



DECISION and FINDINGS

Date of adoption: 10 April 2013

Case No. 2012-09, 2012-10, 2012-11 and 2012-12

A, B, C and D

Against

EULEX

The Human Rights Review Panel, sitting on 8 and 10 April 2013 with the following members present:

Ms Magda MIERZEWSKA, Presiding Member
Mr Guénaél METTRAUX, Member
Ms Katja DOMINIK, Member

Assisted by
Mr John J. RYAN, Senior Legal Officer
Ms Joanna MARSZALIK, Legal Officer
Mr Florian RAZESBERGER, Legal Officer

Having considered the aforementioned complaints, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel as last amended on 15 January 2013,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaints A, B and C were registered on 12 July 2012 while complaint D was registered on 17 July 2012.
2. The Panel acceded to the complainants' request not to have their names disclosed based on their legitimate concerns for their safety and security.

3. The Panel communicated complaints A, B, C and D collectively, without prejudice to the possibility to later order a formal joinder of cases pursuant to Rule 20 of its Rules of Procedure.
4. On 4 December 2012 the Panel decided to give notice of the complaint to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaints.
5. The observations of the HoM were received on 11 March 2013 after which they were translated and communicated to the complainants for additional observations.
6. The complainants did not submit any further information.
7. On 18 March 2013, the Panel invited the HoM to submit further observations he might have on the merits of the case. The Panel takes note of the HoM's extensive submissions of 8 April 2013. Many of these submissions are relevant to issues which the Panel will have to decide at the merits stage of the proceedings where it will address those issues considered relevant to its decision.
8. The Panel hereby orders the formal joinder of these four cases (A, B, C and D) pursuant to Rule 20 of its Rules of Procedure.

II. FACTS

The following facts appear from the information the complainants have provided to the Panel.

Complainant A:

9. The complainant requested his/her name not to be made public, due to fear for his/her security. He/she will be referred to as "A".
10. On 28 June 2012, the complainant, who works as a taxi driver, was driving a passenger to Gazimestan, where that passenger wished to attend the Vidovdan memorial event. When turning from the main road towards Gazimestan, A was stopped by Kosovo Police (KP) and initially denied permission to proceed to Gazimestan. After negotiations between the passenger and KP, the complainant was allowed to continue on his journey.
11. Shortly thereafter, while approaching Gazimestan, the complainant was stopped by the so-called Regional Operational Support Unit (ROSU), a specialized police unit responsible *inter alia* for crowd control. According to A, four or five ROSU officers were present on that occasion. They were shouting at A and the passenger, insulting them and checking the complainant's identification papers, driving

license and vehicle registration. It is alleged that ROSU officers asked A which republic he was coming from. They also allegedly insulted A's mother.

12. After checking A's and the passenger's documents, ROSU officers searched the car, but did not anything of interest. Consequently, ROSU officers instructed the complainant "to turn around the car and to disappear". According to A, EULEX police officers were present during those incidents, observed what was happening and did not intervene. The complainant was unable to give an estimate of the number of EULEX police officers present at the scene.
13. The complainant stated that in order to turn the car around as instructed by the ROSU officers, he first needed to continue towards Vucitrn/Vushtri in order to have enough space for a U-turn as the sides of the road were blocked with barriers. After turning the car around, and driving back towards Pristina, A was followed by a ROSU vehicle, which flashed its light signals. The complainant concluded that the ROSU officers wanted to overtake him, so that he moved his car to the side of the road. At this point, the same ROSU officers who had accosted A earlier stopped their vehicle in front of A's vehicle and asked again for his documents; at the same time other ROSU officers assaulted the passenger.
14. The complainant claims that three ROSU officers then took A to the back of a police van where they slapped and kicked him. According to the complainant, a fourth ROSU officer stayed outside the van, purportedly to make sure that no one observed the assault. According to A, the assault lasted for about 10 to 15 minutes. As a result, A had bruises on his head, back and stomach. The complainant alleges that when leaving the van, a EULEX vehicle passed by but did not stop.
15. Thereafter, A was allowed to leave the scene with the passenger and was told by ROSU officers to take the road towards Obilić/Obiliq. Further, it is stated that A and the passenger were told that ROSU officers did not want to see their car near the area again and instructed them "to get lost because if they see [the] car again they will beat [them] again".
16. The complainant then drove back to Gračanica/Graçanicë. A was at first afraid to report the incident to the police. The uncle of the complainant (a medical doctor) then met A, and convinced him to go to the police and report the matter, which A promptly did. The same day, at about 18:00, A went to a clinic to get a medical check-up. The complainant provided the Panel with medical records that demonstrate the presence of several bruises on his body which are consistent with his account of the assault.

