DECISION AND FINDINGS

Date of adoption: 12 February 2020

Case no. 2016-12

U.F.

Against

EULEX

The Human Rights Review Panel, sitting on 12 February 2020 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 11 December 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 with the Panel.

3. On 28 June 2017, the Panel requested this and other complainants to provide additional information regarding their complaints. 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 case.

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 the present case.

6. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM) of EULEX Kosovo, inviting the Mission to submit answers and written observations on the complaints no later than 26 January 2018.

7. By letter of 17 January 2019, the Mission was requested again to provide answers to the questions by 16 February 2019.

8. By letter of 8 April 2019, the Mission was requested to indicate when it would be able to provide answers to the questions, and once again was urged to respond as soon as possible.

9. The observations of the HoM were received on 14 June 2019 after which they were communicated to the complainants for additional observations.

10. On 5 July 2019, the complainant submitted additional observations, which were transmitted to the HoM for information.

11. On 11 September 2019, the Panel declared the complaint admissible in relation to Articles 2, 3, 8 and 13 of the European Convention on Human Rights (https://hrrp.eu/docs/decisions/2019-09-11%20Admissibility%20Decision%202016-12%20signed.pdf).

12. In that Decision, the Panel asked the parties to address the following issues:

    i. **The Mission**:

        1. What step(s), if any, were taken by the Mission or any of its organs to investigate this case?

        2. In paragraph 24 above, the following is noted: A database handed over to EULEX by UNMIK indicated that a UNMIK Police Missing Persons Unit (MPU) case number was assigned to this disappearance presumably in 2003. However, the Mission did not receive MPU documentation in relation to it. Did the Mission ask for this documentation? If so when and what was UNMIK's response to that request?

        3. Have any of the documents received from UNMIK in relation to this case been communicated to relatives of the disappeared? If not, why?

        4. 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?

ii. **The complainant**:

1. What contact, if any, did you have with the EULEX Mission or its representatives?

2. Are you aware of any efforts by local authorities to investigate this case?

3. 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?

4. What are the consequences – personal, financial, legal and emotional – associated with the disappearance of your relative?

The parties were asked to provide responses to these queries, if any, no later than 11 November 2019.

13. On 9 October 2019, the Mission requested an extension of the deadline to submit its responses to the Panel's questions. The Mission was granted an extension of the deadline until 11 December 2019.

14. On 11 November 2019, the complainant sent additional comments in response to the Panel's queries.

15. On 6 December 2019, the Mission submitted its responses to the Panel's questions.

II. FACTS

16. The facts of the case, as they appear from the complaint, may be summarized as follows.

17. On 9 March 2000, the brother of the complainant was kidnapped. He was last seen outside his family home in northern Mitrovica by his son-in-law at about 10.15 hours on that day.

18. He was also allegedly seen at another family home in Vushtrri/Vučitrn at around the same time "*where he was forced into vehicle Golf 2, black color, by members of a security service*". He has not been seen since.

19. His disappearance was reported to the UNMIK Police, northern Mitrovica, and thereafter to KFOR and latterly to EULEX Kosovo. The complainant also indicates that his disappearance was reported to 'other local and international organizations dealing with human rights and freedoms'. It appears from subsequent submissions that the complaint did not have direct contacts with EULEX but suggests that information provided to other institutions would have been passed on to EULEX (see, *infra*, para. 34). Regarding EULEX, in particular, the complainant told the Panel that at an unspecified date, he had spoken to a staff member of EULEX about his missing family member during a meeting of the Serb Association of Missing Persons at the time when EULEX had only recently arrived in Kosovo.

20. The complainant requested that his identity should not be disclosed to the public. Considering the sensitive nature of this case, the Panel is satisfied that the complainant's request to keep his identity from the public is reasonable and justified in the circumstances.

III. SUBMISSIONS OF THE PARTIES

The complainant

21. 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 fundamental rights.

Head of Mission ("HoM")

22. The Mission's submissions regarding the admissibility of this case were received by the Panel on 14 June 2019. Some of these submissions remain relevant to the Panel's consideration of the merit of this case so that they are reflected here.

23. The Mission first explained that in the framework of the hand-over of cases and case-files from UNMIK to EULEX in the period December 2008 – March 2009, the Mission staff at what is now the Institute of Forensic Medicine (IFM) received a database containing victim identification forms on individuals reported missing during and after the conflict. The said database contained a 'victim identification form' on the complainant's relative. This form indicates that the complainant's relative (hereafter, the disappeared) was last seen in Vushtrri/Vučitrn on 9 March 2000. It does not include information regarding the circumstances of that disappearance.

