DECISION AND FINDINGS

Date of adoption: 11 December 2019

Case no. 2016-09

Milorad Trifunović

Against

EULEX

The Human Rights Review Panel, sitting on 11 December 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 on 30 June 2016.

2. By letter of 1 July 2016, the Panel informed the Mission that this case had been registered.

3. On 28 June 2017, the Panel requested the complainant to provide additional information regarding his complaint. The complainant initially responded through the representative for Serb families of the Missing Persons Resource Center (MPRC), an NGO based in Pristina, that he had no further information in relation to this cases.

4. On 20 September and 17 October 2017, the Panel sent two further requests for additional information via the representative of the MPRC.

5. On 20 October 2017, the Panel received a response through the representative of the MPRC providing additional information in relation to two cases, including the present one.

6. 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.

7. By letter of 19 January 2019, the Mission was requested again to provide answers to the questions by 16 February 2019.

8. The observations of the HoM were received on 12 March 2019 after which they were communicated to the complainants for additional observations.

9. On 15 March 2019, the HoM's letter was submitted for information to the complainant, who was given time until 15 April 2019 to make any further submissions in response to that letter.

10. On 19 June 2019, the Panel rendered its admissibility decision in this case, declaring the complaint admissible in respect of Articles 2, 3, 8 and 13 of the European Convention of Human Rights (hereafter, "the European Convention" or "the Convention") (https://hrrp.eu/docs/decisions/2019-06-19%20Admissibility%20Decision%202016-09.pdf).

11. In addition, in its Admissibility Decision, the Panel invited the parties to address the following queries:

I. TO THE HEAD OF MISSION:

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

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

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

iv. Please also provide a copy of the letter of 5 November 2018 accompanying the transfer of the case to the Kosovo authorities.

v. In its submissions, the Mission indicated that 'it was deemed unlikely that further investigation by the police would provide sufficient information' (see Admissibility Decision, para. 26). What were the factors or considerations leading up to that conclusion? Who was it made by and when?

vi. In its submissions (summarized in the Admissibility Decision, para. 21), the Mission indicates that as a result of reconfiguration of the WCIU in 2014, the Mission's intelligence and research capacity was *deleted*. Who took that decision? Based on what factors and considerations?

II. TO THE COMPLAINANT:

i. What contact did you have with the EULEX Mission during the period 2008-2014 in relation to this case? In particular, what was the nature and extent of your contacts with the EULEX's Forensic Institute?

ii. Were you informed that, in 2009, EULEX Kosovo decided to close the case involving the disappearance of nine mine workers including your relative?

iii. Please describe the effect – financial, personal and emotional – that the disappearance of your relative has had upon you.

II. COMPOSITION OF THE PANEL

12. Following the resignation of one of its permanent 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. FACTS

13. The facts as presented by the complainant may be summarised as follows.

14. On 22 June 1998, Miroslav Trifunović, a brother of the complainant, Milorad Trifunović, went to work by bus in the Belaćevac mine, Municipality of Fushë Kosovë/Kosovo Polje. He and eight other workers were intercepted by individuals thought to be members of the Kosovo Liberation Army (KLA) in the village Graboc i Poshtëm/Donji Grabovac, Municipality of Fushë Kosovë/Kosovo Polje. Miroslav Trifunović and other workers were ordered off the bus and taken in an unknown direction. He has not been heard of since that time.

15. The complainant and his family notified the International Committee of the Red Cross (ICRC), the International Civilian Mission (ICM), the 'US Office' (understood to be a reference to the U.S. diplomatic representation in Pristina), the Cultural Center in Pristina and the Ministry of the Interior of the Republic of Serbia and the ICRC in Serbia, of the disappearance of Miroslav Trifunović.

IV. SUBMISSIONS OF THE PARTIES

The complainant

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

Head of Mission ("HoM")

17. On 19 September 2019, the Panel received the HoM's submissions regarding the merit of this case.

18. As a preliminary matter, the HoM clarified that, contrary to what its earlier submissions might have suggested, although most documents from UNMIK were received by the Mission's forensic institute, some of these documents – not specifically identified by the Mission – were also received by the EULEX War Crimes Investigation Unit (WCIU). However, the HoM adds that 'since they were not part of the CCIU case-file, they were not reviewed by the EULEX SPRK Prosecutor'. On that basis, the HoM indicated that it would withdraw its earlier suggestion that there was no indication that EULEX Kosovo WCIU had received the said case-file.

