ADMISSIBILITY DECISION AND

DECISION AND FINDINGS

Date of adoption: 11 December 2020

Case no. 2016-24

Vesko Kandić

Against

EULEX

The Human Rights Review Panel, sitting on 11 December 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 through electronic means in accordance with Rule 13(3) of the Panel's Rules of Procedure, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 1 July 2016 as Case no. 2016-24. It was later mistakenly registered again as Case no. 2016-31 on 22 September 2016. It is one and the same case and will therefore be dealt with as such.

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 the complainant to provide additional information regarding his complaints. The complainant initially responded that there was no further information in relation to this case.

4. On 19 September and 17 October 2017, the Panel sent two further requests for additional information via the representative for Serb families of the Missing Persons Resource Center (MPRC), an NGO based in Pristina.

5. On 20 October 2017, the Panel received a response through the MPRC providing additional information regarding this complaint.

6. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), EULEX Kosovo, inviting the then Head of Mission to submit her 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. On 31 January 2019, the complainant was requested to complete the application form with his signature and date.

9. On 7 February 2019, the complaint submitted his signature and date on the application form.

10. By letter of 8 April 2019, the Panel again requested the HoM to provide answers to the questions as soon as practical.

11. On 20 June 2019, the complainant was informed that the Panel was still in the process of examining his complaint.

12. The Head of Mission's submissions were eventually received by the Panel on 30 September 2020.

13. On 23 October 2020, the submissions of the Head of Mission were forwarded to the complainant, who was invited to submit his comments, if any, by 20 November 2020.

14. On 29 October 2020, the Panel inquired by email with the Mission whether they had additional submissions to make on the merit of the case should it be declared admissible.

15. On 29 October 2020, the Mission responded by email that it did not wish to provide any additional observations in relation to this complaint.

16. No further submissions were received from the complainant.

17. In order to recuperate some of the time that was lost between 2017 and 2020, and in order to guarantee the expeditiousness of proceedings, the Panel informed the Mission by letter of 18 September 2020 that it would now deal in principle with admissibility and merit of all cases in one single decision and will not grant further extension of time unless exceptional circumstances are shown.

18. On the basis, the Panel has decided to address the issue of admissibility and merit in relation to the present case in one single decision.

II. THE FACTS

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

20. On 13 June 1998, Čedo Kandić, the uncle of the complainant, was reportedly taken by force from his house in Kotore, Skenderaj/Srbica Municipality, Kosovo.

21. On 15 June 1998, Radoslav Kandić, a brother of the missing person and father of the complainant, gave a statement to the judicial police, Ministry of Internal Affairs of the Republic of Serbia in Kosovska Mitrovica (Report No. 16203/98, dated 16 September 1998).

22. According to this statement, Čedo Kandić was taken by 8 (eight) unidentified persons wearing masks and uniforms, and carrying automatic weapons. He was taken away in an unknown direction.

23. The case was reported the Police, to the ICRC and to the Humanitarian Law Centre in Serbia.

24. There has been no trace of Čedo Kandić since that time.

III. COMPLAINT

25. The complainants refers to two particular fundamental rights reflected in the following provisions: Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) under its procedural head, which guarantees a person's fundamental right to life and provides for an obligation to investigate cases of suspicious deaths; and Article 3 of the Convention which guarantees a person's right not to be subjected to torture or inhuman or degrading treatment or punishment.

IV. STANDING

26. The Mission does not take a position on whether the complainant may be considered a victim for the purpose of being granted standing in the present matter.

27. In light of this and considering the complainant is a close relative of the disappeared and appears to be responsible on behalf of the family to represent their collective interests, the Panel is satisfied that the requirements of Rules 2(3) and 25(1) of the Panel's Rules of Procedure are met.

V. SUBMISSIONS OF THE PARTIES

Submissions of the complainant

28. As is apparent from the complaint form, the complainant alleges that, in the exercise of its executive mandate, EULEX Kosovo should have investigated the disappearance of his uncle and culpably failed to do so in violation of his fundamental rights.

Submissions of the Head of Mission

29. By letter of 24 September 2020, the Head of Mission responded to the Panel's questions. To the question of whether and when the Mission became aware of that case, the Mission responded as follows. EULEX Kosovo says it became aware of the 'kidnapping' of Čedo Kandić after the hand-over of cases and case-files from the United Nations Interim Administration Mission in Kosovo (UNMIK) to EULEX in the period December 2008 to March 2009. As part of that process, the EULEX War Crimes Investigation Unit – WCIU – received an *'Ante-Mortem Investigation Report'* from UNMIK dated 30 December 2004. This Report included information from unidentified open sources on the abduction of Mr Kandić on 13 June 1998. This Report is said to include a notion pointing out that

> 'no witnesses could be identified, either because they were not residing in Kosovo or because their whereabouts were unknown'.

The Report also suggests that 'the criminal character of Kandić's disappearance was clear' and that the case should remain open with UNMIK's War Crimes Unit.

30. However, the Mission notes, at the moment of the hand-over to EULEX, the UNMIK crime pillar database (which listed all the so-called 'war crimes' files) indicated that the case opened in relation to the disappearance of Mr Kandić had been 'closed'.