24. Another database handed over to EULEX by UNMIK indicated that a UNMIK Police Missing Persons Unit (MPU) case number was assigned to this case presumably in 2003. However, the Mission did not receive MPU documentation in relation to it.

25. The only other document received by EULEX as part of the hand-over from UNMIK that relates specifically to this disappearance, is an unsigned request dated 18 December 2001 filed by a lawyer [presumably on behalf of the family of the disappeared] and addressed to the District Court in Mitrovica, to expand an ongoing investigation against several suspects with a view to include in it the alleged kidnapping of the disappeared and other individuals.

26. The Mission further suggested that it had no records of the complainant having brought the disappearance of his brother to the attention of the Mission's police and prosecutorial units. The Mission also noted that, according to its records, there was no involvement of the Mission in relation to the disappearance of the complainant's relative.

27. In response to the Panel's query on that point, the Mission provided an extensive explanation of the complex process of receiving, recording, categorising, storing and

reviewing of files received from UNMIK. The Mission emphasised the difficulties involved and the challenge it represented from the practical and logistical point of view.

28. The Mission also indicated that it was not aware of any ongoing investigation by Kosovo authorities into this case and 'invite[d] the complainant to address this question to the competent Kosovo institutions'.

29. On 21 August 2019, the Panel sought clarification from the Mission as to whether a case-file regarding this case had been transmitted to the local Kosovo authorities at the time of the Mission's transition in June 2018.

30. By email of 23 August 2019, the Mission clarified the matter as follows:

> "[T]he victim identification form concerning the relative of U.F. like all other 'victims identification forms', has been accessible to the local authorities since the very beginning of EULEX mandate. As far as the lawyer request mentioned on page 2 of the EULEX responses dated 14 June 2019 is concerned, that document has been transferred to the local authorities as part of the hand-over process which was completed by 14 December 2018. We would like to point out however, that EULEX Kosovo did not receive the original document from UNMIK but only a photocopy; the Mission is not aware of where the original document may be."

31. In addition to the above, the Mission made submissions regarding the merit of this case on 6 December 2019.

32. To the question of what steps, if any, were taken by the Mission or any of its organs to investigate this case, the Mission responded that, according to its records, the Mission did not investigate this disappearance. It further explained that

> "[r]egrettably, given the limited resources at its disposal and the short time-frame of its mandate, the Mission was unable to investigate all cases of disappearance and prioritized the review and assessment of the "war crimes" files."

33. Regarding the Panel's second question (see, *supra*, para 12), the Mission responded that it did not appear that EULEX had requested documentation from UNMIK regarding this case.

34. The Panel also asked the Mission whether any of the documents received from UNMIK in relation to this case had been communicated to relatives of the disappeared person. The Mission's letter is not entirely clear on that point, but it appears from its response that no such documents were provided by the Mission to the disappeared person's family.

35. To the Panel's question of whether the Mission had violated the fundamental rights of the complainant, the Mission invited the Panel to take into account its earlier submissions (as outlined and summarised above). The Mission added the following observations:

> "EULEX does not dispute that it had a mandate to investigate the disappearance of […] and in that regard, it recalls that in its observations of 14 June 2019, it did not contest the competence *ratione materiae* of the Panel over this case. However, the

Mission wishes to reiterate its conviction that an assessment of the conduct of EULEX under Article 2, 3, 8 and 13 of the European Convention on Human Rights in relation to this specific disappearance, cannot disregard the context and the circumstances in which the Mission was called to implement its mandate.

As already illustrated, EULEX faced enormous challenges from the very beginning of its mandate due to the poor state of the files inherited from UNMIK. Between 2008 and 2009 the Mission took over control over a very large amount of police documents (around 800.000 pages) scattered in poorly organised case-files. Many of the files contained copies instead of original documents (many hardly readable), were missing documents, and comprised documents with nothing more than the same basic information repeated over and over again. The information from the different branches of the UNMIK police referring to the same events, including disappearances, had not been systematically integrated or merged into easily searchable files prior to the hand-over to EULEX; electronic information management systems handed over were rudimentary and did not enable the Mission to gather all available information on one event. All in all, although the documents received from UNMIK were materially in the possession of EULEX, the fact that they could not be searched electronically from the outset of the Mission implied that they were in fact not, or not immediately usable.