19. In response to the Panel's question as to whether the files in possession of the Forensic Institute were shared with EULEX Prosecutors, the HoM submits that it would appear that the Mission's prosecutors were unaware of the existence of the files in possession of the Forensic Institute in relation to this case and must have assumed that they were in possession of all relevant records. 'It would appear', the Mission said, 'that, at the time, the different units of EULEX were not aware that documents pertaining to the same events and/or individuals were split in different case-files and registered under different file numbers.'

20. The Panel next asked

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

21. In response, the HoM submitted the following:

> 'As a general practice, whenever the WCIU and the EULEX prosecutors in the SPRK were investigating cases, they were reaching out to other units to determine whether any additional information existed. This practice may have been followed to a lesser extent in the initial phase of the Mission.'

22. The Mission does not seek to address why this 'general' practice was not seemingly followed in the present case. The Mission added that it would appear that in the first semester, and as a result of the high number of incoming cases, review and assessment of UNMIK case-files was 'mostly based (…) on what was already existing in the case-file'.

23. To the question of whether the Mission is competent to monitor this case without local authorities having initiated an investigation into it, the HoM does not clearly address the Panel's query and did not specify whether it would be in a position to monitor this particular case. Instead, it provides a general description of the nature of its monitoring function and mandate. It specifies, however, that selected cases are or can be monitored 'from the investigative phase to the execution of the sentence'.

24. The Panel also further queried the Mission's assertion that it has deemed unlikely that further investigation would provide sufficient information for the matter to move forward. The Mission' response is short on specifics. It suggests that it is its understanding that this conclusion was reached independently by the SPRK prosecutor on the basis of the assessment provided by the WCIU:

> ‘Such conclusion was reached in the overall context and under the general circumstances described on pages 2-9 of the EULEX responses on the case of 12 March 2019. It is legitimate to assume that if the number of cases and documents handed over by UNMIK had been significantly lower and properly organized, the prosecutor may have opted for opening an investigation, instead of dismissing the criminal report based on the information contained in the CCIU file.’

25. Regarding the *deletion* of the intelligence and research capacity of the Mission in 2014, the Mission said that ‘it is probable that this decision was taken (by EU member states) in consideration of the 2014 changes in EULEX mandate’.

26. The HoM further observed that an assessment of the responsibility of the Mission under Article 2 (procedural limb) and Article 3 of the European Convention ‘cannot disregard the context and the circumstances in which the Mission was called to implement its mandate’. The Mission further highlighted a number of challenges it faced at the time, including the number of cases to address, the state of the files received from UNMIK, limitations of resources, the timeframe of its mandate and the steps taken by the Mission to organise the records received from UNMIK. Of particular relevance to the present case, the Mission makes the following submissions, which the Panel reproduces verbatim:

> ‘Two decisions appeared to have informed the initial approach of the police and prosecutorial units of the Mission: on the one hand the prioritization of the review and examination of the around 1,200 case-files that had already been labelled by UNMIK as ‘war crimes file’ over so called ‘missing persons files’; and on the other, the rapid identification of those war crimes cases that appeared more promising in terms of investigation outcomes. This led to the dismissal of criminal reports pertaining to crimes for which no specific suspect could be identified based on information on the file, and where it was deemed unlikely that further investigation by the police may provide sufficient information. However, the fact that the Mission did not investigate the disappearance of Miroslav Trifunovic did not have any bearing in relation to the efforts to try and locate his whereabouts or remains by the Mission’s staff at the IFM. As a matter of fact, while the criminal case was dismissed in 2009 by the EULEX SPRK Prosecutor, the case at the IFM continued in parallel and was not closed. Over the past ten years, EULEX with its expert capacity at the IFM has undertaken major efforts to locate Miroslav Trifunovic and the other eight missing individuals. These efforts began as early as in 2008, when the first excavation work for a larger excavation (drafting of a strategy, securing funds from international donors and ensuring the cooperation of the Kosovo institutions) was carried out. As already indicated in the Mission’s responses and observations of 12 March 2019, these efforts culminated in the six-month long excavation carried out between 2011 and 2012 in Zhillivode/Zilivoda, in an area of around 2000 square meters and up to the depth of around 25 meters. Regrettably no remains were found. If remains were found, it is legitimate to assume that the criminal investigation would most probably have resumed.