31. The Mission also indicates that the EULEX WCIU came into contact with the complainant in Spring 2012 while investigating offences allegedly committed during the conflict. The WCIU 'received from the complainant notes that his father Mr Radoslav Kandić, wrote shortly after the abduction of his brother Čedo Kandić'.

32. To the Panel's questions whether the complainant's case was transferred to EULEX and what measures were taken by EULEX to record, store and categorise cases, the Mission explained *in extensu* the process by which it received, organized and registered cases coming from UNMIK. In that way, it processed thousands of individual case-files, including some pertaining to 'missing persons'. Of the 5,000 or so 'missing person' case-files received by EULEX, 'around 2,000 had been marked by UNMIK as 'active'/'inactive' or 'pending', and 3,000 as 'closed'.' 'Closed' cases, the Mission says, 'were those for which remains of the missing had already been located at the moment of hand-over'. All other cases were kept 'open' and/or 'pending' by the UNMIK police, apparently due to lack of developments or new information.' In total, the 'war crimes' and 'missing persons' cases-files handed over by UNMIK to EULEX Kosovo comprised approximately 800,000 pages. That process was large, time-consuming and complicated. The Mission invested a lot of time – and, assumingly, expenses – into that process.

33. In addition, UNMIK also handed over several databases containing additional information, including one for 'war crimes' police files and another regarding 'missing persons' cases.

34. At the time of hand-over to EULEX, the 'missing persons' database contained an entry on Čedo Kandić, but 'the "status" box was empty'. An entry was also included in the 'war crimes' database, this was marked as 'closed'.

35. As regards the categorization of the cases received from UNMIK, the Mission explains that the categorization of active cases and case-files received from UNMIK 'appeared immediately a major challenge for EULEX'. UNMIK's organizing was incomplete, contradictory and, in some respect, impracticable so that EULEX had to conduct an extensive process of review. Several reviews of the files were thus conducted by the Mission over the years.

36. The Mission also says this:

> 'From a review of EULEX records it emerges that whenever EULEX Prosecutors came across a case-file pertaining to alleged criminal offences (including murders and kidnappings) which occurred after 21 June 1999, they considered themselves incompetent and forwarded the cases to the relevant District Prosecution Offices. Dismissed or terminated cases were not assessed since they were procedurally closed. Missing person cases, either 'open' or 'closed' and 'closed' war crimes case files did not end up being assessed by the SPRK routinely.'

37. Based on UNMIK records, in relation to the present case, the Mission notes, for instance, that –

> 'the abduction of Čedo Kandić had received a "missing person" case number, as well as a "war crime" case number; the latter was opened following the report of the abduction by several village representatives […]. [A]t the moment of the hand-over to EULEX, the case of Čedo Kandić was included in the missing person database with the "status" box left empty, while in the criminal pillar database it was marked as "closed".

38. Asked what steps were taken by the Mission to identify and investigate cases of enforced disappearance and murder dating back to the conflict or its immediate aftermath, the Mission suggests that the notion of 'enforced disappearance' was not expressly foreseen by the relevant legal framework and suggests furthermore that while such acts could constitute a crime against humanity, it could not constitute a war crime.

39. Regarding the Mission's involvement in this case, the Mission notes that despite the case of Mr Kandić having been marked as 'closed' in some of UNMIK's records, the SPRK compiled a report detailing 'the situation of the file' in which he noted that the disappearance of Čedo Kandić had been reported by Serb representatives of a certain village, that it had taken place 'before the war', that this was a missing person case and that authorities should locate possible witnesses. The Mission adds the following:

> 'No actions appear to have been undertaken in relation to this case-file until October 2013, when the EULEX Head of SPRK referred the case to the Basic Prosecution Office in Mitrovica, with the hypothetical qualification of "aggravated murder". It is apparent that the main reason for referring the criminal report filed by the mentioned village representatives to the Basic Prosecution Office in Mitrovica, was the false assumption that the kidnapping had taken place outside of the timeframe of the armed conflict, and therefore SPRK did not have exclusive competence on the case.'

40. The Mission explains further:

> 'Notwithstanding all the above and unrelated to it, based on the information available, the Mission is able to confirm that the abduction of Čedo Kandić was investigated by its police and prosecutorial units, as part of a larger investigation into criminal offences perpetrated during the conflict, which resulted in criminal proceedings instigated by the Mission against several individuals. As Mr Kandić is aware, the EULEX WCIU was in contact with him in May 2012 and later it interviewed several individuals in relation to the abduction of his uncle. However, the Mission infers from the lack of further information in its records that the investigation into the abduction of Čedo Kandić did not move forward.

41. It then adds:

> In the handover note prepared by EULEX and enclosed to the relevant case-file which was transferred to the Kosovo institutions in September 2018, the Mission recommended the Kosovo prosecutorial authorities to open a new case in relation to the disappearance of Čedo Kandić.

42. To the question of whether EULEX is aware of this case being investigated by others, the Mission 'invites the complainant to contact the competent institutions in the SPRK and at the Basic Prosecution Office in Mitrovica'. The Panel understands this response to mean that the Mission is unaware of any such investigation being presently conducted. The Mission adds that:

> 'it stands ready to provide the relevant case numbers to facilitate the request of information by the complainant.'