Complainants B and C

17. These complainants requested that their names not be made public due to fear for their security. They will be referred to as "B" and "C".
18. Both complainants B and C state that they were on their way towards Gazimestan to attend the memorial service to mark the Serbian holiday of Vidovdan on 28 June 2012. Both complainants state that Kosovo police present at Gazimestan took off the shirts of attendees that were displaying Serb symbols.
19. It is alleged that on the way back from Gazimestan, not far from the Pristina bus station, stones as well Molotov cocktails were thrown by young men at buses in which they were travelling, breaking the windows of those buses and putting the lives of passengers at risk. The complainants allege that two passengers were injured in the course of the attack. Further, complainant B alleges he/she lost consciousness upon arrival in Gračanica/Graçanicë due to the stress caused by these incidents. The complainant was subsequently taken to the hospital for examination. The complainant provided a medical report of the treatment received.
20. It is alleged that Kosovo police were escorting the buses but failed to protect them.

Complainant D

21. The complaint was registered on 17 July 2012. The Secretariat obtained additional information from the complainant on 31 October 2012.
22. The complainant requested his/her name not to be made public due to fear for the complainant's security. The complainant will be referred to as "D".
23. On 28 June 2012, D went to Gazimestan on a school bus which was transporting teenage school children to the Vidovdan memorial event. D works as a bus driver and a mechanic. On that day, the complainant was on duty, accompanying the bus as a mechanic.
24. It is alleged that on the road towards Gazimestan, the complainant did not observe "any provocations by Albanians along the route, who were observing, but did observe provocations by ROSU". It is alleged that ROSU officers were mistreating the passengers when they left the buses. ROSU officers asked the drivers to open the front doors of the buses in order to be able to check passengers when they were alighting the buses at Gazimestan. According to the complainant, ROSU officers "were taking off shirts with Serbian signs and threw them on the ground and wiped their boots with them and threw them into the trash". It is further stated that people were then allowed to continue on their way with the upper part of their bodies naked or

uncovered. According to D, "EULEX police was watching all this and did not respond at all". D further adds that there was a large presence of EULEX police at Gazimestan at that time.

25. The complainant also says that after the ceremony at Gazimestan, while returning to Gračanica/Graçanicë, stones and Molotov cocktails were thrown at the buses in which they were travelling. This was said to have occurred near a place called TMK (UQK), at the entrance of Pristina, close to the Victoria hotel. It is alleged that two civilian cars arrived at the scene and stopped in front of a bus, thereby preventing it from travelling any further. D stated that "there were five young men of about 17 to 20 years of age at the scene, one of them threw a Molotov cocktail at the bus and had his face covered with a scarf".
26. All of this was allegedly witnessed by three Kosovo Police Officers who were standing a few meters away from the scene. According to D "they were just laughing". It is alleged that three young men in the bus were injured during the incident which lasted about ten minutes.
27. D provided pictures of the bus which were taken after the incident, displaying smashed bus windows as well as stones on the floor of the bus. The Molotov cocktails that were said to have been thrown at the bus did not explode in the vehicles but exploded instead on the asphalt in front of them. D stated that the buses eventually managed to continue, bringing the injured men to the nearest clinic in Laplje Selo.
28. After a short break in Laplje Selo, the bus continued to Gračanica/Graçanicë. At the parking lot in Gračanica/Graçanicë, the complainant's bus was stopped by KP in order to take pictures and record the damage done to the bus. D stated that one of the police officers came and asked why the complainant did not take pictures of the incident to which D replied that it was more important to take the fire extinguisher and prevent a fire which could have caused the death of its 50 passengers, most of whom were children. D also offered to describe some of the perpetrators whose faces were visible to D. According to the complainant, the police officer "just turned, waved with the hand and went away with the police vehicle". D is not aware of any investigation having taken place pertaining to this case.