27. The Mission also specified that under its current reconfigured mandate, the Mission retains an executive capacity to support the Kosovo IFM:

> ‘Should new credible information come to light, the Mission stands ready to support Kosovo institutions in any additional operations to find Mr Milorad Trifunovic and the other disappeared’.

28. The Mission added the following:

> ‘The Mission does acknowledge that its police and prosecutorial units could and should have been more diligent when handling the CCIU file. Overall, the Mission should have done more outreach efforts to keep victims and the wider public informed about its strategies and approaches, with a view to manage expectations more adequately and be more transparent. However, in the present case and in considering the fundamental obstacles presented, the Mission does not believe that the complainant’s rights were violated and in light of all of the above maintains that it did what was reasonably possible to ascertain the fate of Milorad Trifunovic.’

29. Finally, on 6 November 2019, a member of the Panel’s Secretariat was given access to the Mission’s letter of 5 November 2018 accompanying the transfer of the file pertaining to this case to local authorities. One of these documents, the Ruling to Dismiss the Criminal Report of 20 July 2009 indicated that the criminal report regarding the investigation of the disappearance of the complainant’s relative had been dismissed by the SPRK on the following grounds:

> ‘It is evident from the criminal report that there is no reasonable suspicion against a specific suspect for the criminal offence described above. In addition, the Prosecutor believes that it is not reasonably likely that further investigation by the police may provide sufficient information.’

30. The Panel was also able in that context to review the hand-over letter which EULEX attached to this file when transmitting it to the local authorities on 5 November 2018. The letter said that despite the case having been dismissed on 20 July 2009,

> ‘Nevertheless, I invite your office to conduct its own review of the case-file upon receipt, and contact WCIU in order to verify if they are still in possession of any further material pertaining to this case.’

Further submissions from the complainant

31. No further submission was received from the complainant.

V. DELIBERATIONS

“Enforced disappearance” as a grave violation of the victims’ fundamental rights

32. 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 61; Declaration on the Protection of All Persons from Enforced Disappearance, A/RES/47/133, 18 December 1992.

33. 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, *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 62; 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*, judgment of 29 July 1988, para. 181; *Heliodoro Portugal v. Panama*, judgment of 12 August 2008, para. 244; *Anzualdo Castro v. Peru*, 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, 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 (Jdgt of 20.11.2012; Merits, Reparations and costs), para. 301 (and references cited).

34. For almost two decades, the complainant has lived with the uncertainty regarding the fate of his brother, what happened to him and in what circumstances he disappeared. The psychological suffering resulting from this is not just immense; it is ongoing. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 63; 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; *Khadzhialiyev 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; 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).

35. The continuous nature of the violation of rights involved in such practice explains that the duty of the competent authorities to investigate these cases is a pressing and important obligation that can only be set aside or delayed in the narrowest of circumstances. See *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 64.

36. 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: *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 65; *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.

Duties and obligations of the authorities regarding acts of enforced disappearance

37. The actions of the EULEX prosecutors and police form part 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. See *Krlic against EULEX*, 26 August 2014, para. 25; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 48.

38. 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 49).

39. 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).

40. 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 50.

41. 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, judgment of 18 September 2009, para. 191; *Palić v. Bosnia and Herzegovina*, Application no. 4704/04, judgment of 15 February 2011, para.

63; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 54).

42. The European Court of Human Rights has laid down a number of general principles that provide guidance regarding what human rights law requires and expects of an effective investigation into allegations of rights violations under Article 2 of the European Convention (*Mustafa Tunç and Fecire Tunç* v. Turkey, Application no. 24014/05, Judgment, 14 April 2015 (Grand Chamber), paras 169ff):

