



## **DECISION AND FINDINGS**

**Date of adoption: 19 October 2016**

**Case No. 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16  
and 2014-17**

**D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R.**

**Against**

**EULEX**

The Human Rights Review Panel, sitting on 19 October 2016  
with the following members present:

Ms Magda MIERZEWSKA, Presiding Member  
Mr Guénaél METTRAUX, Member  
Ms Elka ERMENKOVA, Member

Assisted by  
Mr John J. RYAN, Senior 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 15 January 2013,

Having deliberated, decides as follows:

### **PROCEDURE**

1. The Presiding Member of the Panel, Ms Magda Mierzewska, participated in the deliberations of this case by way of electronic communications in accordance with Article 13(3) of the Panel's Rules of Procedure.
2. The complaints were registered respectively on the following dates:
  - complaints no. 2014-11 to 2014-14 on 11 March 2014;
  - complaint no. 2014-15 on 17 March 2014; and
  - complaints no. 2014-16 and 2014-17 on 19 March 2014.

3. All but one complainants asked for their identity to be withheld. In light of the nature of the complaints, the Panel has granted the requests.
4. On 27 May 2014, the Panel decided to give notice of the complaints to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaints. The Panel also decided to examine the merits of the application at the same time as its admissibility (in accordance with Rule 30 paragraphs 1 and 2 of the Rules of Procedure).
5. The observations of the HoM were received on 1 October 2014 after which they were communicated to the complainants for additional observations.
6. On 24 November 2014, the complainants submitted their additional observations, which were in turn transmitted to the HoM for information.
7. On 30 September 2015, the Panel declared the complaint admissible. The Panel found that the complaint raised serious issues of fact and law under Articles 2 (right to life), 3 (freedom from torture, inhuman or degrading treatment), 8 (respect for private life) and 13 (right to an effective remedy) of the European Convention on Human Rights ("Convention") the determination of which required an examination of the merits of the complaint. The Panel invited the parties to submit any additional observations they have on the merits of the case.
8. Observations from the Head of Mission and the complainant were received on 2 March 2016 and 25 April 2016 respectively.
9. In light of the particular tenor of the complainants and the great deal of overlap that exists between the issues raised in these cases, the Panel hereby orders the formal joinder of these seven cases (2014-11 to 2014-17) pursuant to Rule 20 of its Rules of Procedure.

## **FACTS**

### **I. CIRCUMSTANCES OF THE CASES**

10. All complainants are of Serbian ethnicity and are represented by the same advocate, Ms Jovanka Stojšavljević-Savić.

#### **Case 2014-11, D.W.**

11. On 16 June 1999, A.W. and B.W., the complainant's husband and son were visiting their family home in Obiliq/Obilić. Later on that day, the complainant (D.W.) heard gunshots coming from the direction of her home.

12. On 20 June 1999, the complainant was informed that her husband and son had been found dead. She later found out that they had been buried in an unmarked grave. Later on, A.W. and B.W.'s bodies were found and identified by the International Red Cross and returned to the complainant for burial.
13. On 9 April 2009, the complainant lodged a complaint with UNMIK's Human Rights Advisory Panel (HRAP). She submitted that UNMIK had failed to properly investigate the killing of her husband and son and that her rights had therefore been violated. On 6 June 2013, the HRAP found that there had been a violation of the complainant rights under Article 2 of the Convention.
14. On 11 June 2013, the complainant's legal representative sent a letter to EULEX asking whether they held any records concerning A.W., B.W. and a number of other persons. On 12 July 2013, the Head of the Special Prosecution Office (SPRK) replied that, according to Article 63 par. 1 of the Criminal Procedure Code (CPC), the injured party could only be represented by a person who is a member of the Kosovo Bar Association, so that the records could not be disclosed to the complainant's representative who did not belong to the Kosovo bar.
15. On 18 July 2013, the complainant drew the attention of the Head of SPRK to Article 63 par. 3 of the CPC, which provides that an injured party may represent himself or herself. She reiterated her request for information on her relatives to be disclosed to her and asked for it to be sent to her counsel's address.
16. On 9 October 2013, the complainant received a letter from the Head of the SPRK. She was informed that the investigation had been closed as the perpetrator could not be identified (*"a ruling to dismiss the criminal report dated 20 July 2009 was issued by a EULEX prosecutor since [it transpired] [...] from the criminal report there was no reasonable suspicion against a specific suspect"*). The letter further informed her that a notice of the closing of the investigation had been issued and that the injured party was informed of the right to proceed with the prosecution as a subsidiary prosecutor within eight days of receipt of the notice of dismissal. According to the letter, the ruling and the notice were required by law to be served on the family of the victim. In the same letter the complainant was informed that her representative would be permitted to inspect EULEX records of her case. She maintains that she was not able to secure an appointment with EULEX to that effect.
17. The complainant indicates that she was never formally served with the decision to dismiss the criminal report.

#### **Case 2014-12, E.V.**

18. The complainant's husband, S.V., was attacked in his apartment in Prishtinë/Priština on 5 July 1999. He died as a result of his wounds on the way to the hospital.
19. Later on in 2000, the complainant was interviewed by a person whom she believes belonged to the "international police force" and who assured her that an investigation was underway. She was not given any documents by the officer in question nor contact details and did not hear anything further since.
20. On 12 July 2013, in reply to the complainant's representative's inquiry, the Head of SPRK informed her that he could not disclose any information to her, as she was not member of the Kosovo Bar Association.
21. On 18 July 2013, E.V. requested that records about the death of her husband be forwarded to herself at her counsel's address.
22. Despite repeated requests, no further response was received from the SPRK.
23. In its submissions, the HoM made it clear that EULEX does not possess any file concerning the killing of the complainant's husband. It has, however, access to the Archive of the Basic Prosecution Office in Pristina. It would appear therefrom that documents were handed over by UNMIK to the Kosovo authorities on 22 August 2008 regarding this case. It also appears from the record that, on 6 February 2009, the Kosovo Public Prosecutor dismissed the criminal report in the case on the basis that there was no reasonable suspicion against a specific suspect.

