DECISION AND FINDINGS

Date of adoption: 12 February 2020

Case no. 2016-13

Miomir Krivokapić

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 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 the present case.

6. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), 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 eventually received on 26 June 2019.

10. By letter of 24 July 2019, the observations of the HoM were communicated to the complainant and he was invited to reply to the Mission's submissions if he wished to do so. No further submissions were received from the complainant.

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

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

    i. **For the Mission**:

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

        2. Did the Mission take any step to contact or provide information to relatives of Mr Krivokapić regarding to this case? If so, which steps?

        3. What, if anything, is the Mission able to do in order to ensure that local authorities fulfil their human rights obligations in relation to the complainant?

        4. In your letter of 26 June 2019 (page 8), it is said that according to your records there was no involvement of the Mission in investigating the disappearance of Mr Arsenije Krivokapić.

a. Why didn't the Mission investigate this case?
b. When was the decision taken?
c. Was it communicated to relatives of Mr Krivokapić?

5. Was the case-file pertaining to Mr Arsenije Krivokapić provided to local authorities? If so, when? If not, why?

6. In your submissions of 26 June 2019, you discuss an ante-mortem report of 2008 prepared by an UNMIK police officer. You further indicate (p. 4 of your letter) that this document was not transmitted to the SPRK for assessment. Please indicate which organ of the Mission received that document from UNMIK? Please also indicate why it was not transmitted to the SPRK?

7. 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. **For 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. The complainant did not avail himself of the possibility of making additional submissions.

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 13 September 1999 at about 19.00 hours, Arsenije Krivokapić, father of the complainant, Miomir Krivokapić, was seen walking towards Bosniak Mahala, Mitrovica. He disappeared immediately thereafter and was not seen again.

18. The complainant says that he reported the disappearance of his father to the International Committee of the Red Cross (ICRC), to KFOR and to UNMIK at the time of the disappearance. He later also reported the matter to EULEX Kosovo.

19. On 17 September 1999, the ICRC opened a tracing request for Arsenije Krivokapić.

20. The complainant says that neither he nor his family heard anything further from the authorities about his father since the time his disappearance was reported.

21. On 20 April 2000, Zorka Krivokapić, the wife of Arsenije Krivokapić, provided a statement on the disappearance of her husband to an Investigating Judge at the Municipal Court of Mitrovica. On two subsequent occasions, on 19 May 2000 and 29 June 2002, she made additional statements to the Department of Criminal Police of Mitrovica.

III. SUBMISSIONS OF THE PARTIES

The complainant

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

Head of Mission

23. On 26 June 2019, the HoM made submissions regarding the admissibility of this case. Some of these submissions remain relevant to the Panel's consideration of the merit of this case. Those submissions are therefore highlighted below.

24. In response to the Panel's question as to whether the Mission had been aware of the existence of this case, the Mission indicates that in the framework of the hand-over of cases and case-files from UNMIK to EULEX Kosovo, the Mission received an 'UNMIK Police War Crimes Unit – Missing Person Section – Ante-Mortem Investigation Report' reference to the disappearance of Arsenije Krivokapić dated February 2005. This report indicates that Mr Krivokapić disappeared on 13 September 1999, that the case was reported to the ICRC in Belgrade, that an MPU file was opened in 2002, that it was impossible at the time to find a witness to these events, and that the case should be kept 'open'/'pending' within the War Crimes Unit (WCU). The report also mentioned that Mr Krivokapić's wife, who was listed as a 'witness', could not be reached.

25. The Mission also received from UNMIK several victim identification forms with his details, as well as a correspondence between the UNMIK Police Mitrovica Station and the UNMIK Missing Person Unit (MPU) in Pristina in November 2000 indicating that the disappearance of Mr Krivokapić was first registered in November 2000.

26. Also among the documents received by the Mission was a further ante-mortem report prepared at an unspecified date in 2008 by an UNMIK police officer, who indicated that

the case should be kept pending within the Ante-Mortem and Exhumation Section ‘waiting for further information’. It would appear that this document was not transmitted to the SPRK for assessment.