43. The Mission had nothing to add regarding the participation of the victim's relatives in the investigation, nor did it wish to add anything to the Panel's question as to whether witnesses or potential suspects were questioned. The Panel understands these responses as indicating that other than the Mission's contact with the complainant, there was no further effort by the Mission to inform, interview, or get in touch with the victim's family in relation to this matter.

44. The Mission also failed to respond to the Panel's question regarding documents having been served by the Mission to relatives of the disappeared. The Panel understands this to mean that this did not occur.

45. To the Panel's question whether the Mission knew of any ongoing investigation into this case, the Mission responded that it is no longer competent to investigate and that the complainant should seek information from the Kosovo authorities. The Panel takes this response as an indication that the Mission has no information suggesting that an investigation of this case is ongoing.

46. Regarding the question of whether the Mission considers that the fundamental rights of the complainant have been violated, the Mission says the following. First, it leaves it to the Panel to decide whether the complainant has standing in this matter in consideration of the fact that it is the nephew of the missing person and his 'enquirer'.

47. Secondly, the Mission adds this:

> 'EULEX acknowledges that the complainant and Čedo Kandić's family members have a right to know what happened to him and to an effective investigation. However, it disputes that the Mission can be deemed to have violated the complainant's rights under the Convention and reiterates what it has already stated in relation to complaints raising similar allegations. An assessment of the conduct of EULEX under the procedural head of Article 2 and under Article 3 of the Convention in relation to this specific abduction, cannot disregard the magnitude of the challenge that EULEX had to face from the very beginning of its mandate.'

48. The Mission then points to the magnitude of the challenge to investigate this sort of cases, the limitation of resources that it faced and suggests that expectations should be 'realistic' and proportionate. The Mission adds:

> ‘The Mission acknowledges that the management of the files inherited from UNMIK was a challenge and that it was unable to rectify many inconsistencies and duplications. It also acknowledges that its police and prosecutorial units should have ensured better communication with victims and victims’ relatives, and also with the wider public. However, it maintains that it would have been simply disproportionate to expect that the Mission could investigate all killings, suspicious deaths and disappearances at the same time as well as maintain all victim’s relatives informed of the status of any investigations. Therefore, in the present case and in considering the fundamental obstacles presented, the Mission does not believe that the complainants’ rights were violated.’

49. The Mission added further:

> ‘EULEX wishes to recall that under its current mandate the Mission retains an executive capacity to support the Kosovo Institute of Forensic Medicine in the conduct of a variety of activities such as site-assessments, exhumations and excavations. Should credible information come to light, the Mission stands ready to support Kosovo institutions in any efforts to find Mr Čedo Kandić and other missing persons.’

VI. ADMISSIBILITY

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

50. As a matter of substantive law, the Panel is empowered to apply human rights instruments as reflected in the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel. Of particular importance to the work of the Panel are the European Convention on the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights, which set out minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.

51. Before considering the complaint on its merits, the Panel has to decide whether to proceed with the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.

52. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate.

53. The Panel has already established that the actions of the EULEX prosecutors and police form part of the executive mandate of EULEX Kosovo and therefore fall within the ambit of the mandate of the Panel, (see, for instance, *K to T against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 43; *Krlić against EULEX*, 2012-21, 26 August 2014, para. 23; *Y against EULEX*, 2011-28, 15 November 2012, para. 35). This is also the case of positive obligations or culpable failures.

54. 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 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; compare also the UNMIK Human Rights Advisory Panel (HRAP) decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 35).

55. In the assessment of the present complaint, the Panel has also taken into account the difficulties necessarily involved in the investigation of crimes in a post-conflict society such as Kosovo (see *Palić v. Bosnia and Herzegovina*, application no. 4704/04, ECtHR Judgment of 15 February 2011, para. 70; HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, paras. 44 and 62 *et seq*.). Those difficulties should not, however, serve to camouflage or justify 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).

56. Expectations placed upon the ability of EULEX to investigate and resolve complex criminal matters should therefore be realistic and not place upon EULEX a disproportionate burden that its mandate and resources are not able 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; compare also HRAP decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013,para. 35; HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, paras70-71 See also *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, quoted above, paras. 70-71). In each case, the Panel is therefore expected to review whether there were concrete and real obstacles that might have undermined the capacity of EULEX to conduct a prompt and effective investigation of a case. Such an evaluation is not intended to justify operational shortcomings unrelated to concrete and demonstrable challenges. See, again, *L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015, para. 44.

57. In every case, and in particular in cases of this seriousness, the 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, and their reference to ECtHR: *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). A strict commitment and attachment to those standards is particularly important for a Rule of Law mission that is intended to serve as an example of society's commitment to ending impunity and building into it a sense of accountability for serious violations of rights. Any standard short of that standard would risk creating a sense of acquiescence with impunity and disregard for a victims' search for justice and accountability (*L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015, para. 46 and its references to ECtHR: *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)."); *Sadiku-Syla against EULEX*, 2014-34, Decision and Findings, 19 October 2016, para. 37; see also HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, para. 80).

