



**DECISION ON THE IMPLEMENTATION OF
THE PANEL'S RECOMMENDATIONS**

Date of adoption: 29 April 2021

Case no. 2016-09

Slobodan Trifunović

Against

EULEX

The Human Rights Review Panel ("the Panel"), sitting on 29 April 2021 with the following members present:

Mr Guénaël METTRAUX, Presiding Member

Mr Petko PETKOV, Substitute 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 in this case was registered on 30 June 2016.
2. By letter of 1 July 2016, the Panel informed EULEX Kosovo ("the Mission") that this case had been registered.
3. On 28 June 2017, the Panel requested the original complainant in this case and complainants in other cases to provide additional information regarding their complaints.

The complainants initially responded through their Representative that they had no further information in relation to those cases.

4. On 20 September and 17 October 2017, the Panel sent two further requests for additional information to the said Representative.
5. On 20 October 2017, the Panel received a response from the Representative of the complainants providing additional information in relation to two cases, including the present one.
6. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Mission inviting the Head of Mission at the time to submit her answers and written observations on the complaint no later than 26 January 2018.
7. By letter of 19 January 2019, the Mission was requested again to provide answers to the questions by 16 February 2019.
8. The observations of the Mission were received on 12 March 2019 after which they were communicated to the complainant for additional observations.
9. On 15 March 2019, the Mission's letter was submitted for information to the complainant, who was given until 15 April 2019 to make any further submissions in response to that letter.
10. On 19 June 2019, the Panel rendered its admissibility decision in this case, declaring the complaint admissible in respect of Articles 2, 3, 8 and 13 of the European Convention of Human Rights (hereafter, "the European Convention" or "the Convention") (<https://hrrp.eu/docs/decisions/2019-06-19%20Admissibility%20Decision%202016-09.pdf>).
11. On 19 September 2019, the Mission submitted its responses to the Panel's questions.
12. The complainant did not provide any responses to the Panel's questions.
13. On 11 December 2019, the Panel rendered its 'Decision and Findings', finding the Mission responsible for the violation of the complainant's rights under Article 2 (procedural limb) and 3 of the European Convention of Human Rights. In that light, the Panel did not find it necessary to make determinations regarding possible violations by the Mission of Articles 8 and 13 of the Convention. On that basis, the Panel made the following recommendations:

RECOMMENDS the following:

- i. Considering the gravity of the violations under consideration, the Panel invites the Head of Mission to carefully consider the possibility and the need for the Mission to acknowledge the violation of the complainant's rights committed by the Mission;
- ii. The Panel invites the Mission to ensure that the case-file pertaining to this case and the present Decision are sent to the competent local authorities;
- iii. The Panel recommends that this case should be subject to monitoring by the Mission;

- iv. The Panel recommends that, as it did in Case 2017-02, the Mission should consider making recommendations to the authorities regarding possible future investigative courses that could help resolve this case; in that context, the Panel recommends that the Mission should emphasise the importance of the victims' rights to the truth and to be informed of the general course of the investigation;
 - v. The Panel recommends that the mission should report to the competent authorities in Brussels if it becomes apparent that local authorities are not fulfilling their obligations in that regard;
 - vi. The Mission should take active steps to inquire with the authorities what steps, if any, are being taken to investigate this case and to report to the competent authorities of the European Union in Brussels if it becomes apparent that the authorities are not fulfilling their obligations in that regard;
 - vii. The Panel recommends that the present decision should be provided to the relevant organs of the Mission; and
 - viii. The Panel also recommends that the Head of Mission should ensure that the monitoring activities of the Mission should be conducted in a manner consistent with the Mission's human rights obligations and that it ensures that this part of its mandate contributes to the effective protection and promotion of those rights.
14. The Panel asked the Mission to report upon the implementation of these recommendations no later than 16 March 2020. Those submissions were received on 22 December 2020.
 15. On 25 November 2020, the Panel learned that the complainant, Mr Milorad Trifunović, had passed away.
 16. On 29 January 2021, the Panel contacted the complainant's family to inquire whether a family member would wish to continue with the complaint, and the family informed the Panel at first informally that there was such interest.
 17. Based on this indication, on 2 February 2021, the Panel sent a formal letter to the complainant's family to ask them to formally inform the Panel in writing of their interest to maintain the complaint by 26 February 2021.
 18. On 20 April 2021, the complainant's family submitted a formal confirmation to the Panel that Mr Slobodan Trifunović, the brother of the original complainant, would succeed Mr Milorad Trifunović as the complainant.