According to the 'Kosovo Memory Book' of the Humanitarian Law Centre Kosovo, more than 13,000 individuals of which over 10,000 civilians were killed or went missing in the period 1998-2000. The scale of the crimes committed entails that expectations upon the ability of a rule of law mission such as EULEX to investigate and prosecute these cases should be 'realistic' and proportionate. This is acknowledged by the Panel's consolidated case law, as well as in the relevant law of the UNMIK Human Rights Advisory Panel."

36. The Mission also recognised that enforced disappearances are a serious human rights violations and that allegations that such acts occurred should be investigated. However, the Mission added, that

> "when it comes to assessing whether its conduct infringed upon the complainant's rights, EULEX disputes the idea that the failure to investigate an alleged enforced disappearance can by itself lead to the violation of the human rights, when such failure materializes in a context of large scale crimes involving thousands of victims and where it is clear that no investigative authority may be expected to resolve all cases brought before it."

37. The Mission highlighted in that context the limitations on its resources, the limited timeframe of the Mission and the overall circumstances in which EULEX had to operate. The Mission also pointed to the involvement and important contribution of the Institute of Forensic Medicine in a number of enforced disappearance cases.

38. The Mission further acknowledged that to manage expectations more adequately and be more transparent, it should have done more outreach efforts to keep relatives and the

wider public informed about the implementation of its mandate as well as its constraints and limitations.

39. However, the Mission concluded that in the present case and in light of fundamental obstacles presented,

> "the Mission does not believe that the complainant's rights were violated."

40. Finally, the Mission's underlined its continued commitment to continue to assist local authorities, in particular, through the Kosovo Institute of Forensic Medicine, and through monitoring of cases and training.

Complainant's response

41. On 5 July 2019, the complainant made submissions, which were then forwarded for information to the Mission. In these submissions, the complainant took particular issue with the Mission's suggestion that the matter was not brought to the attention of the Mission. In particular, the complainant points to the fact that "a report on a missing person in the territory of Kosovo and Metohija after the post-conflict situation required urgency and efficiency in the actions of the authorized bodies, as any delay could affect the outcome of the investigation". The complainant adds that should the Mission have failed to properly record and organise its records, such a failure could not be blamed on others and should not affect the merit of his complaint.

42. The complainant noted that it has no information regarding the material that was communicated by UNMIK to EULEX considering that neither organisation ever got in contact with him.

43. The complainant also said that the responsibility of the Mission to investigate cannot be dictated by the way in which UNMIK had labelled or organised those files and cannot affect its human rights obligations:

> "From the moment those case-files were handed over to it, the Mission was responsible for their efficient review and investigation."

44. The complainant had no information regarding what steps, if any, the Mission took to investigate this case. Nor was the cooperation of relatives sought and the complainant is unaware of any efforts to investigate this case. No documents pertaining to the case were ever provided to the family. The complainant added the following:

> "The fact that the authorities, competent for carrying out the investigation into the missing of [*redacted by the Panel*], kept changing one after the other, can in no way be the justification for passive behavior/inaction on the part of the authorities, nor can it be assigned as a burden to the family of the missing person. The authorities were responsible to act on the reported missing, to examine and investigate it, to carry out a proper investigation, to involve the family in the proceedings, and to report on actions taken. This has in our case, we repeat, never been done."

45. In response to the Mission's suggestion that the complainant had failed to put forth relevant legal arguments regarding the responsibility, the complainant said the following:

> "What the [*redacted by the Panel*] family expects is the finding of [the victim – *redacted by the Panel*], who went missing in life threatening circumstances, which was in good faith entrusted by the family to the competent authorities. However, the rationale that the complaint **"***includes only numbers of allegedly violated articles and"* indicates how the Mission regards the European Convention on the Protection of Human Rights and Freedoms and the victim's family. Also, on what basis does it conclude that such articles and relevant international instruments are "allegedly" violated**,** if the family does not know whether the investigation was ever carried out. Regarding the reference to the [European Court of Human Rights] case *Varnava et al against Turkey* and the listing of ungrounded arguments referring to the mentioned Decision, we must say that the interpretation of this Decision is absolutely not applicable to the Case No. 2016-12, U.F. against EULEX.
> Firstly, the rights invoked by the Complainant are among the basic principles, rights and freedoms underlying and guaranteed by the [European Convention on Human Rights]. Secondly, EULEX prosecutors are mandated to investigate the violation of rights invoked by the Complainant regardless of the actions of the Complainants, or referred to by them as "unnecessary delay". Third, a comprehensive and efficient investigation is important for building the feeling of accountability and care for rule of law in any post-conflict society, because the responsibility must be shared by the society as a whole, not only by those who are directly affected.
> I remind you that this case is about a person of Serbian nationality, who disappeared in life threatening circumstances in an ethnically clean environment, which was inhabited by Albanians after the war, and that we suspect that he was murdered, that the family took all the necessary actions in terms of reporting the missing to the competent authorities, that at no time was the family involved in the pre-investigation/investigation proceedings by the authorities, and that it suspects that this case has never been effectively investigated. It is inappropriate in the absence of any information from UNMIK and EULEX to impose on the victim and the victim's family the notion of "unnecessary delay", considering that the family was never informed about the results of the investigation, so in this specific case we cannot talk about "disinterest", given that the missing was reported to all institutions, the complaint was submitted in June 2016, when the family became aware only in 2016 that the investigation was not efficiently carried out (*see Brunner against Turkey* (Dec. No. 10/10; *Varnava et al against Turkey (GC),* as above, §157*).*"

The complainant then added the following regarding the passing on of information pertaining to this case from one organization to another:

> "We note that [*redacted by the Panel*] family did not intend to bring the case before the court in Strasbourg, but it expected the investigations would be carried out, that [the victim – *redacted by the Panel*] would be found live or not alive, that it would find out how he was murdered, who murdered him, and the whereabouts of his [remains], and not the relation between UNMIK and EULEX in the handover of

responsibilities, or the relation of these bodies with the Kosovo Police, or their "respect for the pain of the Complainant and the members of his family"."

46. In addition, by letter of 11 November 2019, the complainant made additional submissions regarding the merit of this case.

47. In that letter, the complainant said that he had met repeatedly with representatives of the Mission in relation to this matter when they gave him reassurance that the case of his brother's disappearance would be investigated:

> "I have had numerous contacts with EULEX Mission and its representatives in their official premises in Kosovska Mitrovica and Gračanica. Almost always I have been verbally assured that the case of enforced disappearance of my brother was registered and that will be investigated, and that I will be duly notified on the outcome of the investigation undertaken."

The complainant highlighted furthermore that despite his repeated requests for information regarding the state of advancement of the investigation, he never received a response from EULEX. He therefore takes strong objection to the Mission's suggestion that he did not seek to bring this matter to the Mission's attention.

48. The complainant also said that, in his view, the Mission failed to act with the necessary urgency and efficiency in this matter.

49. In response to the Panel's question as to whether he was aware of any efforts by local authorities to investigate this case, the complainant said that he has no such knowledge and pointed out that he was never contacted by them. He described this state of affair as

> "a devastating fact both from the human and the proclaimed principles of the Convention on human rights and the rights arising from it."

50. Asked whether the Mission violated his fundamental rights, the complainant was affirmative and highlighted the following:

- The Mission's *obligation* to investigate these cases arises from the provisions of the Articles 2-3 of the European Convention, which mandates the Mission to guarantee the effectiveness of these rights in the context of its executive function;

- Article 2 of the European Convention besides the positive obligation imposes also procedural obligation which is consisted of implementation of an effective investigation which exists also in the cases of forced disappearance;

- Article 3 of the European Convention implies that any investigation, including the one under Article 2, should be capable of leading to the identification and punishment of those responsible.

- Article 8 of the European Convention was said to have been violated as the complainant was denied the right to know the truth about his brother's fate.

- Article 13 of the European Convention guarantees the right to an effective remedy before national law to anyone whose rights and freedoms have been violated, which the complainant said was violated in this case as the Mission failed to pursue lines of enquiry relevant to establishing the circumstances of the disappearance of the complainant's brother.