#### **Case 2014-13, F.U.**

24. On 30 June 1999, the complainant's husband, A.U., was shot dead at the doorstep of their relative's house in Obiliq/Obilić, allegedly by men wearing KLA badges.
25. The British KFOR attended the scene and prepared a report on the incident, recording that they had interviewed several "relatives" and "family members" of the complainant.
26. However, neither the report nor any other document was handed over to the family. The complainant has received no further information regarding circumstances of her husband's death.
27. On 1 December 1999, UNMIK Police interviewed four witnesses in relation to this case. In their final report, the Police suggested that the investigation should be closed due to lack of information about

potential suspects. In the UNMIK case report of 2003, the status of the case is recorded as closed. There is no information available whether the victim's family was informed.

28. On 12 July 2013, in reply to the complainant's representative's inquiry, the Head of SPRK informed her that he could not disclose any information to her as she was not member of the Kosovo Bar Association.
29. On 18 July 2013, the complainant requested that records pertaining to the death of her husband be forwarded to her at her counsel's address.
30. On 20 September 2013, the Head of the SPRK informed the complainant that a ruling to dismiss the criminal report dated 20 July 2009 had been issued by a EULEX prosecutor "since [it transpired] [...] from the criminal report there was no reasonable suspicion against a specific suspect". The letter further informed her that a notice of closing of the investigation had been issued and that the injured party had been informed of the right to proceed with the prosecution as a subsidiary prosecutor. She was also informed that her representative would be permitted to inspect EULEX records of the case. She maintains that she was not able to secure an appointment with EULEX to that effect.
31. The complainant was never formally served with the decision to dismiss the criminal report.

#### **Case 2014-14, G.T.**

32. On 27 July 1999, B.T., the complainant's son was killed by unknown persons on a road near Vushtrri/Vučitrn. The British KFOR attended the scene, but the complainant was not asked to provide personal information or testimony and has not heard from KFOR since.
33. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning her son's death. She requested that records about the death of her son be forwarded to her at her counsel's address.
34. On 19 September 2013, the Head of SPRK answered that despite a thorough research conducted by the SPRK and the Police War Crime Investigation Unit (WCIU), no records concerning her son's death had been found.

#### **Case 2014-15, Zlata Veselinović**

35. According to the complainant, her husband, S.V. was shot dead in Prizren on 13 June 1999 by German KFOR soldiers. She does not

know the exact circumstances surrounding his death and has submitted that her request for a death certificate and information about the circumstances of her husband's death remain unanswered.

36. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning her husband's death. She requested that records about the death of her husband be forwarded to her at her counsel's address.
37. On 17 September 2013, the Head of SPRK answered that the SPRK could not find any records related to the complainant's husband's death. However, she was informed that the WCIU had found out that S.V. appeared on the International Committee of Red Cross's Missing Persons list.

#### **Case 2014-16, H.S.**

38. The complainant's brother A.S. was shot outside his house in the village of Batuse on 8 July 1999 and died as a result of his injuries. His family was not questioned, nor were their personal details taken by KFOR at that time.
39. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning his brother's death. He requested that records about the death of his brother be forwarded to him at his counsel's address.
40. In a letter of 20 September 2013, the Head of SPRK informed the complainant that despite thorough research conducted by the SPRK and the WCIU no records concerning his brother's death had been found.

#### **Case 2014-17, I.R.**

41. The complainant's husband was shot dead on the outskirts of Donja Brnica on 11 March 2000.
42. On 29 March 2000, the complainant received a memorandum from an Investigator of the UNMIK Regional Investigation Unit. She was informed that the case of her husband's death was under investigation and that no suspects had been identified by that stage.
43. On 18 July 2013, the complainant sent a letter to the Head of SPRK asking whether they held any records concerning her husband's death. She requested that the records pertaining to his death be forwarded to her at her counsel's address.

44. On 19 September 2013, the Head of SPRK informed the complainant that despite thorough research conducted by the SPRK and the WCIU, no records concerning her husband's death had been found.
45. On 31 October 2013, the complainant's legal representative sent the Head of SPRK the UNMIK the memorandum of 29 March 2000 (see par. 39 above) and asked him to review his position in the light of information contained therein. The complainant has received no response to that enquiry.

## **II. COMPLAINTS**

46. The complainants refer to a number of fundamental rights guaranteed by the following provisions: Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") which guarantees a person's 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 subject to torture or inhuman or degrading treatment or punishment.

## **III. RELEVANT APPLICABLE LAW**

### **Joint Action**

***COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO***

#### **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.

#### **Article 3 Tasks**

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

(...)

(h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and

### **Law on Jurisdiction**

***Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (as applicable until 30 May 2014)***

**Article 3 Jurisdiction and competences of EULEX judges for criminal proceedings**

(...)