58. It should also be emphasised for present purposes that the rights subject to the present complaint are among the most important of all fundamental rights. They touch upon core

interests of the alleged victims and must be guaranteed in all circumstances. The practice of enforced disappearance constitutes an egregious violation of these rights. This is reflected, *inter alia*, in the fact that it is now regarded and characterised as a crime against humanity, in particular, in the Statute of the International Criminal Court (Rome Statute, Article 7(1)(i)) and in the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No.05/L-053) (Article 13(1)(i)). See also the International Convention for the Protection of All Persons from Enforced Disappearance, Preamble and Article 5.

59. All the considerations outlined above have been taken into consideration when deciding the admissibility of the present case and will further be considered in relation to the merit of the case, where relevant.

Sufficient temporal connection with the underlying conduct – The Panel's competence ratione temporis and 6-month rule

60. The Mission did not raise any issue regarding this matter and the Panel is satisfied that it is competent *ratione temporis* and that the 6-month rule pursuant to Rule 25(3) of the Rules of Procedure has been complied with. See also *Gashi v EULEX*, 2013-22, 7 April 2014, para. 10; *Thaqi v EULEX*, cited above, para. 51).

The Panel's competence ratione materiae

61. The Mission has not formally challenged the Panel's competence *ratione materiae* over this case and the Panel is indeed satisfied that it is competent. This issue was already addressed in full in materially comparable cases. 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.

62. In addition, the Panel notes that these acts could also qualify as war crimes, crimes against humanity or ethnic-based crimes over which the Mission had specific and express jurisdictional competence. 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:

> 'there was a very real possibility that those crimes and the accompanying violations of rights were based on ethnic or religious considerations thereby going further into the jurisdictional territory over which the Mission has competence. In a post-conflict environment where ethnic and religious relations might still be tense and fragile, such cases are obvious investigative priorities. This, again, does not appear from the record to have been considered relevant to the Mission's determination of "exceptional circumstances".'

D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX, 2014-11 to 2014-17, 19 October 2016, paras. 83 et seq, in particular para. 85.

63. The Panel must also reiterate that the investigation of these cases did not only form part of the Mission's mandate, it 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).

64. Based on the above, the Panel is satisfied that the matter came until 14 June 2018 within the competence of the Mission in the exercise of its executive mandate and that the Panel is therefore competent to decide the merit of the complaint – in relation to Articles 2, 3, 8 and 13 of the European Convention of Human Rights.

65. To that issue it now turns.

VII. THE PANEL'S ASSESSMENT REGARDING THE MERIT OF THE CASE

No investigation of this case has ever been conducted

66. The Mission effectively acknowledged not to have investigated this case.

67. It is also apparent from the record that there was no effective investigation of the case before it was handed over to the Mission. The steps taken, as described above, cannot be regarded for present purpose as amounting to an effective investigation consistent with the protection of the rights of the complainant.

68. The Panel wishes to underline the fact that the rights at stake in cases such as the present one are among the most important of all fundamental human rights. In particular, such cases often involve issues pertaining to the right to life, the right not to be subject to cruel and inhuman treatment, the right to truth, the right to respect for family life, and the right to have access to justice. (*Milijana Avramović against EULEX*, Decision and Findings, Case no. 2016-17, 4 June 2019, para 34). The nature and extent of the measures to be adopted by the competent authorities to guarantee the effective protection of these rights must, therefore, be commensurate to, and be measured against, the importance that attach to these rights and to the underlying interests which they seek to protect (*Milijana Avramović against EULEX*, Decision and Findings, Case no. 2016-17, 4 June 2019, para 34). At the same time, these standards must apply to this Mission in a realistic manner that accounts, in particular, for the fact that EULEX Mission is not a state, that its resources were limited, and that it operated at the relevant time in a complex post-conflict environment. See, again, *Milijana Avramović against EULEX*, Decision and Findings, Case no. 2016-17, 4 June 2019, paras 36ff (and references cited therein); *A,B,C,D against EULEX,* 2012-09 to 2012-12, 20 June 2013, para. 50.

69. In every case, however, where there are credible allegations that Articles 2 and 3 have been violated, the authorities are expected to investigate such claims in order to establish the truth and, evidence permitting, to bring those responsible for those violations to justice. See, e.g., *Sadiku-Syla against EULEX*, 2014-34, Decision and Findings, 19 October 2016, para. 36; *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. 88; *Sadiku-Syla against EULEX*, 2014-34, Decision on Admissibility, 29 September 2015, para. 58. See also ECtHR: *Nachova and Others v Bulgaria*, Application nos. 43577/98 and 43579/98, Judgment of 6 July 2005, para. 110; *Hugh Jordan v. the United Kingdom*, Application no. 24746/94, Judgment 4 May 2001, para. 105; *McCann and Others v. the United Kingdom*, Judgment of 27 September 1995, Series A no. 324, para. 161; *Assenov and Others v. Bulgaria*, Judgment of 28 October 1998, Reports of Judgments and Decisions 1998-VIII, para. 102).