RELEVANT APPLICABLE LAW

Joint Action

29. Relevant extracts of Articles 2 and 3 of European Council Joint Action 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO (hereafter: Joint Action), read as follows:

Article 2 Mission Statement

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and

in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

EULEX KOSOVO, in full cooperation with the European Commission Assistance Programs, shall fulfill its mandate through monitoring, mentoring and advising, while retaining certain executive responsibilities.

Article 3 Tasks

In order to fulfill the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(a) monitor, mentor and advise the competent Kosovo institutions on all areas related to the wider rule of law (including a customs service), whilst retaining certain executive responsibilities;

...

(d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;

(e) contribute to strengthening cooperation and coordination throughout the whole judicial process, particularly in the area of organised crime;

(f) contribute to the fight against corruption, fraud and financial crime;

Law on Jurisdiction

30. The Law on Jurisdiction, Case Selection and Case Allocation of EULEX judges and prosecutors in Kosovo (No. 03/L-053, hereafter: the Law on Jurisdiction), and more specifically its Articles 5, 7 and 8, regulate the integration and jurisdiction of the EULEX judges and prosecutors in the judicial and prosecutorial system of Kosovo.

Article 7 General authority of EULEX prosecutors

7.1 EULEX prosecutors will have the authority and responsibility to perform the functions of his or her office, including the authority to conduct criminal investigations and take responsibility for new and pending criminal investigations or proceedings, within the SPRK or within the prosecution offices to which he or she is assigned to by the Chief EULEX Prosecutor and according to the modalities as established by the present Law and by the Assembly of the EULEX Prosecutors.

Article 8 Competences of EULEX prosecutors in Kosovo

8.1 The EULEX prosecutors will be competent to investigate and prosecute the crimes, that fall under the exclusive competence of the SPRK in accordance with the law that establishes the SPRK, and the crimes, including the attempt and the various form of collaboration to the crimes, listed in all items of paragraph 3 of Article 3 of this law.

III. THE LAW

ADMISSIBILITY

General remarks

31. Before considering the complaint on its merits the Panel has to decide whether to accept it for examination, taking into account the admissibility criteria set out in Rule 29 of its ROP.
32. The complaints were lodged with the Panel on 12 and 17 July 2012 respectively, thus within six months from the date of the alleged human rights violations (28 June 2012), as set out in Rule 25 paragraph 3.
33. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to human rights violations attributable to EULEX Kosovo in the conduct of its executive mandate. The executive mandate refers in particular to certain matters pertaining to justice, police and customs.
34. The Panel notes, that with the restructuring of the Mission, the former Justice, Police and Customs Components were replaced on 15 June 2012, by the Executive Division and the Strengthening Division. Therefore, those newly created divisions have been officially established and operational by 28 June 2012, the time when the relevant incidents took place.
35. In the present case, the complaints relate to two different incidents that are both connected to the *Vidovdan* celebrations of 28 June 2012. The complaints relate to a number of protected rights, including the right to life (e.g., Article 2 ECHR; Article 6 ICCPR), the right not to be subject to cruel, degrading or inhumane treatment (e.g., Article 3 ECHR; Article 7 ICCPR), the right to liberty and security (Article 5 ECHR; Article 9 ICCPR), the right to respect for private and family life (Article 8 ECHR; Articles 17/23 ICCPR), the right to freedom of thought, conscience and religion (Article 9 ECHR; Articles 18/19 ICCPR), freedom of expression (Article 10 ECHR; Article 19 ICCPR), the right to freedom of assembly and association (Article 11 ECHR; Article 21/22 ICCPR), the right to an effective remedy (Article 13 ECHR; Article 2 ICCPR), prohibition against discrimination (Article 14 ECHR; Article 26/27 ICCPR).