3.3. Before the commencement of the relevant stage of the proceeding, upon petition of the EULEX Prosecutor assigned to the case or working in the mixed team identified in Articles 9 and 10 of this law, or upon petition of any of the parties to the proceeding, or upon a written request of the President of the competent court or of the General Session 5 of the Supreme Court of Kosovo where the provisions related to the disqualification of a judge or lay judge foreseen by the PCPCK (Article 40-44 of the PCPCK) are not applicable, the President of the Assembly of EULEX Judges will have the authority, for any reason when this is considered necessary to ensure the proper administration of justice, to assign EULEX judges to the respective stage of a criminal proceeding, according to the modalities on case selection and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law, for the following crimes, when the investigation or prosecution is not conducted by the SPRK:

(...)

h) violating equal status of residents of Kosovo (Art. 158, PCCK)

**Article 12 Authority of EULEX prosecutors in case of unwillingness or inability of Kosovo Public Prosecutors**

12.1. At any stage of any criminal proceeding, if a Kosovo Public Prosecutor is unwilling or unable to perform his or her duties and this unwillingness or inability might endanger the proper investigation or prosecution of a criminal offence, or whenever there is a grounded suspicion of attempts made to influence the investigation or prosecution of a criminal offence, the Chief EULEX Prosecutor will have the authority to request the Chief Prosecutor of the competent office to assign the case a) to another Kosovo Public Prosecutor working within the same prosecution office, b) or to any EULEX prosecutor who will take the responsibility over the relevant investigation or prosecution.

12.2. If the Chief Prosecutor of the competent office rejects the request of the Chief EULEX Prosecutor, the Chief EULEX Prosecutor will inform the Chief Public Prosecutor of Kosovo and they will issue a joint decision which will be respected by the Chief Prosecutor of the competent office.

12.3. In urgent situations, or when the delay might affect the conduct or the result of the investigation, prosecution or the fairness of the proceeding, the Chief EULEX prosecutor will be entitled to undertake



any urgent procedural activity or to assign any EULEX prosecutor or Kosovo Public Prosecutor to the case for such purpose.

***Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo (as applicable as of 31 May 2014)***

**Article 3 Amending and Supplementing the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo**

.....

3. After Article 1 of the basic Law, a new article 1.A is added with the following text:

**Article 1.A Ongoing cases**

For purpose of this law an ongoing case means:

1. Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law;
2. Cases that are assigned to EULEX judges before 15 April 2014.

.....

9. Article 7 of the basic Law is reworded as following:

**Article 7 General authority and competences of EULEX prosecutors**

7.1. EULEX prosecutors will have the authority and responsibility to perform their functions, including the authority to conduct criminal investigations as stipulated in Article 2.1 of this Law, unless foreseen otherwise by this Law.

7.2. The EULEX prosecutors will be competent to investigate and prosecute the crimes that fall under the competence of the SPRK in accordance with the law on SPRK.

7.3. EULEX prosecutors are integrated into Kosovo Prosecutorial system and will discharge their functions in compliance with the applicable legislation in Kosovo.

7.4. Cases conducted by EULEX prosecutors as stipulated in Article 2.1 of this Law will continue to be managed in accordance with relevant provisions of the Law No. 03/L-053 on Jurisdiction, Case

Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (2008) and Law on SPRK (2008).

7.5. EULEX KOSOVO will appoint prosecutors to assist in the implementation, according to the agreement, of the EU-facilitated Dialogue between Kosovo and Serbia.

7.6. In carrying out their functions, EULEX prosecutors will closely consult and coordinate their activities with the Chief Prosecutor in charge of the office, where they are assigned.

....

10. After Article 7 of the basic Law, two new Articles 7.A and 7.B are added with the following text:

Article 7.A Authority of EULEX prosecutors in extraordinary circumstances

In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority.

***Law No. 03/L-052 on Special Prosecution Office of the Republic of Kosovo***

Article 5 Exclusive competence of the SPRK

5.1 The SPRK will have exclusive competence to investigate and prosecute the following crimes, also in the forms of attempt, and the various forms of collaboration to the crimes of:

.....

e) crimes Against Humanity (Art. 117, PCCK);

f) war Crimes in Grave Breach of the Geneva Conventions (Art. 118, PCCK), War Crimes in Serious Violation of Laws and Customs Applicable in International Armed Conflict (Art. 119, PCCK), War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions (Art. 120, PCCK), War Crimes in Serious Violation of Laws and Customs Applicable in Armed Conflict not of an International Character (Art. 121, PCCK);

...

n) organized Crime (Art. 274, PCCK), Intimidation during Criminal Proceedings for Organized Crime (Art. 310, PCCK);

.....

Article 9 Subsidiary competence of the SPRK

9.1 The SPRK will have subsidiary competence, according to the modalities set forth in Article 10 of this Law, to investigate and

prosecute the following crimes, also in the form of attempt, and the various forms of collaboration to the crimes of:

.....

b) inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance (Art. 115, PCCK);

.....

h) murder (Art. 146, PCCK), Aggravated Murder (Art. 147, PCCK);

i) hostage Taking (Art. 143, PCCK);

j) violating equal status of residents of Kosovo (Art. 158, PCCK);

k) kidnapping (Art. 159, PCCK);

.....

**Article 63 of Kosovo's Criminal Procedure Code (Criminal No. 04/L-123) reads as follows:**

**Article 63  
Representatives of the Injured Party**

1. The injured party may be represented by a representative who shall be a member of the bar of Kosovo.
2. The injured party may be represented by a victim advocate.
3. The injured party may represent himself or herself.