70. In that sense, the right of the complainant – under both Article 2 and Article 3 of the European Convention of Human Rights – to have the disappearance of his uncle investigated has been violated. The enquiry next turns to the Mission's responsibility, if any, for that state of affairs.

The Mission's human rights obligations

71. The Mission was required to fulfill its executive responsibilities in a manner consistent with relevant human rights standards. This implied, *inter alia*, that it would investigate cases within its *jurisdictional* competence that involved the violation of rights guaranteed under Articles 2 and 3 of the European Convention of Human Rights. The present case, as well as other cases of enforced disappearance/missing persons, fell right within the scope of those competences and responsibilities. See, e.g., *Milorad Trifunović against EULEX*, 2016-09, 11 December 2019, para. 63; *Dragiša Kostić against EULEX*, 2016-10, 13 February 2020, para. 59; *Milan Ađančić against EULEX*, 2016-14, 11 December 2019, para. 63; *S.H. against EULEX*, 2016-28, 11 September 2019, para. 83.

72. In order to explain its failure to investigate the present case, the Mission essentially advances two factors or considerations:

    a) the challenge involved in investigating cases of this sort in the particular circumstances in which it had to operate; and
    b) the fact that it could not be expected to resolve each and all of the relevant cases in light of the magnitude of the undertaking, in particular in light of the inadequate organizing and classifying of case-files by its predecessor, UNMIK, and of the UNMIK-EULEX agreement on the transfer of cases, outlined below.

73. In addition, the Mission raises a number of preliminary objections or legal arguments that will be addressed below.

UNMIK's 'open' and 'closed' cases

74. The Mission suggests that this case was characterized as 'closed' by UNMIK, it was not unreasonable for the Mission to treat it as secondary or as not requiring it to investigate the case. The Panel does not agree and rejects that suggestion.

75. The characterization by UNMIK of a case as 'closed' was without legal effect upon the Mission. In other words, the Mission was no less required and expected to fulfill its human rights responsibilities in relation to an UNMIK 'open' case as it was in relation to an UNMIK 'closed' case.

76. Furthermore, the Mission knew from reviewing those records that (a) they were not necessarily reliable and (b) that cases were sometimes 'closed' by UNMIK on the basis that the remains of the victim had been located. As the Mission knew, such a factor did not put an end to its human rights obligations to investigate and, evidence permitting, to bring those responsible to trial. Even if the body of the victim had been retrieved, which was not the case here, the retrieval of a person's body would not have put an end to the obligation binding on a state – or, in this case, a rule of law Mission – to investigate and try to resolve the case. See, e.g., *Q.J. against EULEX*, 2016-23, Decision and Findings, 11 December 2020, paras. 39-41. As noted in earlier cases, this obligation – an obligation of means – requires the authorities to adopt all reasonable and necessary measures to both establish what happened to the individual(s) concerned and, where a crime has been committed, to bring those responsible to justice. See, *supra*, paras 55-58.

77. To that extent, UNMIK's classification of cases as open/closed did not have a normative bearing on the Mission's own obligations. EULEX Kosovo was, as its mandate demanded, obliged to investigate each and all of those cases and to investigate the required time and resources to attempt to resolve those cases and bring to justice those responsible. This the Mission failed to do. See, e.g., *L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015, para. 65; *Milorad Trifunović against EULEX*, 2016-09, 11 December 2019, para. 96; *Dragiša Kostić against EULEX*, 2016-10, 13 February 2020, para. 88; *U.F. against EULEX*, 2016-12, 12 February 2020, para. 111; *Miomir Krivaković against EULEX*, 2016-13, 12 February 2020, para. 108; *Milan Ađančić against EULEX*, 2016-14, 11 December 2019, para. 96; *Milijana Avramović against EULEX*, 2016-17, 4 June 2020, para. 54; *S.H. against EULEX*, 2016-28, 11 September 2019, para. 83, *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 99.

78. The present case highlights another fact in regards to the classification of cases by UNMIK as 'open' and 'closed': its ambiguity and unreliabilty. After suggesting that the case should remain 'open', it somehow appeared as 'closed' in the database provided to the Mission without a record of why this change of view occurred. See, *supra*, paras 34-37. To this confusion was added the ambiguous annotation in the 'missing persons' and 'war crimes' databases transferred by UNMIK – with the former not listing a status for this case and the latter marking it as 'closed'. These contradictions should have alerted the Mission to the questionable reliability of this sort of open/closed classification of cases and further highlighted the need for the Mission to conduct its <u>own</u> evaluation of cases.

79. The Panel turns to consider particular aspects of this case that are relevant to evaluating the Mission's conduct.

Transfer of files from UNMIK

80. The Panel has noted in earlier cases the inadequate manner in which UNMIK kept, organised and transferred cases and case-files to the Mission. The Panel will not repeat those findings here, but merely notes that UNMIK's actions unquestionably had a negative impact on the ability of the Mission to effectively and promptly investigate cases of enforced disappearance connected to the conflict or its immediate aftermath.