> "169. ... The investigation must be, *inter alia*, thorough, impartial and careful (see *McCann and Others v. the United Kingdom*, 27 September 1995, §§ 161-163, Series A no. 324).
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> 170. The form of investigation required by this obligation varies according to the nature of the infringement of life: although a criminal investigation is generally necessary where death is caused intentionally, civil or even disciplinary proceedings may satisfy this requirement where death occurs as a result of negligence (see, *inter alia*, *Calvelli and Ciglio v. Italy*, cited above, § 51; *Mastromatteo v. Italy* [GC], no.37703/97, § 90, ECHR 2002-VIII; and *Vo v. France*, cited above, § 90).
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> 171. By requiring a State to take appropriate steps to safeguard the lives of those within its jurisdiction, Article 2 imposes a duty on that State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. This obligation requires by implication that there should be some form of effective official investigation when there is reason to believe that an individual has sustained life-threatening injuries in suspicious circumstances, even where the presumed perpetrator of the fatal attack is not a State agent (see *Menson v. the United Kingdom* (dec.), no. 47916/99, ECHR 2003-V; *Pereira Henriques v. Luxembourg*, no. 60255/00, § 56, 9 May 2006; and *Yotova v. Bulgaria,* no. 43606/04, § 68, 23 October 2012).
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> 172. In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.
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> 173. The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 186, ECHR 2014; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).
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> 174. In any event, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011).
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> 175. In particular, the investigation's conclusions must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an

obvious line of inquiry undermines to a decisive extent the investigation's ability to establish the circumstances of the case and, where appropriate, the identity of those responsible (see *Kolevi v. Bulgaria*, no. 1108/02, § 201, 5 November 2009).

176. Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria (see *Tanrıkulu v. Turkey* [GC], no. 23763/94, §§ 101-110, ECHR 1999-IV; and *Velikova v. Bulgaria*, no. 41488/98, § 80, ECHR 2000-VI).

177. Moreover, the persons responsible for the investigations should be independent of anyone implicated or likely to be implicated in the events. This means not only a lack of hierarchical or institutional connection but also a practical independence (see *Anguelova v. Bulgaria*, no. 38361/97, § 138, ECHR 2002-IV).

178. A requirement of promptness and reasonable expedition is implicit in this context (see *Al-Skeini and Others*, cited above, § 167).

179. In addition, the investigation must be accessible to the victim's family to the extent necessary to safeguard their legitimate interests. There must also be a sufficient element of public scrutiny of the investigation, the degree of which may vary from case to case (see *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 109, ECHR 2001-III). The requisite access of the public or the victim's relatives may, however, be provided for in other stages of the procedure (see, among other authorities, *Giuliani and Gaggio*, cited above, § 304; and *McKerr v. the United Kingdom*, no. 28883/95, § 129, ECHR 2001-III).

180. Article 2 does not impose a duty on the investigating authorities to satisfy every request for a particular investigative measure made by a relative in the course of the investigation (see *Ramsahai and Others*, cited above, § 348; and *Velcea and Mazăre v. Romania*, no. 64301/01, § 113, 1 December 2009).

181. The question of whether an investigation has been sufficiently effective must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work (see *Dobriyeva and Others v. Russia*, no. 18407/10, § 72, 19 December 2013; and *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 147, 17 July 2014)."

43. The European Court has highlighted another important element of a human rights compatible investigation, namely, the need for the investigative authorities to seek the assistance and cooperation of other authorities if and when the latter might have in their possession information and/or resources of relevance to the former's efforts to conduct an effective investigation. See, generally, *Case of Güzelyurtlu and Others v. Cyprus And Turkey*, Application no. 36925/07, Judgment, 29 January 2019, paras 229 and 232-233:

'229. The above survey of the case-law shows that in the majority of the cases in which the Court has thus far examined a failure to cooperate or seek cooperation between States in transnational cases, it has done so when assessing the overall compliance by the State concerned with its procedural obligation to investigate under Article 2. In these cases the failure to cooperate was only one aspect among others in the Court's examination of the effectiveness of the investigation carried out by the State concerned, generally as a failure to seek cooperation from another State (for example, Cyprus in *Rantsev*, cited above, § 241, and *Aliyeva and Aliyev*, cited above, § 78), including where that cooperation entailed the possibility of transferring the proceedings to another State (see *Huseynova*, cited above, § 111). The Court has dealt specifically with the failure to cooperate or assist with

an investigation conducted within the jurisdiction of another Contracting State in very few cases, namely in *O'Loughlin, Cummins* and *Rantsev* (see paragraphs 223 and 225 above).

