is provided in many other human rights instruments, including Article 7 of the International Covenant on Civil and Political Rights. This is again a fundamental right of immense importance that must be protected at all times and circumstances.

110. It has been acknowledged in the jurisprudence of the Panel and in the practice of other human rights bodies that the emotional trauma that result for relatives of a disappeared from the absence of information regarding the fate of their relative could reach the threshold of gravity required for this guarantee. See, e.g., L.O. against EULEX, 2014-32, Decision and Findings, 11 November 2015; 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 and Findings, 19 October 2016. See also Declaration on the Protection of All Persons from Enforced Disappearance, 5th Preambular paragraph (noting that enforced disappearance causes “anguish and sorrow”) and Article 1(2) which provides that “[a]ny act of enforced disappearance (…) constitutes a violation of the rules of international law guaranteeing, (…) the right not to be subjected to torture and other cruel, inhuman or degrading treatment or punishment”); and General Comment on the right to the truth in relation to enforced disappearance, Report of the Working Group on Enforced or Involuntary Disappearances,2010. Document A/HRC/16/48, para. 4.

111. In the view of the Panel, the Mission’s failure to use all available investigative means to resolve this case and its failure to properly inform in a timely manner the complainant of the course of the investigation all contributed to violating the rights of the

complainant under Article 2 of the Convention to have this matter fully and diligently investigated by the Mission.

112. These culpable failures and omissions also contributed to the violation of the complainant's rights under Article 3 of the Convention and contributed to the emotional and psychological trauma resulting from not knowing what happened to his father. That trauma is grave, durable and ongoing. It is not, of course, exclusively the consequence of the Mission's conduct, but the Panel is not competent to make determinations regarding UNMIK's responsibility in that regard. In any case, UNMIK's failure, however serious, would not excuse the Mission's own. Therefore, the findings made here are limited to those acts and failures of the Mission that contributed to the violation of the complainant's rights and those of his father, having taken into consideration the challenges outlined above which the Mission faced at the time.

113. The Panel reiterates, however, that the Mission invested in this case a not insignificant amount of time and resources, that these efforts resulted in the prosecution of a number of suspects and that these efforts were directed, *inter alia*, towards the protection of the complainant's rights and those of his relatives. The fact that these proceedings did not succeed in establishing the truth regarding the fate of the complainant's relative is not to be imputed to the Mission. Furhtermore, the Mission's investigative failure is relatively short in duration and arose in the particular context of the 'extraordinary circumstances' foreseen by the then applicable Law on Jurisdiction. All these considerations are relevant to evaluating the gravity of the Mission's failure.

114. In light of the findings made above in relation to Articles 2 and 3 of the Convention, the Panel does not feel that it needs to also make findings in relation to Articles 8 and 13 of the Convention. The Panel notes, however, that whilst the interest(s) protected by each provision overlap in part, they are not identical. The Panel notes, furthermore, that the conduct imputed to the Mission appears *prima facie* to have negatively affected the complainant's rights to family life and his right to an effective remedy. The Panel will not make definite findings in respect of these rights as its findings in relation to Articles 2 and 3 encapsulate what it regards as the core features of the violations imputed to the Mission.

115. Based on the above, the Panel has determined that the Mission has violated the rights of the complainant and those of his father pursuant to Article 2 (procedural limb) and Article 3 of the Convention.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS that the Mission has violated the rights of the complainant as guaranteed by Article 2 (procedural limb) and 3 of the European Convention of Human Rights;

IN THAT LIGHT, THE PANEL DOES NOT FIND IT NECESSARY to make determinations regarding possible violations by the Mission of Articles 8 and 13 of the Convention;

NOTES that, based on the record available to the Panel, the violation of the complainant's rights might be ongoing; and, therefore,

RECOMMENDS the following:

i. Considering the gravity of the violations under consideration, the Panel invites the Head of Mission to carefully consider the possibility and the need for the Mission to acknowledge the violation of the complainant and his father's rights committed by the Mission;
ii. The Panel also invites the Head of Mission to consider the possibility of expressing the willingness of the Mission to continue to pursue its efforts to see justice being done in this case;
iii. If this has not already been done, the Panel invites the Mission to ensure that the case-file pertaining to this case is sent to the competent local authorities;
iv. The Panel recommends that, as it did in 2017-02, the Mission should consider making recommendations to the authorities regarding possible future investigative courses that could help resolve this case; in that context, the Panel recommends that the Mission should emphasise the importance of the victims' rights to the truth and to be informed of the general course of the investigation;
v. The Mission should take active steps to inquire with the authorities what steps, if any, are being taken to investigate this case and to report to the competent authorities of the European Union in Brussels if it becomes apparent that the authorities are not fulfilling their obligations in that regard;
vi. The Panel recommends that the present decision should be provided to the competent investigative authorities in Kosovo;
vii. The Panel also recommends that the Head of Mission should ensure that the monitoring activities of the Mission are conducted in a manner consistent with the Mission's human rights obligations and that it ensures that this part of its mandate contributes to the effective protection and promotion of those rights;

THE PANEL RESPECTFULLY ASKS THE MISSION to report upon the implementation of these recommendations at its earliest convenience and no later than 11 November 2019; and

ASKS the Mission, when it so reports, to clarify what “executive” competences it still enjoys under the current mandate.

For the Panel,

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member