81. As noted above, the Mission suggests that as part of the evaluation of its conduct, the Panel should account for the fact that the UNMIK-EULEX agreement relating to the transfer of the prosecution files, did not foresee the transfer of files that had already been dismissed or terminated by UNMIK, but only of 'active' prosecution files. However, *if at all relevant*, that fact would only carry minor weight. That is because: (a) it matters not whether this was foreseen in the agreement in question but that the transfer of those files *actually* occurred; and (b) the semantic distinction between *transfer* and *archiving* which the Mission seeks to draw attention to has no bearing on its human rights duties: having this file in its possession, the Mission was expected to acquaint itself with it and, as the case may be, make effective use of it for the purpose of investigating and bringing those responsible to justice.

82. In any case, with or without such files, the Mission would have been required to investigate those cases of which it had knowledge and which came within its jurisdictional responsibility. Its responsibilities – in particular, from the human rights point of view – were established independently of any agreement with UNMIK regarding the transfer of cases and case-files.

83. The Mission also argues that the EULEX Prosecutors were never competent to investigate these cases where the case files did not formally reach them. The Panel cannot accept these submissions for at least two reasons. The first reason is that it is the responsibility of the Mission to ensure that it organises itself in such a way as to guarantee the effective protection of human rights in the exercise of its executive mandate. The Panel has already noted in earlier cases that a mission such as EULEX is expected to organise its records and the transfer thereof in such a way that it is able to guarantee in all circumstances the effective protection of the rights of those concerned by those files (*Becić against EULEX*, 2013-03, 12 November 2014, paras. 58–60).

84. The second reason is that the effective protection of these rights cannot depend on the particular arrangement put in place by UNMIK and EULEX in regard to the transfer of case files. The Mission was duly informed by the complainants of the existence of a large number of cases of enforced disappearance. From the point of view of human rights law, the Mission's responsibility to investigate these cases did not and could not depend on the formal submission of a "live" case file by UNMIK. It was the responsibility of EULEX to effectively review and investigate these cases when they were brought to its attention.

85. The Panel, therefore, dismisses the Mission's arguments on that point.

War linkage

86. One of the reasons for the Mission's failure to fulfill its human rights obligations in relation to this case is also apparent from what the Mission said in its submissions. As noted above, the Mission mentioned that:

> 'From a review of EULEX records it emerges that whenever EULEX Prosecutors came across a case-file pertaining to alleged criminal offences (including murders and kidnappings) which occurred after 21 June 1999, they considered themselves incompetent and forwarded the cases to the relevant District Prosecution Offices.'

87. That assessment, if indeed adopted by EULEX Prosecutors, was legally incorrect. The Mission has failed to point to any normative indication that would suggest that its competence over cases of missing persons or enforced disappearance was limited to that period. To the extent that it limited its effort to the war period, the Mission read its mandate and the associated human rights obligations more narrowly than it should have. Furthermore, in this particular case, there is no indication that the case-file of the present case was forwarded to a District Prosecution Offices so that it remained un-investigated as a result.

Legal labelling is irrelevant

88. In its submissions, the Mission also appears to suggest that the legal notion of 'enforced disappearance' was not made an explicit part of its mandate. That is entirely irrelevant as it fell squarely within the scope of the serious criminal offences – in particular those with an 'ethnic' or religious undertone – over which it was made responsible.

89. The Panel wishes to reiterate that the question of enforced disappearances, as a serious violation of international human rights law, and their investigation, formed an integral part of the Mission's human rights obligations. Given the nature of the Mission's executive functions and its overarching human rights mandate, the scope of the human rights obligations could not be limited by the use of specific terminology or framing.

90. Furthermore, and contrary to the Mission's submission, acts of enforced disappearance can constitute a war crime. While the laws of war do not provide for a specific legal category known as 'enforced disappearance', these laws criminalise each and all of the elements that make up such practice – from arbitrary detention/imprisonment to unlawful killing/murder. That explains, for instance, that such acts were prosecuted before the International Criminal Tribunal for the Former Yugoslavia as war crimes albeit under other legal labels. This also explains that the *ICRC Customary Law Study (Rule 98)* provides that in relations to both international and non-international armed conflicts:

> *Enforced disappearance is prohibited.*

91. There was, therefore, nothing preventing the Mission from investigation allegations of enforced disappearance and it cannot hide behind legal labels to explain its failure to fulfill its human rights obligations in the context of which the notion of 'enforced disappearance' was well known. See, e.g., Inter-American Convention on Forced Disappearance of Persons (1994); UN General Assembly, *Declaration on the Protection of All Persons from Enforced Disappearance*, UN Doc A/RES/47/133, 18 December 1992 (hereafter 1992 Declaration on Enforced Disappearance), art. 1(1); UN Economic and Social Council, Report of the Working Group on Enforced or Involuntary Disappearances, UN Doc E/CN. 4/1996/38, 1 January 1996; UN Human Rights Committee, *CCPR General Comment No. 6: Article 6 (Right to Life)*, 30 April 1982 (hereafter General Comment No. 6), s. 4; UN General Assembly, Disappeared Persons, UN Doc A/RES/33/173, 20 December 1978 (hereafter UN Doc A/RES/33/173); UN General Assembly, Question of Enforced or Involuntary Disappearances, UN Doc A/49/610/Add.2, 23 December 1994.