27. Therefore, according to the Mission, at the time of the hand-over of the file to EULEX, the case was not being actively investigated by UNMIK ‘due to lack of information’.

28. The Mission received no other documents regarding this case and submitted that the complainant did not bring the disappearance of his father to its attention.

29. In response to the Panel’s query on that point, the Mission provided a detailed explanation of the complex and time-consuming exercise of reviewing, recording, storing and analysing of files received from UNMIK.

30. As part its transfer, UNMIK provided the Mission with several databases. The case of Mr Krivokapić received an MPU number and it was recorded in the database on missing persons handed over by UNMIK to the Mission.

31. The Mission also said that the content of the police ‘war crimes’ files and the ‘missing persons’ files were not compared or merged by the Mission upon the hand-over of those files. Priority was seemingly given to the ‘war crimes’ files ‘based on the consideration that a comprehensive cross-check of all files would have required putting on hold at least in part the work on the open investigations inherited from UNMIK’.

32. The Mission’s submissions made it clear that the categorization of cases and case-files received from UNMIK was a ‘major challenge’ for EULEX due to the magnitude of the matter and the inadequacy of some of UNMIK’s classification. At the time of hand-over, the case-file of Mr Krivokapić was that of a ‘missing person’. To address this challenge, EULEX had to conduct several reviews of UNMIK’s files. This cumbersome process was further complicated by issues pertaining to staff and reconfiguration of the Mission, which resulted in certain case-files missing documents, reports or photographs. Successive reviews of case-files was also conducted in 2009, 2010 and 2013.

33. The Mission also indicated, in general terms, that it had investigated and prosecuted a number of instances of enforced disappearance ‘in the framework of war crimes cases’.

34. According to EULEX records, however, there was no involvement of the Mission in investigating the disappearance of Mr Krivokapić. In particular, no interview appears to have been conducted by the Mission with potential witnesses or informants.

35. The Mission indicated that it was not aware of any ongoing investigation of this case by local authorities.

36. The Mission’s submissions suggested that it took no steps to contact or inform relatives of Mr Krivokapić regarding any aspect of this case.

37. 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.

38. In response, through an email of 23 August 2019, the Mission clarified that

> "all the documents referred to in the EULEX responses of 26 June 2019 were transferred to the local authorities as part of the hand-over process. Our understanding is that the case was transferred as a missing person file."

39. On 6 December 2019, the Mission sent its submissions regarding the merit of this case. Asked what steps the Mission or its organs had taken to investigate this case, the Mission indicated that they did not investigate this case.

40. Nor has the Mission taken any step to contact relatives of the disappeared.

41. Asked what, if anything, the Mission would be able to do in order to ensure that local authorities fulfil their human rights obligations in relation to the complainant, the Mission pointed to its continued involvement through the Kosovo Institute of Forensic Medicine and expressed its willingness to assist should relevant information become available. The Mission also pointed generally to its monitoring activities and to the setting up of a database of cases as indications of its support for and continued engagement with local authorities. The Mission also emphasised its involvement in training local actors regarding investigations and case-management. The Mission added that these efforts will continue throughout the remaining mandate of the Mission whilst 'appreciat[ing] that these activities cannot in any way alleviate the suffering of the complainant and meet his demands for justice'.

42. Asked why it never sought to investigate this case, the Mission gave the following explanation which the Panel outlines in full:

> "There was never a formal decision to not investigate this specific disappearance. EULEX Kosovo's resources were not unlimited and it would have been unreasonable and ineffective to investigate all instances of war crimes and other serious crimes related to the conflict at the same time; therefore, the Mission had to necessarily prioritize certain cases over others. The non-investigation of this case was the consequence of the Mission's decision to prioritize the "war crimes files" over the 'missing person files'."

The Mission also pointed to the number of cases and limited resources to explain that a large number of cases remained in 'legal limbo'.