**THE LAW**

47. The complainants allege that EULEX infringed their rights protected under Articles 2 and 3 of the Convention. These provisions, in so far as relevant, read as follows:

**Article 2 Right to life**

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

...

**Article 3 Prohibition of torture**

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

48. In addition to these provisions, the Panel decided *proprio motu* to also communicate and examine the case under Articles 8 and 13 of the Convention which read as follows:

**Article 8 Right to respect for private and family life**

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

### **Article 13 Right to an effective remedy**

Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.

## **Submissions by the parties**

### ***Head of Mission ("HoM")***

49. In his observations on the merits of the cases, the Head of Mission (HoM) addressed the Panel's question as to whether EULEX Prosecutors would be competent to prosecute the cases pursuant to "exceptional circumstances" of article 7(A) of the amended Law on Jurisdiction (decision on admissibility, *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, 30 September 2015, conclusion). The HoM stated that the notion of "exceptional circumstances" had been detailed in the Administrative Instruction on the Special Prosecution Office of Kosovo on the Description and Allocation of Tasks and the Manner of Cooperation between the Chief Prosecutor of SPRK and the (EULEX) Deputy Chief Prosecutor of SPRK in the Administration and Management of the SPRK. According to its Article 4.4, they refer to: "unwillingness or inability on the part of the Kosovo Prosecutor; expertise and experience of the EULEX Prosecutor would ensure the proper investigation of the criminal prosecution of the case at hand; there is a grounded suspicion of attempts to influence the investigation or the criminal prosecution; the case under investigation touches upon the interests of the EU Member States or the EULEX staff in Kosovo." If a person believed that the conditions set out in Article 7(A) were met, they should address a detailed petition to the Chief State Prosecutor or the Chief EULEX Prosecutor, highlighting the claimed extraordinary circumstances. The decision to apply Article 7(A) was taken jointly by those two prosecutors and it is not EULEX Prosecutor alone who decides to take over the case.
50. The HoM reiterated that cases 2014-11 and 2014-13 had been closed in 2009 after having been examined by EULEX and could be reopened if new information becomes available. However, since no

such information had come to light to date, there was no possibility to consider applying Article 7(A). Regarding the other five cases, the HoM says that they have never been transferred to EULEX by UNMIK. EULEX Prosecutors were therefore unaware of their existence and could not be expected to carry out any investigation regarding the alleged crimes. Moreover, most of these cases concerned events that had occurred after the end of the conflict and could not therefore be considered war crimes. It was therefore unlikely that Article 7(A) could be applied.

51. The HoM explained that upon completion of its executive mandate UNMIK had transferred both the so-called “active” (relating to ongoing investigations) and “inactive” files to EULEX. However, files in cases which had been prior to that terminated and/or dismissed or transferred by UNMIK to the Kosovo authorities had not reached EULEX. Hence, the fact that EULEX did not possess a certain file was therefore not related to the organisation and work of the Mission. All the files received from UNMIK had been reviewed by EULEX Prosecutors, irrespective of their status.
52. The HoM concluded that EULEX had not violated the complainants’ rights. Although it was the Mission’s mandate to investigate war crimes and other serious crimes, it would be disproportionate and unrealistic to expect that it would prosecute and solve all such pending cases. It was not for EULEX to provide all the victims of conflict-related crimes with the effective remedy against violations of their rights by other organisations or the Kosovo authorities. He considered that EULEX had diligently dealt with all the cases that had been handed over to it by UNMIK. In relation to the other cases the Mission had no control and they were therefore outside of their responsibility.

### ***The complainants***

53. The complainants disputed the HoM’s interpretation of “exceptional circumstances” and appeared to suggest that the interpretation of this notion advanced by the HoM would effectively amount to or involve a continued violation of their Article 2 rights. Furthermore, the complainants pointed to the Opinion of the Human Rights Advisory Panel of UNMIK in the case of 2014-11, where HRAP had found that UNMIK violated the complainant’s rights protected by Article 2 of the Convention (see par. 13 above) and which, in their view, could be considered to constitute an “exceptional circumstance” that should have compelled EULEX to re-open the investigation in their cases.
54. The complainants concluded that, by failing to conduct an investigation of its own motion or even when prompted to do so, EULEX continued to violate the human rights of complainants D.W. and F.V. Furthermore, the absence of case-files concerning the four other cases, or any indication that investigative steps were taken and

a clear indication that EULEX would take no such steps to investigate of its own motion constituted a continuous violation of the rights of the remaining complainants. The complainants invited the Panel to find that EULEX had continuously violated the complainants' rights protected by Articles 2, 3, 8 and 13 of the Convention.

## The Panel's assessment

### *General legal considerations*

55. There is no suggestion that the underlying acts of disappearance can be attributed to the Mission, the Panel is not competent to consider who may be held responsible for these acts. Nor will be Panel consider the initial failure of taking investigative steps concerning deaths of the applicants relatives occurred prior to the creation of EULEX Kosovo and would be attributable to others (in particular to UNMIK). Because of the temporal and substantive limits on its mandate, the Panel can and will only consider those acts and omissions attributable to the Mission since it commenced its operations (see *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, admissibility decision of 30 September 2015, § 78; *Berisha against EULEX*, 2015-08, 1 March 2016, § 14).
56. The Panel has already had occasion to point out 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 (HRRP, *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, cited above, § 72; see also *L.O. against EULEX*, no. 2014-32, 11 November 2015, § 42; compare also HRAP opinion in cases nos 248/09, 250/09 and 251/09, 25 April 2013, § 35). That is because the mission does not possess all the attributes and resources typically available to States in the performance of their governmental functions. However, to the extent that the Mission has the mandate and resources relevant and necessary to fulfil a function similar to that of a government as part of its executive functions, it is required to perform those in compliance with the applicable human rights standards.
57. The Panel also takes notice of the difficulties necessarily involved in the investigation of serious crimes in a post-conflict society such as Kosovo (see European Court of Human Rights, *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011, § 70, *mutatis mutandis*; HRAP opinion in cases nos 248/09, 250/09 and 251/09, cited above, §§ 44 and 62 et seq. and its opinion in cases nos 168/09, 169/09 and 312/09; 6 June 2013, § 77; HRRP, *L.O. against EULEX*, cited above, § 44). Such a situation might indeed complicate the search for evidence, the protection of witnesses or the performance of certain investigative or forensic tasks. The fact that an investigation or prosecution is taking place in a post-conflict situation cannot,