Submissions by the parties

36. In its submissions, EULEX stated that all cases should be declared inadmissible for the following reasons:

Complainant A

37. In relation to complainant A, EULEX submitted that enquiries carried out by the EULEX Strengthening Division established that no EULEX Police Strengthening Department (PDS) staff deployed for the monitoring of this event were present at, or witnessed the alleged two incidents complained of by A.
38. EULEX further submitted that the police operation related to Vidovdan celebrations was a KP led operation and no EULEX sanctioned operational plan had been drafted. EULEX PSD conducted a briefing with staff members who were going to be deployed for the monitoring of key elements of the KP led operation. Four pairs of officers were deployed and were given flexibility to monitor events as they unfolded. Also, the officers deployed were in constant contact via radio communication with EULEX.
39. It is stated that, under some limited circumstances, EULEX PSD Officers may have a positive obligation to intervene. However, according to EULEX, such situations should be limited – with respect to EULEX MMA activities – to those where immediate intervention is needed in view of the importance of protected right (i.e. those rights protected by Articles 2 and 3 of the European Convention on Human Rights and Fundamental Freedoms) because an intervention by national institutions would be considered to be belated and incapable of properly protecting endangered rights which could otherwise be irretrievably harmed. In addition, EULEX intervention should be feasible and proportionate in terms of available EULEX resources and the possible risks involved.
40. In sum, EULEX stated that there are no records of the presence of EULEX police officers during the human rights violations alleged by complainant A and respectfully maintains that the complaint is not within the Panel's mandate and must be declared inadmissible.
41. The complainant did not reply to the observations of EULEX.

Complainants B & C

42. EULEX submitted that from the statements provided by complainants B and C, they allegedly witnessed human rights violations committed by KP on other persons but neither B nor C claim to have suffered the alleged violations.
43. Further, EULEX submitted that according to Rule 25 para. 1 of the Rules of Procedure of the Panel, the Panel can examine complaints filed by any person claiming to be a victim of human rights violations by EULEX Kosovo in the conduct of its executive mandate. EULEX also made reference to the Panel's decision 2012-07, where the Panel refers to the meaning of the word victim stating that the European Court of Human Rights ("the Court") has found on many

occasions that a victim denotes a person directly affected by the act or omission in issue. In this regard, EULEX stated that the Panel had also noted that its Rules of Procedure do not envisage the bringing of an *actio popularis*, i.e. they do not permit individuals to complain against alleged actions and omissions on the part of EULEX *in abstracto* simply because they feel that they infringe human rights.

44. Further, EULEX noted that concerning the throwing of stones and Molotov cocktails against the buses, the complainants do not allege that there was any EULEX presence while the alleged offences were being committed.
45. EULEX therefore submitted that the subjects of these complaints are not within the Panel's mandate and must be declared inadmissible.
46. The complainants did not reply to the observations of EULEX.

Complainant D

47. EULEX noted that according to D's complaint, the involvement of EULEX in the incidents described is limited to being present while the alleged violation of taking off the shirts of attendees with Serbian signs took place. EULEX submitted that the complainant did not state that he had been subjected to the alleged offence. Accordingly, D cannot be considered a victim of the said violation as D was not directly affected by these acts. EULEX referred to its submissions in respect of complainants B and C.
48. Further, EULEX noted that concerning the throwing of stones and Molotov cocktails against the buses, the complainant does not allege that there was any EULEX presence while the alleged offences were being committed.
49. In view of the above, EULEX submitted that the application filed by complainant D is not within the Panel's mandate and must be declared inadmissible.
50. The complainant did not reply to the observations of EULEX.