II. STANDING OF THE COMPLAINANT

19. Considering the close family relationship between the primary victim, the original complainant and the new complainant – i.e. brother of the complainant and of the disappeared person – the Panel is satisfied that the new complainant may succeed the original complainant and may be regarded as a secondary victim of the alleged violations and, as such, a potential victim in accordance with Rule 25(1) of the Panel's Rules of Procedure.

III. FACTS

20. The facts as presented by the original complainant may be summarised as follows.
21. On 22 June 1998, Miroslav Trifunović, a brother of the original complainant, Milorad Trifunović, went to work by bus in the Belačevac mine, Municipality of Fushë Kosovë/Kosovo Polje. He and eight other workers were intercepted by individuals thought to be members of the Kosovo Liberation Army (KLA) in the village Graboc i Poshtëm/Donji Grabovac, Municipality of Kosovo Polje. Miroslav Trifunović and other workers were ordered off the bus and taken in an unknown direction. He has not been heard of since that time.
22. The complainant and his family notified the International Committee of the Red Cross (ICRC), the International Civilian Mission (ICM), the 'US Office' (understood to be a reference to the U.S. diplomatic representation in Pristina), the Cultural Center in Pristina and the Ministry of the Interior of the Republic of Serbia and the ICRC in Serbia, of the disappearance of Miroslav Trifunović.
23. Neither Mr Trifunović, nor his remains were ever found and the circumstances of his disappearance remained un-established. No one was ever brought to justice in relation to this matter.
24. The Panel found that the Mission had contributed to this situation and to the resulting violation of the rights of the complainant by failing to investigate this case and failing to properly keep relatives informed.

IV. PRELIMINARY CONSIDERATIONS: THE VALUE AND IMPORTANCE OF THE AUTHORITY OF THE PANEL TO FOLLOW-UP ON ITS RECOMMENDATIONS

25. The present Decision is a Follow-up Decision adopted by the Panel in accordance with Rule 45*bis* of its Rules of Procedure.
26. The authority of the Panel to follow-up on its recommendations is undisputed. It is in accordance with its Rules and this procedural possibility is well established in the practice and jurisprudence of the Panel. See Annex A of the present decision listing cases in which follow-up decisions have been issued.
27. The procedural possibility for the Panel to follow up on its Recommendations is particularly important in light of limitations placed on its powers and authority. In particular, the Panel's decisions come in the form of non-binding recommendations. See, e.g., *Thomas Rüsche against EULEX*, Case No. 2013-21, Decision on the Implementation of the Panel's Recommendations, 13 June 2017, para. 7. See also HRRP, *Case-Law Note On Remedies For Human Rights Violations* (<https://hrrp.eu/docs/Case%20law%20note%20on%20REMEDIES%20FOR%20HR%20VIOLATIONS.pdf>). The non-binding nature of the Panel's recommendations means that, to be effective, the mechanism of accountability of which the Panel forms a part depends largely on the Mission's compliance with the Panel's recommendations.
28. Furthermore, the mandate of the Panel does not allow it to make recommendations for financial reparation even where they might have otherwise provided an adequate

remedy for a violation of human rights by the Mission. See, e.g., *Zahiti against EULEX*, Case no. 2012-14, Decision on the Implementation of the Panel's Recommendations, 11 November 2014, para. 16; *X and 115 other complainants against EULEX*, Case no. 2011-20, Fourth Decision on the Implementation of the Recommendations of the Human Rights Review, 11 December 2019, Operative Part; Annual Report 2016 of the HRRP, pages 2 and 48-50; and, again, HRRP, *Case-Law Note On Remedies For Human Rights Violations*