however, explain every and all investigative shortcoming unless those are reasonably connected to particular difficulties associated with that situation. The Panel, therefore, evaluates in each case before it whether a particular investigative step that was normally open would have been rendered impossible or impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation.

58. Furthermore, as a rule of law mission, EULEX is expected to pay particularly close attention to the need for the restoration, maintenance and reinforcement of the rule of law. The effective investigation and prosecution of serious crimes is a particularly important feature of this aspect of EULEX's mandate. It is therefore essential that the Mission should interpret the requirement of "exceptional circumstances" within the meaning of Article 7(A) of the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation (see paras. 9, 10 and 49 above) in a way that is consistent with the fulfilment of that mandate. There is little difference between the ability of a State or a rule of law mission to prioritise the investigation of such crimes and to devote adequate time and resources to this operational priority (see *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, cited above, § 75; *L.O. against EULEX*, cited above, §§ 46-47).
59. Acts of unlawful killing constitute or involve serious violations of individual rights. As a result, victims of such acts may in some cases be said to include not just the most direct victim of the act but also close relatives of that individual (see, e.g., in relation to violations of art 2, *Mustafa-Sadiku against EULEX*, Case No. 2014-41, 15 June 2015, § 14 and references cited therein; see also, in the context of Article 3 and disappearance cases, ECHR, *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, §§ 130-34; *Khadzhaliyev and Others v. Russia*, No. 3013/04, §§ 120-121, 6 November 2008).
60. Furthermore, Article 2 does not concern only deaths resulting from the use of force by agents of the State (*Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, § 69). It also lays down a positive obligation on the authorities to take appropriate steps to safeguard the lives of those within their jurisdiction (see, for example, *Mursel Hasani against EULEX*, 2010-05, 14 September 2011, § 66, 69-70; see also ECHR, *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, Reports of Judgments and Decisions 1998-III, and *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 54, ECHR 2002-II), including by putting in place a legal framework designed to provide effective deterrence against threats to the right to life in context of any activity, whether public or not, in which the right to life may be at stake (see, ECHR, amongst many other authorities, *Zubkova v. Ukraine*, No. 36660/08, § 35, 17 October 2013). Whatever form the investigation takes, the available legal remedies should be capable of establishing the facts, holding accountable those at fault and providing appropriate

redress (see, e.g., *Sadik Thaqi against EULEX*, 2010-02, 14 September 2011, §§ 69-70 and 95-101). Any deficiency in the investigation, undermining its ability to establish the cause of the death or those responsible for it, may lead to the finding that the Convention requirements have not been met (see ECHR, *Antonov v. Ukraine*, No. 28096/04, § 46, 3 November 2011).

61. The involvement of family members in the investigation of such cases and the way in which the authorities respond to their enquiries may also add to their emotional distress (see, *mutatis mutandis*, ECHR, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002). When assessing the responsibility of the authorities in regard to such a case, the particular vulnerability of this category of victims must necessarily be accounted for. Also relevant in this context is the right of victims of such violation of the truth (see, e.g., L. Joinet, Special Rapporteur, Revised Final Report on Question of the Impunity of Perpetrators of Human Rights Violations (Civil and Political); E/CN.4/Sub.2/1997/20/Rev.1; 2 October 1997; ECHR, *El-Masri v. "the Former Yugoslav Republic of Macedonia"*, [GC], no. 39630/09, §§ 191 and 193, ECHR 2012; *Cyprus v. Turkey*, no. 25781/94, ECHR 2001-IV; see also Human Rights Council, Right to the Truth, A/HRC/12/L.27, 25 September 2009; Human Rights Chamber for Bosnia and Herzegovina, The "*Srebrenica Cases*", Case No. CH/01/8365, et al., Decision on Admissibility and Merits (7 March 2003)).
62. Consequently, the response expected of the authorities – in this case the Mission – must be commensurate to the gravity of the alleged violation and importance of the protected rights.
63. Undoubtedly, many years after the events there would be considerable difficulty in assembling evidence or in identifying and mounting a case against any alleged perpetrators. The essential purpose of such investigation is to secure the effective implementation of domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility. Even where there may be obstacles which prevent progress in an investigation in a particular situation, a timely and effective response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see *Varnava and Others v Turkey*, no. 16064/90 et al, 18 September 2009, § 191; *McKerr v. the United Kingdom*, no. 28883/95, §§ 111 and 114, ECHR 2001-III; *Brecknell v. the United Kingdom*, no. 32457/04, § 65, 27 November 2007; *L.O. against EULEX*, cited above, § 46).
64. The Panel notes that a strict commitment and attachment to those standards is particularly important for a rule of law mission such as EULEX that is intended to serve as example of society's dedication to ending impunity and to building a strong sense of accountability for



serious human rights violations. Any standard short of that one would risk creating a sense of acquiescence with impunity and disregard for victims' legitimate search for justice and accountability (see HRAP decision in cases nos 248/09, 250/09 and 251/09, cited above, § 80). This, in turn, might constitute or involve a continued and ongoing violation of rights. In other words, the violation of the fundamental rights of the disappeared persons (and their close relatives) continues until that point when the authorities fulfil their investigative obligations.