[…]

232. The Court has previously held that in interpreting the Convention regard must be had to its special character as a treaty for the collective enforcement of human rights and fundamental freedoms (see *Ireland v. the United Kingdom*, 18 January 1978, § 239, Series A no. 25, referring to its Preamble; *Loizidou v. Turkey* (preliminary objections), cited above, § 70; and *Nada v. Switzerland* [GC], no. 10593/08, § 196, ECHR 2012). This collective character may, in some specific circumstances, imply a duty for Contracting States to act jointly and to cooperate in order to protect the rights and freedoms they have undertaken to secure within their jurisdiction (see for instance, in the area of cross-border human trafficking under Article 4 of the Convention, *Rantsev*, cited above, § 289). In cases where an effective investigation into an unlawful killing which occurred within the jurisdiction of one Contracting State requires the involvement of more than one Contracting State, the Court finds that the Convention's special character as a collective enforcement treaty entails in principle an obligation on the part of the States concerned to cooperate effectively with each other in order to elucidate the circumstances of the killing and to bring the perpetrators to justice.

233. The Court accordingly takes the view that Article 2 may require from both States a two-way obligation to cooperate with each other, implying at the same time an obligation to seek assistance and an obligation to afford assistance. The nature and scope of these obligations will inevitably depend on the circumstances of each particular case, for instance whether the main items of evidence are located on the territory of the Contracting State concerned or whether the suspects have fled there.'

44. Regarding the issue of expeditiousness, the Panel wishes to note the following. Regarding its investigative obligations, the Mission was required under its existing mandate 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, *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 56; *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 36. See also *Varnava and Others v Turkey*, Application no. 16064/90 et al, judgment of 18 September 2009, para. 191; *Oğur v. Turkey*, Application no. 21594/93, judgment of 20 May 1999, para. 88; *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, Judgment 4 May 2001, paras. 105-09; *Douglas-Williams v. the United Kingdom*, Application no. 56413/00, Decision of 8 January 2002.

45. 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. *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 57. But investigative challenges and difficulties do not authorize 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. See, again, *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 57. 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 *Stögmüller v Austria*, Application no. 1602/62, judgment of 10 November 1969, para 5; reiterated in *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 57).

46. 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 *König v FRG*, Application no. 6232/73, judgment of 28 June 1978, para. 99, *Pedersen and Baadsgaard v. Denmark*, Application no. 49017/99, judgment of 17 December 2004, para. 45; see also, *Thomas Rüsche against EULEX*, 2013-21, 11 January 2017, para. 59-65; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 58). 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 58).

47. 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. See *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 55. 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 (*S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 55; *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, judgment of 18 September 2009, para. 191; *Palić v. Bosnia and Herzegovina*, Application no. 4704/04, judgment of 15 February 2011, para. 63; HRAP decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 80).

48. 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 characterized 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)). See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 59.

49. 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.

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

50. The HoM does not dispute that the Mission was competent to investigate this case and could have done so in the exercise of its jurisdictional competence.

51. 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; *Zlata Veselinović, H.S., I.R. against EULEX,* 2014-11 to 2014-17, Decision and Findings, 19 October 2016; *L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019.

52. Where acts such as enforced disappearance are committed in the general 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.'

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.

53. 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'

L.O. against EULEX, case No. 2014-32, Decision and Findings, 11 November 2015, para. 47. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019.

54. 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.

Circumstances in which the Mission was to fulfill its human rights responsibilities

55. 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 these were, in some respects, inadequate to the task and expectations. This required the Mission to make choices and to prioritise certain efforts over others.

56. Furthermore, the manner in which UNMIK conducted its own investigative efforts and the manner in which it transferred its files 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.

57. 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 (*L.O. against EULEX*, 2014-32, 11 November 2015, para. 44 and references cited therein; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 51; see also *Palić v. Bosnia and Herzegovina*, application no. 4704/04, 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 51).

58. 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. See, again, *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, paras 52-53.

59. 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 various 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 the United Nations, which determined that UNMIK had violated the rights of victims of such acts on a number of occasions. The proper, diligent and organized 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 practice 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. *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 53.

Findings regarding the Mission's alleged failures

60. As noted above, there is no question that the Mission operated in difficult circumstances for much of the time of concern to this case.

61. It is also clear from the record of this case that the Mission took a number of steps relevant to the present complaint. In particular, it took active steps to review and organise

records received from UNMIK. And the Forensic Institute was directly involved in the attempt to locate the complainant's relative or his remains.