92. There was, therefore, no normative bar to the Mission's fulfilling its human rights obligations in relation to this and similar cases.

Complexity and magnitude of the investigative challenge

93. The Panel then turns to the Mission's arguments regarding the challenges it faced in investigating this sort of cases in the particular post-conflict context of Kosovo.

94. The Mission has rightly underlined some of the challenges involved in investigating the type of cases now under considerations. This sort of case can be diabolically difficult to investigate, particularly when the scale of relevant criminality is large, resources limited, cooperation not always forthcoming. And, in the case of EULEX, having to organize case-files that had been poorly managed and organized by the UN mission before transfer.

95. While those challenges are genuine, they were commensurate to the nature of the responsibilities (and resources) that the Mission was given. At no point did the Mission publically claim that it was unable to carry out its responsibilities or that it could not comply with its human rights obligations. There is no public record of the Mission requesting more resources to enable it to fulfill those obligations or suggestions that it was unable to fulfill its mandate on the resources allocated to it. Instead, it remained silent about what it now says was the impossibility – for practical or technical reasons – to deal with all the transferred cases. Only when the violation of claimants' rights were raised did the Mission turn to that circumstance as justification for its failure to act and protect the rights of those concerned.

96. The Mission also appears to suggest that it would be unreasonable to expect it to investigate each and all cases of disappearances and killings and to keep all relatives of those concerned informed.

97. That, however, is not the issue relevant here. The issue here is why this particular case was left uninvestigated and relatives of the disappeared left in the dark.

98. Furthermore, to the extent that the Mission wishes to point to the magnitude of the challenge as justification for its failure, it should consider what proportion of those cases it actually (a) investigated and (b) solved. This might have been relevant to assessing whether the present case was an odd failure or one that is reflective of a broader pattern of failures to act. From the cases that the Panel has already dealt with and from the information pertaining to the present case, it is apparent that the latter is a much more credible explanation for the Mission's failure to investigate the present case. Only a tiny fraction of all cases of enforced disappearance linked to the conflict (or its aftermath) were subject to an effective investigation by EULEX. And an even smaller group resulted in the prosecution of suspects. *That* is the record on which the Mission's conduct in individual cases is to be assessed. The magnitude and difficulty of the task, therefore, cannot alone explain the Mission's failure to investigate the present case.

99. In those circumstances, the Panel cannot accept as reasonable or credible the suggestion that the magnitude of the challenge – while genuine in character – offers a valid justification for the Mission's failure to investigate the present case and to keep relatives of Mr Kandić adequately informed.

100. The Panel also wish to add the following. As noted above (para. 29), UNMIK's *ante mortem* Report on the case suggested that

> 'no witnesses could be identified, either because they were not residing in Kosovo or because their whereabouts were unknown'.

That, however, was no justification for a failure to investigate. Instead, this is the very point of an investigation: to look for, track and interview those who might be able to provide information regarding the circumstances of the commission of the crime.

101. The Panel, therefore, finds that by failing to investigate this case the Mission violated the rights of the complainant under Articles 2 (procedural limb) and 3 of the European Convention of Human Rights. In light of those findings, the Panel need not make findings in respect of other protected rights (in particular, those arising from Articles 8 and 13 of the European Convention).

Failure to inform relatives of the disappeared

102. An effective investigation in this sort of cases will also require of the authorities that they keep victims generally informed of the process of the investigation. *(L.O. against EULEX*, 2014-32, Decision and Findings, 11 November 2015, paras 61-63; U.F. Against EULEX, 2016-12, Decision and Findings, 12 February 2020, para 97; *Milijana Avramović Against EULEX*, Decision and Findings, Case no. 2016-17, 4 June 2019, para *55; 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). This requirement is intended to ensure that relatives can meaningfully contribute and participate and it seeks to diminish the strain and pain of not knowing what happened to their loved one. (see also *S.H. against EULEX*, Decision and Findings, case no. 2016-

28, 11 September 2019, para. 66; U.F. Against EULEX, 2016-12, Decision and Findings, 12 February 2020, para 96).

103. The Mission does not attempt to explain why it failed to do so in this case.

104. This is in part linked to the fact that it conducted no investigation of this case and thus had little or nothing to report to those relatives. This, however, is no excuse or justification for its failure to inform relatives of the disappeared. Instead, normatively speaking, it aggravates the violation of the rights of those concerned, in this case those of the complainant.

105. The Panel therefore finds that the Mission also failed to fulfill its obligation to inform relatives of the missing person relevant to this case and that this failure constitutes a further breach of the fundamental rights of the complainant under Articles 2 (procedural limb) and 3 of the European Convention of Human Rights.

106. In light of the above findings, the Panel will not make findings regarding the Mission's compliance (or otherwise) with other relevant human rights guarantees.

The Mission's indication that it is ready to help

107. Finally, the Mission said that it was ready to help Kosovo institutions in any efforts to find Mr Čedo Kandić and other missing persons should new evidence become available.