51. Regarding the consequences – personal, financial, legal and emotional – associated with the disappearance of his relative, the complainant said the following:

> "For me and my family, the forced disappearance of my brother has been marked by great mental pain and trauma that continuously lasts for 19 years. We do not know if he is alive or killed, if he was killed, whether he was inhumanely treated, given that he was abducted (kidnapped) by members of the Albanian armed forces, who killed him and where his remains are. How emotionally it feels for a person to be left without a family member is certainly only known to those who have gone through it in an inter-ethnic conflict, therefore our pain and the agony of searching for him from institution to institution (international and local) cannot be described in words. Respecting your question regarding the financial consequences, I believe that this is a secondary issue at this moment, given that my brother […] in the records is still registered as alive, and that all my efforts and the efforts of my family are directed at finding him or his remains, and prosecution of responsible persons, in order to calm our mind, regardless of the financial consequences of his disappearance."

IV. DELIBERATIONS

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

52. 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.

53. 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).

54. 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. The Mission did nothing or too little to dispel the sense that the Mission would fulfil its obligations in regards to his relative; instead, it gave the complainant reassurances that it would investigate this case. 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*).

55. 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.

56. The right to truth in relation to human rights violations is not only an individual right. It is also a collective right, serving to preserve memory at the level of society and acting as a safeguard against the recurrence of violations. 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, Preamble. In the post-conflict context of Kosovo, investigations of enforced disappearances should have contributed – and should continue to contribute – to promoting truth, to the collective memory of such human rights violations, and to ensuring their non-recurrence.

57. 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

58. 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 omission. 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.

59. 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).

60. Expectations placed upon the ability of EULEX to investigate and resolve complex criminal cases should therefore be realistic and should 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).

61. 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.

62. 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).

63. 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, which the Panel fully endorses (*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).

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.

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).

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).

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)."

64. The European Court has also 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.'

65. A strict commitment and attachment to those standards is particularly important for a Rule of Law mission operating in a post-conflict context, 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).

66. 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.

67. 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

68. 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.

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; *Zlata Veselinović, H.S., I.R. against EULEX,* 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015; *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.

70. 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, as crimes against humanity or as 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 relation 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.

71. The investigation of this sort of cases did not just 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.

72. The above considerations will serve to assess the Mission’s conduct in relation to this case in light of its overall mandate and human rights obligations.

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

73. 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.

74. Furthermore, the manner in which UNMIK had 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.

75. 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*).

76. 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).

77. 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.

78. The Panel has also taken into consideration the fact that EULEX Kosovo had to confront and address the investigative legacy of UNMIK. The Human Rights Advisory Panel of the United Nations (HRAP) found that UNMIK failed in various respects to fulfill its human rights obligations in relation to victims of "enforced disappearances" in a number of cases. 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. 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

79. As noted above, there is little question that the Mission operated in difficult circumstances for much of the time of concern to this case. It is also apparent that the Mission's resources were limited in kind and nature and, in some respects, inadequate to the expectations. The state and disorganised nature of files received from UNMIK also greatly complicated the work of the Mission.

80. Also relevant is the magnitude of the task expected of the Mission. Missing persons cases were numerous, evidentially complex and resource-intensive. To that extent, it is reasonable for the Mission to suggest that choices had to be made and that decisions on prioritization were necessary and reasonable in the circumstances.

81. Despite these circumstances, which affected the Mission's ability to conduct a full and effective investigation of all cases of enforced disappearance, the Panel still finds that the Mission did not do enough to protect and guarantee the fundamental rights of the complainant. 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; and

ii. A failure to sufficiently involve and inform close relatives of the disappeared.

Investigation of the disappearance of the complainant's relative

82. 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.

83. 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.

84. 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.

85. 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.

86. 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. 89.

87. Also, whilst the Mission is right to point out that the magnitude of the task at hand and its limited resources required decisions to be made on prioritisation, the Panel cannot agree that this provides a valid explanation for the Mission's inaction in this case. First, there is no indication on the record of this case that any request was made by the Mission to obtain additional resources to be able to investigate this case (or cases of the same sort).

88. Second, to the extent that prioritisation was based on whether the files were classified as 'war crimes' or 'missing persons', such a criteria provided no reasonable basis for such a decision: a war crime case could involve acts of enforced disappearance just like a case of missing persons could invovle the commission of war crimes. Furthermore, this qualification was not based on the actual 'merit' of individual cases and on available information. Nor was it based, as it should have been, on the gravity of the violation of rights involved. Instead, it was based on a theoretical connection to the armed conflict, a criteria not directly relevant to the effective protection of human rights. Acts of enforced disappearance constitute violations of international human rights law. But they could also constitute violations of international humanitarian law (see Rule 98, ICRC Customary Law Study) and crimes against humanity (see, e.g., ICC Statute, art. 7(1)(i)). As such, the claimed prioritisation of 'war crimes' over 'missing persons' case is not only normativelly questionable, but it also fails to provide a reasonable explanation for the Mission's failure to investigate cases of enforced disappearance, be it as 'war crimes' cases.