62. These efforts did not, however, do enough to protect and guarantee the effectiveness of the fundamental rights of the complainant and his brother. The Panel has identified a number of shortcomings in the Mission's conduct that have resulted in or contributed to the violation of the rights of the complainant:

i. A failure to fully and diligently investigate the case, involving, *inter alia*, a failure to properly coordinate between the Mission's organs; and
ii. A failure to sufficiently involve and inform close relatives of the disappeared.

Investigation of the disappearance of the complainant's relative

63. 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* (Jdgt of 20.11.2012; Merits, Reparations and costs), in particular, paras 192, 231-232. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 83.

64. 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.

65. 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. See *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 85.

66. 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. See also *X. and 115 Others Against EULEX*, Case No. 2011-20, Decision and Findings, 22 April 2015, paras. 60-67; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 86.

67. Secondly, that obligation to investigate must be interpreted in light of the Mission's human rights obligations under the OPLAN. Considering that the violation of the victims' rights and those of the complainant was ongoing, it fell to the Mission to ensure that those rights were effectively protected and their violation duly remedied.

68. 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 88.

69. 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; and *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 72.

70. In this particular case, the Mission acknowledged its failure to investigate this case. It pointed out, however, that the Forensic Institute was and remained involved in this matter for quite some time (see, *supra*, paras. 26 and 27). The involvement of the Forensic Institute into this matter is indeed to be acknowledged and did go some way towards fulfilling the Mission's obligations. However, the Forensic Institute's

responsibility was purely forensic in the sense of seeking to locate and identify the remains of the complainant's relative. This does not qualify as or fulfill the requirement that the authorities should investigate and elucidate the circumstances in which an individual disappeared and bring those responsible to justice.

71. In that sense, whilst the Mission took some steps towards the fulfillment of its obligations in this case, these efforts were not enough to meet the human rights standards set out above that were binding on the Mission at the time.

72. The Panel notes furthermore that a lack of clear priorities might have negatively affected the Mission's ability to focus on cases of this sort. Also unfortunate is the Mission's reliance upon UNMIK's own classification of cases as open/closed and war crimes/missing persons cases. UNMIK's classification of cases appears to have been carried out without a full and proper investigation of cases having first been attempted or carried out and without in many cases relatives of disappeared having been contacted or informed. The Mission should have conducted their own evaluation and investigation and not based their decisions whether to commence an investigation on what information might have already been in an UNMIK file.

73. Furthermore, the Panel notes that little or no effort was made in cases of this sort and, in particular, in this case, to reach out to other institutions and organisations (such as the ICRC; ICTY; NGOs; state authorities) which might have had information in their possession about these cases or expertise relevant to assisting the Mission's investigative efforts.

74. Therefore, prior to deciding not to investigate a case, the Mission should have been expected to exhaust all reasonable avenues of information, including by contacting relatives of the disappeared to ascertain whether they possessed relevant information about the case.

75. The Panel rejects the Mission's unsubstantiated and unverified assertion that an investigation into this case would have been unlikely to lead to the discovery of new evidence or to the establishment of the truth. Only a genuine and effective attempt to elucidate this matter would have provided a valid verification for that assertion.

76. Finally, the Panel notes that the Mission's ability to investigate cases of this sort was further reduced by the decision of EU states in 2014 to *delete* its intelligence and research capacity (see, *supra*, para. 25). Where a rule of law mission is established with responsibilities to investigate complex criminal cases, as was the case here, it is the responsibility of states and competent EU organs to ensure that the Mission is provided with all the necessary resources to fulfill its tasks effectively and in a manner consistent with its human rights obligations.

Sharing of information between organs of the Mission

77. A particular aspect of the Mission's failure to act in accordance with expected standards of due diligence in carrying out its investigative obligations pertains to its failure to ensure that information available to one of its organs was shared with all other relevant entities within the Mission.

78. The Mission has described how it was the usual practice of organs of the Mission to try to coordinate efforts to share information pertaining to such cases. The Mission was unable to explain, however, why this did not seemingly occur in this case and why, in particular, files in possession of the Forensic Institute did not come into the possession of the Mission's investigative and prosecutorial authorities.