(<https://hrrp.eu/docs/Case%20law%20note%20on%20REMEDIES%20FOR%20HR%20VIOLATIONS.pdf>). Whilst this has not prevented the Mission, *proprio motu*, to offer financial compensation to a victim of rights violation in a limited number of cases (see, e.g., *Zahiti against EULEX*, 2012-14, 11 November 2014, paras. 7, 11- 12 and 24-26), the inability of the Panel to recommend this sort of remedy or, more effectively still, to order financial compensation where appropriate, has limited the Panel's accountability powers quite significantly. The absence of possibility for the Panel to recommend financial reparation even where it would have been appropriate means that the Panel might have to recommend steps and measures which do not provide a full or entirely adequate sort of remedy for a violation of rights which it has established. This highlights yet further the need for the Mission to play close attention to those remedial recommendations being made by the Panel and, to the greatest extent possible, to implement those.

29. Without a full and effective commitment to upholding human rights standards by the Mission, the Panel's recommendations might create little more than the *appearance* of accountability on the part of the Mission. It is therefore essential for the Mission to demonstrate its *actual* commitment to those standards by implementing to the greatest possible extent the Panel's recommendations. The Panel issues follow-up decisions in cases where the Mission is found to have violated a complainant's human rights, as is the case here, as a means to ensure actual and effective accountability by the Mission for such violations. Considering how limited the powers of the Panel are, a failure by the Head of Mission to implement the substance of its recommendations would render the entire mechanism of accountability ineffective and illusory from the point of view of complainants.

V. FOLLOW-UP ON PANEL RECOMMENDATIONS

30. As a preliminary matter, the Panel would note and reiterate that the violations attributed by the Panel to the Mission are of an extremely serious nature. They pertain to some of the most important fundamental rights guaranteed to an individual. Furthermore, the violation attributed to the Mission lasted for a long and significant period of time. It showed a grave dereliction of its duties and obligations in relation to the victim. In those circumstances, the Panel would expect that the Mission should pay special attention to providing an adequate remedy for the violations committed and would take effective steps to ensure that this violation is adequately and fully repaired. Based on what follows, however, it is apparent to the Panel that the Mission has fallen far short of that expectation.

31. Each of the Panel's recommendation and the Mission's response thereto will be considered in turn.

32. The first Panel recommendation was to the following effect:

'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;'

33. In place of an acknowledgment of the responsibility, the Head of Mission expressed that he

'deeply regret[s] that the Mission was unable to bring the investigation into the abduction of Miroslav Trifunovic to a positive conclusion'.

As has been indicated by the Panel in earlier cases, an expression of regret is not the same as an acknowledgment of responsibility when it comes to remedying rights violations. The Panel regrets that, once again, the Mission through its Head would decline to acknowledge its responsibility for the violation of the complainant's rights.

34. The Panel therefore finds that the Mission has not implemented the Panel's first recommendation.

35. The Panel's second recommendation was:

'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;'

36. The Mission indicated that all files and case-files in possession of the Mission have now been handed over to local authorities, specifying that the case-file in which Mr Miroslav Trifunović is mentioned was handed over to the Special Prosecutor's Office of the Republic of Kosovo (SPRK) on 15 November 2018.