108. Considering, however, that it has failed to carry just such an investigation and must be aware of the absence of any ongoing investigation into this case by the local authorities, it is not clear to the Panel what this statement means for the complainant. Absent an investigation, relevant evidence is unlikely become available and the Mission's offer of help therefore appears to be little more than wishful thinking.

109. If, as the Panel hopes, the Mission wishes to help resolve the present case and similar ones, it will have to do more than wait for others to ask for its help and finally, after more than a decade, devise a plan and concrete measures by which it could help those with the responsibility to investigate those cases.

110. The Panel also believes that the Mission should fully and carefully consider how to repair the harm that it has contributed to as regards the rights of those concerned. While such a remedy would be belated and perhaps inadequate, it would at least demonstrate what the Mission failed to demonstrate over the past decade, namely, that cases of enforced disappearance are an important element of its activity. Words will not do. Actions – urgent actions – are now needed if the Mission wants to make amends.

111. For that reason, the Panel will invite the Head of Mission to give careful consideration to adopt a full and effective strategy for the Mission to finally make the issue of the disappeared a priority of the Mission, including acknowledging and providing effective remedy where the Mission itself has committed human rights violations in cases of enforced disappearance.

112. The Panel notes in this context the public statements attributed to the Head of Mission in which he indicated that the Mission was and remains committed to contributing to the resolution of cases of enforced disappearance (see, e.g., EULEX Press Office, Press Release: 'We have more than 1640 reasons to continue our work to establish the fate of the missing," says Head of the EU's Rule of Law Mission on the National Day of Missing Persons'; Associated Press, 'Kosovo families seek answers 21 years after Serb conflict', 14 May 2020: https://apnews.com/d86d5397215c81f2f695f46d2c905977).

113. The Panel takes cautious hope in this statement and will invite the Head of Mission to provide an indication of the strategy which the Mission intends to deploy in that regard to ensure that the human rights of those concerned – including the present complainant – are being effectively guaranteed in such a context.

Conclusions of the Panel regarding the Mission's failure to comply with its human rights obligations

114. For reasons outlined above, the Panel finds that the Mission has violated the fundamental rights of the complainant as guaranteed, *inter alia*, by Articles 2 (procedural limb) and 3 of the European Conventions of Human Rights.

115. These rights are among the most important guaranteed under the European Convention. And the violations attributed to the Mission are grave and serious. It pertains to core and fundamental guarantees of human rights that the Mission was created to protect and uphold. It failed to do so in relation to the complainant and, as a result, contributed the situation in which he continues to live. One in which he has no information regarding the fate of the disappeared, the circumstances in which he disappeared and what happened to him.

116. The Mission must take some responsibility for this situation and must find a way to provide some form of relief for it.

The Mission's current mandate and its human rights obligations

117. The Panel has come to form the view that the current Mission's mandate or, at least, the way it is being interpreted by the Mission might not be capable of ensuring that the Mission can effectively remedy the rights of victims such as the complainant in this case.

118. Considering that the Head of Mission has consistently refused to acknowledge the Mission's responsibility for those violations which the Panel has attributed to it and in light of the fact that the Mission cannot provide financial compensation, nor anymore investigate those cases, there are few remedies left to make up for the Mission's violations.

119. The Panel, therefore, invites the Head of Mission to carefully consider what remedies are still available to the Mission in a case such as the present one where the Mission has been found to have violated the rights of a relative of a missing person and to inform the Panel of its conclusions.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS the complaint to be admissible under Articles 2, 3, 8 and 13 of the European Convention of Human Rights;

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

DETERMINES that it is not necessary to make findings also in relation to Articles 8 and 13 of the Convention;

FINDS FURTHER that the violations are serious and ongoing and that they, therefore, call for the adoption of remedial measures commensurate to those;

INVITES THE HEAD OF MISSION, in particular, to review the interpretation currently given to the nature and scope of the Mission's human rights obligations and to give consideration to the following:

1. The Panel invites the Head of Mission to consider formally acknowledging the violation of the rights of the complainant by the Mission and to offer adequate relief for it.

2. The Panel invites the Mission to continue looking for, and to identify the prosecution office responsible for the investigation of this case.

3. The Panel further invites the Mission to inquire with the competent prosecutor whether the matter is being investigated and, if not, why that is.

4. The Panel invites the Mission to consider what concrete steps, meaningful to the relatives of the disappeared person and Kosovo as a whole, should be taken to contribute to moving forward the investigation of cases of enforced disappearance/missing persons. The Panel is willing to continue to engage with the Head of Mission in trying to find solutions for that purpose. The Panel wishes to note, however, that steps taken thus far by the Mission are inadequate from the point of view of the Mission's human rights obligations and incapable of contributing meaningfully to resolving those cases. It is high time for the Mission to do more to meet its human rights obligations.

5. The Panel invites the Mission to distribute the present Decision to

    i. Relevant personnel within the Mission;
    ii. Relevant officials of the European Union who have responsibility for Kosovo, the Balkans region or human rights issues.

THE PANEL RESPECTFULLY ASKS THE MISSION to report upon the implementation of these recommendations and to respond to its enquiries at its earliest convenience and no later than 28 February 2021.

For the Panel

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member