89. Third, this classification of cases – 'war crimes files' *vs* 'missing persons files' – was the legacy of UNMIK's activities, which the Mission had good reason to know – as is apparent from its submissions – was not entirely reliable. It should therefore have conducted its own assessment of casefiles and made an individual assessment for each of them, not based on generic and not entirely pertinent categories of cases. The Mission should therefore have conducted individualised evaluation and investigation rather than based its decision to investigate on what information might have already been in an UNMIK file.

90. Last, the complainant's submissions make it clear that the Mission never actually sought to dispel the complainant's hope and belief that this case would be investigated by the Mission. Instead, he received assurances from the Mission that it would (see, *supra*, paras 47 and 54).

91. The apparent lack of clear prosecutorial focus on cases of this sort, which involve serious violations of the right to life, and the absence of a clear policy to address such cases as an investigative priority, might have negatively affected the Mission's ability to focus on cases of this sort.

92. 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. In particular, the Mission has conceded that it did not seek to reach out to UNMIK in relation to this case.

93. Prior to deciding not to investigate a case of this seriousness, the Mission should therefore have exhausted reasonable avenues of information, including by contacting relatives of the disappeared and relevant organisations to ascertain whether they possessed information about the case.

94. Based on the above, the Panel finds that the Mission did not fulfill its investigative responsibilities towards the complainant and thereby contributed to the violation of his fundamental rights.

95. 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. 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.

Informing relatives of the disappeared

96. 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.

97. 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.

98. 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.

99. 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.

100. In relation to the present case, the Mission has conceded that no efforts were made to reach out to the complainant or relatives of the disappeared. No information in the Mission's possession relevant to this case was passed on to those relatives.

101. 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 Mission acknowledges, however, the inadequacies of its outreach efforts and the fact that it could and should have done more to inform the public of its mandate and its limitations (see, *supra*, para 37).

102. The Mission's failure to contact and inform the complainant of their decision not to investigate this case and its failure to reach out to them and to provide them with information about 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

103. 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. 98.

104. 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.

105. 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

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

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; *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.

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

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 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.

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 results 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.

111. In the view of the Panel, the Mission's failure to a) to keep close relatives informed of the actions of the Mission in relation to this case and b) 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.

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 brother. That trauma is grave, durable and ongoing. In that regard, the Panel quotes once again the complainant's submissions regarding the effect of his brother's disappearance upon him and his family:

> "For me and my family, the forced disappearance of my brother has been marked by great mental pain and trauma that continuously lasts for 19 years. We do not know if he is alive or killed, if he was killed, whether he was inhumanely treated, given that he was abducted (kidnapped) by members of the Albanian armed forces, who killed him and where his remains are. How emotionally it feels for a person to be left without a family member is certainly only known to those who have gone through it in an inter-ethnic conflict, therefore our pain and the agony of searching for him from institution to institution (international and local) cannot be described in words.

113. The violation of the complainant's fundamental rights 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.

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 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 to the authorities the importance of the victims' rights to the truth, the fact that the violation is ongoing, and to indicate that it welcomes information on 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.

IN ADDITION, in light of the Mission's submissions of 6 December 2019 in which the Mission indicated that not all cases could be investigated and that decisions on prioritisation had to be made, **THE PANEL ASKS THE MISSION TO PROVIDE THE FOLLOWING INFORMATION**:

i. How many cases of enforced disappearance were received by the Mission from UNMIK?

ii. How many of these have been investigated by the Mission over the course of its mandate?

iii. How many of these resulted in criminal proceedings?

iv. How many 'war crimes' cases were received by the Mission from UNMIK?

v. How many of these were investigated by the Mission in the course of its mandate?

vi. How many of these resulted in criminal proceedings?

vii. What were the factors taken into consideration when making decisions on prioritisation of cases? Who made that decision? Has this been documented in any way? If so, please provide documentary evidence.

THE PANEL RESPECTFULLY ASKS THE MISSION to report upon the implementation of these recommendations and to response to its enquiries at its earliest convenience and no later than 15 April 2020.

For the Panel:

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member