65. In the performance of these investigative duties, the authorities are bound by a general obligation of diligence and expeditiousness. In every case, the investigative authorities are expected to act with reasonableness, promptness and expeditiousness and to invest resources commensurate with the necessity and possibility of resolving the case in question. (HRAP opinion in cases nos. 248/09, 250/09 and 251/09, cited above, § 80; HRRP, *Maksutaj against EULEX*, 2014-18, 12 November 2015, § 56). To meet this requirement of diligence, the investigative effort must in all cases be directed at addressing the facts and circumstances that resulted in or contributed to the violation of a right. An investigation that would fail to address these and, instead, focus narrowly on one aspect of the case or on unrelated matters or inexplicably fails to address the responsibility of particular individuals would not in principle meet that requirement (see e.g. *A,B,C,D against EULEX* nos. 2012-09 to 2012-12, 20 June 2013, §§ 66-67). To meet that standard, the investigation must also involve such steps as are capable of establishing the relevant facts and, as the case may be, identify the persons who might be responsible for the violation of rights. The steps taken must reflect "a genuine attempt, based on the existing investigation material [...] to establish the relevant facts and identify the persons [...] responsible for [the harm caused]" (for an illustration, see HRRP, *Thaqi against EULEX*, 2010-02, 14 September 2011, § 98; see also ECHR, *Velcea and Mazăre v. Romania*, no. 64301/01, § 105, 1 December 2009).

*Application of the general principles to the circumstances of cases 2014-12, 2014-14, 2014-15, 2014-16 and 2014-17*

66. The Panel will first turn to the cases in respect of which EULEX argues that they never reached its investigative bodies (nos 2014-12, 2014-14, 2014-15, 2014-16 and 2014-17).
67. When addressing the issue of admissibility of these cases, the HoM argued that the EULEX Prosecutors never became competent to investigate these cases where the case file did not formally reach them. The Panel is of the view that this position should be rejected for two primary reasons.
68. First, 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 (*D.W., E.V., F.U., G.T.*,

*Zlata Veselinović, H.S., I.R. against EULEX*, cited above, § 89). No argument has been advanced to explain how the transfer of files of criminal investigations from UNMIK to EULEX was conducted in respect of persons who were subject to unlawful killings or had disappeared during the conflict or shortly afterwards from UNMIK to EULEX. Nor was it explained what steps were taken with a view to safeguarding the procedural rights of victims of alleged offences; including by way of, *inter alia*, proper recording of all transferred files.

69. Secondly, 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. In the cases under examination, the Mission was duly informed by the complainants of the existence of such cases. 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 is the Mission's own responsibility to effectively review and investigate these cases, in particular when serious offences such as those concerned in the present case were brought to its attention (*D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, cited above, § 89).
70. The above reasoning remains applicable to this stage of the proceedings. The Panel also reiterates that EULEX Prosecutors have a duty to act *proprio motu* in investigating cases coming within their competence and that their duty to act is not tied to their being seized by anyone or receiving information from any other source (see, e.g., *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, cited above, § 97).
71. Furthermore, the fact that a prior mission (UNMIK) has "closed" a case or declared it "inactive" does not exonerate EULEX from its procedural obligations. The Panel is of the view that where, as in the present case, the Mission's attention was drawn to possible human rights issues in the investigation of a case arising in connection with alleged serious offences, the Mission may be expected to carefully review the record of that case to conduct its own evaluation of the compatibility of that investigation with the procedural standards of human rights law.
72. The Panel has already held that a person alleging a violation of this sort cannot be expected to conduct his/her own investigation of the case, nor should he/she be required to knock on the door of various institutions in the hope of identifying an authority that might be responsible for investigating the case (see also *L.O. against EULEX*, no. 2014-32, 11 November 2015, § 63). In order to guarantee the effective protection of human rights in cases raising issues under Articles 2 and 3 of the Convention it is imperative that the responsibility to coordinate the investigative (and prosecutorial) effort remains with the authorities themselves. They, not the victims' relatives, bear the responsibility to ensure the effectiveness of the rights of those who have suffered prejudice.

*Application of the general principles to the circumstances of cases 2014-11 and 2014-13*