The Panel's assessment

51. Before evaluating other issues pertaining to the admissibility of these complaints, the Panel will consider whether complainants B, C and D qualify as "victims" for the purpose of admissibility. EULEX does not dispute A's status as a victim.

Victim status

52. As discussed above, EULEX submitted that B, C or D do not qualify as victims for the purpose of Article 3 ECHR as they have not been

personally subjected to any kind of cruel, degrading or inhumane treatment.

53. The position taken by EULEX appears overly restrictive. All three complainants were exposed to instances of serious violence inflicted on other individuals whom they knew and had travelled with. They were aware that there were no valid reason for the abuse that was inflicted on these people and they therefore had reasons to fear for themselves. This must have caused anguish and, as they testified in their complaints, serious mental harm, which the Panel considers to be such as to be sufficiently serious to constitute a violation of Article 3 ECHR/Article 7 ICCPR.
54. This *prima facie* assessment follows the approach developed by the Court, which states that “*where treatment humiliates or debases an individual, showing a lack of respect for, or diminishing, his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition of Article 3*” (see *Pretty v. The United Kingdom*, no. 2346/02, judgment of 29 April 2002 at par. 52). In this regard the Panel also notes the approach as developed by the Court that “*a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision*” (see *Gäfgen v. Germany*, no. 22978/05, judgment of 1 June 2010 at par. 91). Further, the public nature of any treatment is relevant to its degrading character, although it may be sufficient that a person is humiliated in his or her own eyes. (Compare *Tyrer v. the United Kingdom*, no. 5856/72) judgment of 25 April 1978 at par. 32)
55. Therefore, the Panel rejects the reasoning of EULEX, that the alleged actions and omissions entertain an *in abstracto* complaint or an *actio popularis* referring to human rights violations unconnected to the specific complainants. The complainants formed part of a group that had been directly targeted. Being a member of such a group and being present at the scene of the alleged incident, also if not physically tackled, establishes undoubtedly a sufficiently close connection to the alleged human rights violations, resulting in having been subjected to injury, including mental harm and emotional suffering. Thus, the Panel is satisfied that the circumstances of the case establish sufficiently that the complainants fulfil the requirements of victims as denoted by the Court as persons directly affected by the act or omission in question (compare also *Ibishi against EULEX*, 2012-07, 15 January 2013 at pars. 6-8).

Protected rights

56. EULEX failed to consider and address a number of other protected rights, which might arguably have been breached in this case, in particular, the complainant's right to life (e.g., Article 2 ECHR; Article 6 ICCPR), their right to liberty and security (Article 5 ECHR; Article 9

ICCPR), their right to respect for private and family life (Article 8 ECHR; Articles 17/23 ICCPR), their right to freedom of thought, conscience and religion (Article 9 ECHR; Articles 18/19 ICCPR), freedom of expression (Article 10 ECHR; Article 19 ICCPR), their right to freedom of assembly and association (Article 11 ECHR; Article 21/22 ICCPR), the right to an effective remedy (Article 13 ECHR; Article 2 ICCPR), prohibition against discrimination (Article 14 ECHR; Article 26/27 ICCPR). Considering that EULEX has made no submissions in regard to these rights and considering the *prima facie* indications that some or all of these rights might have been affected by the impugned conduct, the Panel determines that Complainants A, B, C and D may be regarded as “victims” of violations of these rights for the purpose of determining the admissibility of their complaints. The Panel reserves its position as to whether some or all of these rights were in fact violated and whether EULEX may be held accountable for any such violation.

Executive mandate of EULEX and attributability

57. EULEX submits that the alleged absence of EULEX officers at the location where the alleged abuses have taken place must mean that EULEX could not be held responsible for the alleged violation. These submissions are not dispositive for at least two reasons.