43. The Mission explained that an UNMIK *ante-mortem* report of 2008 was not transmitted by the EULEX War Crimes Investigation Unit to the SPRK 'because it was deemed that the information contained therein was insufficient to enable the prosecuting authorities to make a determination on the cases'.

44. In response to the Panel's question whether the Mission violated the fundamental rights of the complainant, the Mission referred to its earlier submissions and submitted that it could not be held responsible for the violation of these rights. In particular, the Mission did not dispute that it would have been competent to investigate this case but that the context and circumstances – in particular the magnitude of the task; the limited resources and time available; the poor state of UNMIK files – all made it impossible for the Mission to investigate each and all cases.

45. The Mission did, however, acknowledge some shortcomings in terms of its efforts to manage expectations and to provide outreach to relevant communities.

46. The Mission also said that all documents in its possession pertaining to this case have now been passed on to the competent local authorities.

Complainant's reply

47. The complainant did not avail himself of the opportunity to make additional submissions on the merit of this case.

IV. DELIBERATIONS

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

48. 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.

49. 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).

50. For almost two decades, the complainant has lived with the uncertainty regarding the fate of his father, what happened to him and in what circumstances he disappeared. The psychological suffering resulting from this is not just immense; it is ongoing. See 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*).

51. 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.

52. 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.

53. 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

54. 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.

55. 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).

56. 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).

57. 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. See, e.g., *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.

58. 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).

59. 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 this Panel wholly embraces (*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.

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)."

60. 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.

61. 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).

62. 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.

63. 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

64. 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.

65. 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.

66. 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 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.

67. 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.

68. 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

69. 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.

70. 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.

71. 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*).

72. 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).

73. 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.

74. 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

75. 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.

76. 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.

77. 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

78. 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.

79. 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.

80. 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.

81. 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.

82. 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.

83. 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).

84. 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 involve 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 convincing explanation for the Mission having failed to investigate cases of enforced disappearance, be it as 'war crimes' cases.

85. 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 case-files 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.

86. 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.

87. 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.

88. 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.

89. In addition, the Mission should have ensured that, prior to taking any such decision, the prosecuting authorities had in their possessesion all relevant information. In that respect, the Panel notes the Mission's unsatisfactor explanation for why an UNMIK *ante-mortem* report of 2008 was not transmitted by the EULEX War Crimes Investigation Unit to the SPRK (see, *supra*, para. 43). That information should have reached the SPRK and formed part of the factual background on which to decide whether to take this case further.

90. 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.

91. Finally, the Panel notes that the Mission's ability to investigate this sort of cases 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

92. 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.

93. 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.

94. 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.

95. 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.

96. 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.

97. 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 45).

98. 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

99. 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.

100. 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.

101. 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

102. 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.

103. 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.

104. 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.

105. Also relevant to the present case is Article 3 of the European Convention on 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.

106. 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.

107. Also of relevance here are the rights guaranteed by, *inter alia*, Article 3 of the European Convention of Human Rights. The essence of the violation of Article 3 of the Convention with regard to a family member is related to the "reactions and attitudes" of the authorities, rather than the fact that a family member disappeared. To make a determination of a violation of Article 3 of the Convention in relation to a family member of a disappeared person, there are factors that give the complainant's suffering a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation. Such factors include "the proximity of the family tie – in that context, a certain weight will attach to the parent-child bond –, the particular circumstances of the relationship, the extent to which

the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries". See *Çakıcı v. Turkey,* ECtHR Judgment of 8 July 1999, Reports of Judgments and Decisions of 1999-IV, para. 98.

108. 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.

109. These culpable failures and omissions also contributed to the violation of the complainant's rights under Article 3 of the Convention and contributed to the emotional and psychological trauma resulting from not knowing what happened to his father. That trauma is grave, durable and ongoing.

110. 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 father, having taken into consideration the challenges outlined above which the Mission faced at the time.

111. 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.

112. 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