73. In the present case, the Mission's attention was drawn by the complainants to the deaths of their next-of-kin. The actions taken by the Mission in respect of that information were limited to checking whether the files were in possession of EULEX as a result of transfer of files to it by UNMIK and to informing the complainants that this was not the case. The applicants were informed that in the absence of such files, EULEX would not take any investigative measures. In cases nos.2014-14, 2014-15, 2014-16 and 2014-17 no steps appear to have been taken in order to ascertain whether the files of investigation were to be found with Kosovo authorities. No explanation for it has been provided to the Panel. In case 2014-12 the complainant did not receive any reply concerning the substance of her case except for information that she could not represent herself as she had to be represented by an advocate, member of the Kosovo Bar Association.
74. With regard to the two cases where an investigation did take place (nos 2014-11 and 2014-13), the Panel reiterates that investigative steps must be commensurate in nature with the gravity of the alleged violation (*Varnava and Others v. Turkey* [GC], quoted above, § 191; *Palić v. Bosnia and Herzegovina*, quoted above, § 63, *L.O. against EULEX*, cited above, § 59). This pertains to the timeliness of the authorities' response, the resources put into the matter and the thoroughness with which they may be expected to act. In a case such as the present ones where there is a credible allegation that important fundamental rights have been violated, there is an expectation that the investigative authorities will act promptly in initiating, conducting and finalising their investigation and that, in that process, they will take all reasonably available steps to establish the circumstances in which these violations occurred (see, e.g., HRRP, *L.O. against EULEX*, case No. 2014-32, Decision and Findings, 11 November 2015, par 46; see also HRAP opinion in case no. 52/09, cited above, §§ 46-49).
75. The Panel further reiterates that the effectiveness of an investigation in this sort of circumstances requires the authorities to keep victims or their relatives, as the case may be, informed of the general course of the investigation and to treat their requests for information with the necessary tact and diligence (see, e.g., *L.O. against EULEX*, 2014-32, 11 November 2015; *Desanka and Zoran Stanisić* against EULEX, 2012-22, 11 November 2015; HRAP opinion in cases nos 168/09, 169/09 and 312/09, cited above, § 89-90; HRAP opinion in case 02/09, 6 December 2012, § 84). A degree of transparency and candour in such context will ensure that the plaintiff's case was dealt with fairly, diligently and effectively (*Desanka and Zoran Stanisić* against EULEX, 2012-22, 11 November 2015, § 69).

76. It is further noted that the human rights obligations imposed on the authorities by Article 3 of the Convention are distinct from the obligation flowing from Article 2 of the Convention both on points of substance, and in its temporal outreach. There is a degree of similarity between the two obligations in that both are not an obligation of result, but one of means. However, whereas the procedural obligation under Article 2 requires the authorities to take specific legal action capable of leading to identification and punishment of those responsible, the obligation imposed by Article 3 is a more general humanitarian nature, for it enjoins the authorities to react to the plight of the relatives of the dead individual in a humane and compassionate way. The authorities have a duty to comply with the requirements of Article 3 irrespective of whether they were responsible for the original act of death or disappearance (see *Açış v. Turkey*, no. [7050/05](#), §§ 36 and 51-54, 1 February 2011).
77. In the present case, the Panel notes that it has not been argued, let alone shown that prior to decisions to dismiss criminal reports issued in 2009 (see, in particular, paras 16-17, 23, 30-31 above), any steps were adopted to take witness statements by EULEX prosecutors. Nor does the Panel have any indication of the lines of investigation, if any, that were pursued in these two cases or what other efforts were made to try to identify suspects. Nor were any attempts made to contact the complainants or other close relatives of the victims to ascertain whether they had relevant information about the cases. The Panel has not received any indication that this has been done and draws the necessary inferences from the absence of such information (compare HRAP opinion in case no. 52/09, cited above, §§ 46-49). Furthermore, it is not in dispute that the decisions given in 2009 were never formally communicated to the complainants.
78. Furthermore, the Panel has noted the suggestion by the EULEX Prosecutor that the complainants could not act unless represented by members of the Kosovo Bar (see above) The Panel need not decide whether Article 63(1) of the CPC was indeed applicable to this matter or whether it was properly applied. However, it cannot but note that paragraph 2 of that provision would have provided a sufficient legal basis for the Prosecutor to regard the complainants' representative as having been validly empowered to represent them. In the alternative, the EULEX Prosecutor could have treated the request as having been made by the complainants themselves pursuant to Article 63(3) CPC. Furthermore, the text of that provision expressly provides that a victim "may" be represented so that the Code does not treat legal representation as a necessary condition (as is also evident from paragraph 3 of that provision). It further observes that the curt replies given to the complainants failed to take into consideration the serious nature of the situations concerned, the complainant's distress and anguish. No explanation for this unduly formalist and insensitive approach has been provided to the Panel. Such an approach falls short of applicable standards and expectations in this matter (see,

e.g., *L.O. against EULEX*, 2014-32, 11 November 2015; *Desanka and Zoran Stanisić against EULEX*, 2012-22, 11 November 2015; HRAP opinion in cases nos 168/09, 169/09 and 312/09, cited above, § 89-90; HRAP opinion in case 02/09, 6 December 2012, § 84). No explanation for this unduly formalist and insensitive approach has been provided to the Panel.

79. The Panel notes, finally, that EULEX's competence and responsibility to investigate crimes falling within its mandate is not conditioned by the actions of an injured party. In a case such as the present one, EULEX is responsible to act *proprio motu* with a view to ensuring that the disappearance is being diligently, promptly and effectively investigated. Accordingly, a rejection of the complainants' requests for information in no way affected the Mission's *proprio motu* obligations to guarantee the effectiveness of their fundamental rights (see, among many other authorities, *Ahmet Özkan and Others v. Turkey*, no. 21689/93, § 310, 6 April 2004; *Isayeva v. Russia*, no. 57950/00, § 210, 24 February 2005).
80. In those circumstances, the Panel concludes that EULEX response to the complainant's requests, in particular the letters of 12 July 2013 (see paras 20 and 28 above) has been far from adequate. Their efforts resulted only in them receiving the bare minimum of information and only when they pressed for answers.