Lack of EULEX presence at the location

58. First, the Panel takes note of the submissions of EULEX that its personnel were absent from a number of locations relevant to this case. The Panel reserves its position in regard to the relevance, if any, of this fact for the purpose of deciding the merits of the present case.
59. Second, EULEX has failed to point to and specifically address Article 3 (d) of the Council joint action, which appear to be relevant to the determination that is expected of the Panel. That provision states that EULEX shall:

“(d) ensure that cases of [...], inter-ethnic crimes, [...] and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities.”
60. Considered in the context of this provision, and in light of EULEX's acknowledgment that its officers had in fact been dispatched to these events, the Panel has taken the view that there are sufficient indications *prima facie* that the involvement of EULEX officers in the monitoring of these events fall within the ambit of exercise of the

mandate of the Panel. If, however, the HoM wishes to take issue with this finding, the Panel invites the HoM to provide a detailed account of the circumstances under which EULEX officers were sent to participate in these events and in what capacity and under what mandate they were deployed.

Failure to investigate

61. Thirdly, the Panel notes the submissions of EULEX regarding certain investigative steps taken by EULEX and/or competent Kosovo authorities in regard to some of the incidents that form the background to the complaints. The Panel will consider the relevance of these at the merits stage of the proceedings and will invite the HoM to provide further details regarding the extent to which the specific cases of the complainants have been the subject of an investigation, what was done by whom and what was established by this investigation.
62. The Panel considers that, in the light of the parties' submissions, the complaints raise serious issues of fact and law under Article 3 ECHR/Article 7 ICCPR (in relation to Complainants A, B, C and D), Article 2 ECHR/Article 6 ICCPR, Article 5 ECHR/Article 9 ICCPR), Article 8 ECHR/Articles 17/23 ICCPR, Article 9 ECHR/Articles 18/19 ICCPR, Article 10 ECHR/Article 19 ICCPR, Article 11 ECHR/Article 21/22 ICCPR, Article 13 ECHR/Article 2 ICCPR, and Article 14 ECHR/Article 26/27 ICCPR, the determination of which requires an examination of the merits of the complaints.
63. The Panel concludes therefore that these complaints are not manifestly ill-founded. No other ground for declaring it inadmissible has been established.

FOR THESE REASONS,

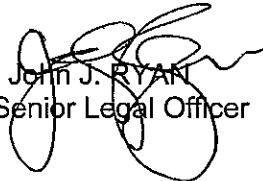
The Panel, unanimously,

DECLARES ADMISSIBLE, without prejudging the merits, the complaints with regard to alleged violations of Article 2 ECHR/Article 6 ICCPR, Article 3 ECHR/Article 7 ICCPR, Article 5 ECHR/Article 9 ICCPR), Article 8 ECHR/Articles 17/23 ICCPR, Article 9 ECHR/Articles 18/19 ICCPR, Article 10 ECHR/Article 19 ICCPR, Article 11 ECHR/Article 21/22 ICCPR, Article 13 ECHR/Article 2 ICCPR, and Article 14 ECHR/Article 26/27 ICCPR;


CONSIDERS that these cases should be treated with the necessary expeditiousness so that the Panel will direct the parties to submit additional submissions, if any, regarding the merits of these cases within the following deadlines:

1. The HoM has suggested that he would submit further observations on the merits of the matter no later than 19 April 2013. Requests for additional time will only be granted if exceptional circumstances are shown.
2. The complainants shall have until 02 May 2013 to respond and comment upon any new issue raised by the HoM in his observations, if any.

INVITES the HoM and the Complainants to specifically address, in their submissions, if any, the issues identified in the present Decision as relevant to deciding this matter and any other matter which parties consider relevant to the merits of this case and not already addressed in existing submissions.


John J. RYAN
Senior Legal Officer




Magda Mierzewska
Presiding Member