79. This failure to properly coordinate things within the Mission and to ensure that mechanisms and procedures were put in place to ensure the centralisation of sensitive information pertaining to this sort of cases has contributed to a situation where SPRK prosecutors took a decision not to investigate this case without full knowledge of what information was in the Mission's possession at the relevant time. Adequate safeguards should have been put in place to avoid such a situation. See also *Rejhane Sadiku-Syla against EULEX*, Case No. 2014-34, Decision on Admissibility, 29 September 2015, paras 60-61; and *Rejhane Sadiku-Syla against EULEX*, Case No. 2014-34, Decision and Findings, 19 October 2016, paras 39-40.

Informing relatives of the disappeared

80. Because of the effect of acts of enforced disappearance 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. *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 66.

81. 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, *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 66; *Desanka and Zoran Stanisić against EULEX*, 2012-22, 11 November 2015, para. 66; *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-73; HRRP, Case-Law Note on the Duty to Investigate Allegations of Violations of Rights, pp 28-30; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.

82. 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. As a result, close relatives of the disappeared 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 78. Such a requirement is a necessary element of the protection of the rights of the victims in the investigation of such a case. See, e.g., *.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 77; *Desanka and Zoran Stanisić against EULEX*, 2012-22, 11 November 2015, para. 66, referring to *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-74; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 86; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005 paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167. And competent

authorities will not easily be permitted to disregard or ignore it. See *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 67.

83. Also relevant in this context is the victim's right to truth, which emanates from other recognised categories of human rights. 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) (Jdgt of 4.09.2012, Prelimin. objection, merits, repair and costs), para. 265. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 78.

84. In relation to the present case, 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.

85. 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. In response to the Panel's query on that point, the Mission said the following:

> 'Overall, the Mission should have done more outreach efforts to keep victims and the wider public informed about its strategies and approaches, with a view to manage expectations more adequately and be more transparent. However, in the present case and in considering the fundamental obstacles presented, the Mission does not believe that the complainant's rights were violated and in light of all of

the above maintains that it did what was reasonably possible to ascertain the fate of Milorad Trifunović.'

86. The Mission's obligation towards this category of victim does not pertain to 'strategies' or 'approaches'. Nor is it about outreach. It pertains to the right of victims of such a violation of their rights to be specifically informed about what the authorities are doing to elucidate the matter and to bring those responsible to justice. By falling to reach out to the complainant and to even try to do so, the Mission did in fact violate his rights.

87. The Mission's failure to contact and inform the complainant of their decision not to investigate this case 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.

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

88. 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. *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 96.

89. 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. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 99; and Council Decision (CFSP) 2018/856 of 8 June 2018.

90. On that basis, the Panel will recommend that the Mission should further take active steps to inquire with the competent local 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.

Consequences upon the rights of the complainant

91. 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"); *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 106.

92. 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 107; 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.

93. 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; and *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 108.

94. 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 and Article 2 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. This is again a fundamental right of immense importance that must be protected at all times and circumstances.

95. 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; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019. 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.

96. In the view of the Panel, the Mission's failure to a) adequately coordinate among its organs to ensure that all relevant information was shared before a decision was taken not to investigate this case, b) to keep close relatives informed of the actions of the Mission in relation to this case and c) to use all available investigative means to try to resolve this case 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.

97. 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 brother. 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 brother, having taken into consideration the challenges outlined above which the Mission faced at the time.

98. The Panel reiterates, however, that the Mission invested in this case a not insignificant amount of time and resources to try to locate the complainant's relative or his remains.

99. 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.

100. Based on the above, the Panel has determined that the Mission has violated the rights of the complainant 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 right 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's rights committed by the Mission;
ii. The Panel invites the Mission to ensure that the case-file pertaining to this case and the present Decision are sent to the competent local authorities;
iii. The Panel recommends that this case should be subject to monitoring by the Mission;
iv. The Panel recommends that, as it did in Case 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 Panel recommends that the mission should report to the competent authorities in Brussels if it becomes apparent that local authorities are not fulfilling their obligations in that regard;

vi. 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;

vii. The Panel recommends that the present decision should be provided to the relevant organs of the Mission; and

viii. The Panel also recommends that the Head of Mission should ensure that the monitoring activities of the Mission should be 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 16 March 2020.

For the Panel,

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member