### **CONCLUSION**

81. Based on the above, the Panel finds that EULEX's investigative efforts were insufficient and resulted in a violation of the complainants' rights guaranteed by Articles 2 and 3 of the Convention in respect and by Article 13 in conjunction with Article 2 of the Convention.
82. Given its findings concerning Articles 2, 3 and 13 of the Convention, the Panel considers that it is not necessary to examine the case also in the light of Article 8 of the Convention.

#### *Applicability of Article 7(A) of the Law on Jurisdiction*

83. The Panel will now consider whether the Mission remained competent to investigate these cases after the amendment of Article 7(A) of the Law on Jurisdiction and, if that is the case, if it may be held responsible for failing to do so after that point (see, in particular, paras. 9-10, and 49 above).
84. As noted by the Panel in an earlier case, Article 7 (A) of the Law No. 04/L-273 gives EULEX prosecution the ability to apply an exception to the general principle that cases which were not considered ongoing as of the cutting date of 14 April 2014 were to be dealt with by the Kosovo authorities (compare, *X and 115 other complainants against EULEX*, 2011-20, § 64). This provision cannot result in undermining or

qualifying the Mission's responsibility to act at all times in a manner consistent with relevant human rights standards (see, e.g., *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, §§ 41 *et seq*).

85. Among the considerations relevant to the existence of "exceptional circumstances" are the following: first, whether an effective investigation of the case has been conducted up to that point. A negative answer would militate in favour of EULEX Prosecutors exercising their "exceptional" competence. In the present case, the Panel has already found that that the cases were never subject to a full and effective investigation for any significant period of time by any one entity. Secondly, it is relevant whether the case concern important rights and violations of extreme gravity. Such considerations would again weigh in favour of the "exceptional" involvement of EULEX Prosecutors. The cases under consideration here all pertain to a series of fundamental rights, including the right to life. Also, 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". Thirdly, if the EULEX Prosecutors decide not to exercise their "exceptional" competence, is there a genuine and real prospect of local authorities carrying out their responsibility in relation to that case. In the present case, there is no indication that this would be the case or that any steps were taken in order to establish facts relevant for the existence of such prospect (see also, *X and 115 other complainants*, § 66).
86. The law confers on EULEX prosecuting authorities a discretionary power to take over cases they consider exceptional in nature. It is not for the Panel to replace the EULEX authorities in applying that requirement. However, the Mission's discretion in that regard cannot be exercised arbitrarily or without consideration of all relevant factors and circumstances. It must be exercised in a manner that is consistent with the effective protection of human rights. In this case, it has not been argued, let alone shown, that adequate consideration had been given by the EULEX prosecuting authorities to the question of whether the circumstances of the cases (as described above) warranted qualifying them as "exceptional" for the purposes of this statute.
87. Based on the above, the Panel is satisfied that, *prima facie*, the cases could have come within the meaning of the phrase "exceptional circumstances" of Article 7(A) of the amended Law on Jurisdiction and that the Mission would therefore have remained competent in principle to investigate them after the amendment of the Law on Jurisdiction. For these reasons, the Panel finds that the violation of the rights of the

complainants by the Mission continued even after the amendment of that Law on account of the failure of the consideration of these cases under this provision.

**FOR THESE REASONS, THE PANEL, BY UNANIMOUSLY,**

1. *Holds* that there has been a violation of Articles 2 and 3, and of Article 13 in conjunction with Article 2 of the Convention.
2. *Finds* it appropriate, in the light of its above findings of fact and law, to make the following recommendations to the Head of Mission under Rule 34 of its Rules of Procedure:
  - a. The HoM should make a declaration acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the acts [and /or omissions] of EULEX in the performance of its executive mandate.
  - b. The HoM should communicate and transmit the present decision to all relevant investigative and prosecutorial organs of the Mission.
  - c. At the time of doing so, the HoM should instruct all organs of the Mission who are in contact with close relatives of persons reported to have been killed during the conflict or in the post-conflict circumstances to ensure that in all communications with them, they communicate with the necessary amount of expeditiousness, diligence and care necessary to account for the emotional distress of their interlocutors. If necessary, the HoM should consider adopting guidelines laying down in more details what this general instruction might imply in concrete circumstances.
  - d. The HoM should also impress upon the EULEX investigative bodies the importance of cases of disappearance remaining an investigative priority so that they are fully and effectively investigated and that wherever suspects are identified that they are brought to justice promptly and fairly.
  - e. The HoM is further invited to draw to the attention of the competent investigative and prosecutorial authorities within the mission the factors listed in the present decision as being relevant to evaluating the "exceptional" competence of EULEX prosecutors under Article 7(A) of the revised Law on Jurisdiction and to impress upon them the importance of taking these into

account in their assessment of whether they should seek to take over responsibility over this case. The Panel expects that a review of the present cases will be conducted in light of these parameters with a view to ensure that the investigative and prosecutorial authorities take an informed and legally sound decision as regards the need to investigate some or all of these cases.

- f. The Panel is fully aware of the challenges and difficulties resulting from the Mission's shrinking resources. However, within the confines of these resources and commensurate with the importance that the Mission attaches to the effective protection of human rights, the Panel invites the HoM to ensure that investigative bodies within the Mission have at their disposal all the necessary resources and support to accomplish their mission effectively and in a manner consistent with the effective protection of human rights, in particular those guaranteed by Articles 2 and 3 of the Convention.

The HoM is invited to inform the Panel of the measures he has undertaken in connection with the present decision by 19 November 2016.

For the Panel,

  
John J. RYAN  
Senior Legal Officer



  
Magda MIERZEWSKA  
Presiding Member