37. The Panel is therefore satisfied that the Mission has implemented the Panel's second recommendation in full.

38. The Panel's third recommendation was:

'The Panel recommends that this case should be subject to monitoring by the Mission;'

39. In response to this recommendation, the Mission provided a lengthy rendition of what he understands to be the scope and nature of the Mission's current mandate. In particular, the Mission suggested that the Mission's current 'monitoring' mandate did not include any competence to advise or make recommendations regarding cases. The Mission also suggested that 'EULEX can support the competent authorities by providing recommendations addressing structural issues and can perform additional tasks upon request'. The Mission added that should the authorities commence an investigation into

the case of Mr Trifunović, the Mission will monitor it, since the case ‘falls within one of its thematic priority areas’.

40. For the following reasons, the Panel is not convinced that the above explanation provides a full and accurate picture of the Mission’s responsibilities. First, having been found in violation of the complainant’s fundamental rights, the Mission can now be expected to remedy those violations. This requires effective steps being taken by the Mission, and the change in the Mission’s mandate does not change the nature of the Mission’s obligation to provide an effective remedy.
41. Second, the Mission is still bound by an obligation to act in accordance with human rights standards. This requires that its current mandate be interpreted in light of those obligations. The views submitted above by the Mission do not appear to factor in those two considerations.
42. It is also apparent that if the Mission sits idle in the hope of local authorities taking on what used to be the Mission’s responsibilities, the likelihood that this would never happen is real. This is apparent from the fact already that many and perhaps all of the cases of enforced disappearance that have come to the Panel and which were found not to have been investigated effectively by the Mission do not appear to be investigated by the local authorities either. The Mission, aware of the situation, cannot, therefore, in good faith claim to be expecting this to take place unless steps are taken to see to it that this is the case.
43. The Panel understands that the Mission’s ‘monitoring’ role is also one that involves monitoring what cases or types of cases are not subject to investigation by local authorities where they are expected and legally required to do so. Any other interpretation of the Mission’s current mandate would mean that the Mission could be seen as becoming a silent accomplice to the failure by the authorities to meet their human rights obligations. Such a situation, if it were to occur, would be inconsistent with the Mission’s commitment to binding human rights obligations. It would also be fully inconsistent with the principles of rule of law, which the Mission has the mandate to promote in Kosovo.
44. The Panel notes, furthermore, several public statements by officials of the Mission, including the Head of Mission, to the effect that the Mission remains deeply concerned by the issue of the disappeared persons. If that is indeed the case, and the Panel wishes to assume that it is, the Panel is concerned that the inaction by the Mission with regard to remedying the Mission’s own human rights violations in cases such as the present one and with regard to the Mission’s interpretation of its mandate as outlined above falls short of the attention and worry stated in the Mission’s public statements.
45. The Panel finds that the Mission has not implemented the Panel’s third recommendation.
46. The Panel’s fourth recommendation was:

‘The Panel recommends that, as it did in Case 2017-02, the Mission should consider making recommendations to the authorities regarding possible future

investigative courses that could help resolve this case; in that context, the Panel recommends that the Mission should emphasise the importance of the victims' rights to the truth and to be informed of the general course of the investigation;'

47. What has been said above in paragraphs 38-43 applies here. The Panel is not satisfied by the explanation given by the Mission to refrain from taking any active step to ensure that the present matter should be investigated.

48. The Panel finds that the Mission has not implemented the Panel's fourth recommendation.

49. The Panel's fifth recommendation was:

'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;'

50. Once again, what has been said above in paragraphs 38-43 applies here. If local authorities do not meet their human rights obligations, the Mission should not pretend that it is not aware of it, or that if it is aware, that it has no ability to play a role in addressing the situation. The Panel has rendered many decisions which should have caused the Mission to be concerned about what appears to be the systemic failure of local authorities to investigate cases involving allegations of enforced disappearance linked to the conflict.

51. In light of this, it would be incompatible with the Mission's human rights obligations to fail to act on that knowledge. Insofar as he feels that the Mission does not have the necessary mandate to act upon this matter, the Head of Mission should raise the issue with competent EU authorities with a view to ensure that such authority is duly granted or that EU authorities should take direct steps to address and raise this with local, Kosovo, authorities.

52. The Panel finds that the Mission has not implemented the Panel's fifth recommendation.

53. The Panel's sixth recommendation was:

'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;'

54. As discussed above, instead of taking the recommended steps, the Mission sought to explain its inability to act based on its narrow interpretation of its mandate and obligations. For the reasons outlined above, the Panel does not accept that explanation and invites the Mission once again to consider the matter.

55. The Panel finds that the Mission has not implemented the Panel's sixth recommendation.

56. The Panel's seventh recommendation was:

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

57. In response, the Mission indicated that the decision was immediately circulated to all relevant units of the Mission and said that 'relevant European Union authorities in Brussels are also routinely informed about all the decisions of the Panel and they are also receiving its Annual Report'. The Mission further indicated that the Panel's Decision was also transmitted to the 'competent local authorities and more specifically the Kosovo Police and the SPRK. Upon their request, EULEX also provided the SPRK with the relevant police and prosecution case numbers with a view to enable such authorities to locate the case and relevant documentation'.

58. The Panel is satisfied that the Mission has implemented its seventh recommendation in full.

59. The Panel's eighth recommendation was:

'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.'

60. The Mission did not address this recommendation. For reasons outlined above, the Panel is concerned that the current interpretation given to the Mission's mandate might not be consistent with the Mission's human rights obligations. It appears, instead, that its failure to voice its concern with the failure of local authorities to investigate certain categories of cases – including the present one – could create the false impression that those authorities are acting in compliance with their own obligations. To the extent that the Mission's monitoring mandate is intended to give EU authorities and states an accurate picture of the status quo in Kosovo as far as rule of law efforts are concerned, that picture would be entirely incomplete and distorted by the Mission's narrow interpretation of its responsibilities.

61. The Panel finds that the Mission has not implemented the Panel's eighth recommendation.

62. The Panel notes that the Mission has argued that its changed mandate prevents it from fully implementing several of the Panel's recommendations. While the mandate of the Mission has changed, the Panel emphasizes that the Mission is still one and the same. Its responsibility attaches to its conduct, past and present. And it is the responsibility of the Mission, as it currently stands, to remedy the violations that it has committed in the past albeit at a time when its mandate was different.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS that the Mission has failed to implement in full the Panel's Recommendations, noting that while the Mission has implemented in full the Panel's second and seventh recommendation, it has not implemented the Panel's first, third, fourth, fifth, sixth or eighth recommendation;

MUST REQUEST that the Head of Mission should once again consider the Panel's Recommendations that have not been complied with in full in light of the gravity of the violations committed by the Mission in this case, in particular, these:

- The Panel's first recommendation;
- The Panel's third recommendation;
- The Panel's fourth recommendation;
- The Panel's fifth recommendation;
- The Panel's sixth recommendation;
- The Panel's eighth recommendation;

And, in that light, **INVITES THE MISSION** to adopt measures in response to the Panel's recommendations that truly reflect the depth of the Mission's commitment to upholding human rights standards and to repair the harm caused to the Complainant in this case;

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 REITERATES ITS REQUEST FOR 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.

RECOMMENDS FURTHER that the present Decision be circulated to all relevant organs of the Mission and to relevant European Union organs and officials in Brussels;

REMAINS SEIZED of the present matter;

FINALLY, THE PANEL NOTES that the responsibility to provide an effective remedy for violations of rights committed by the Mission is and remains firmly with the Mission itself. To the extent that the Mission, through the Head of Mission, is unable or unwilling to fully and

completely adopts the remedial recommendations of the Panel, it remains its responsibility to find alternative means and methods of relief that provide an effective remedy for the violations that it is found to have committed;

INVITES THE MISSION to inform the Panel of its response to the present Decision at the earliest possible time and no later than 30 November 2021.

For the Panel,

Guénaël METTRAUX
Presiding Member

Petko PETKOV
Substitute Member

Anna AUTIO
Member