HRRP
Human Rights Review Panel

**DECISION and FINDINGS**

**Date of adoption: 22 April 2015**

**Case No. 2011-20**

**X. and 115 other complainants**

**Against**

**EULEX**

The Human Rights Review Panel sitting on 21 and 22 April 2015 with the following members present:

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

Assisted by
Mr John RYAN, Senior Legal Officer
Ms Joanna MARSZALIK, 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 of 9 June 2010,

Having deliberated, decides as follows:

## I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was registered on 9 June 2011.

2. The Panel subsequently acceded to the complainants' wishes not to have their names disclosed.

3. On 20 March 2012, the Panel decided to give notice of the complaint to the Head of the Mission (HoM), inviting him to submit written observations. The observations of the HoM were received on 2 May 2012. They were subsequently sent to the complainants for their observations.

4. On 5 June 2012, the complainants submitted their reply.

5. On 5 October 2012, the Panel declared the complaint partly admissible. The Panel declared inadmissible the complaints relating to the general living conditions in the camps, environmental pollution, alleged damage to the complainants' health, insufficient medical care and failure to relocate the inhabitants of the camps. It concluded that the issues did not fall within the ambit of the executive mandate of EULEX Kosovo, which does not cover administration or responsibility for the administration of IDP camps.

6. The Panel found that the complaints under Article 6 (right to a fair trial) and Article 13 (right to an effective remedy) of the European Convention on Human Rights and Fundamental Freedoms (the Convention) raised serious issues of fact and law the determination of which required an examination of the merits. The Panel invited the parties to submit any additional observations on the merits of the case.

7. The parties' observations were received on 12 November and 20 December 2012.

8. On 9 January and 2 July 2014, the Panel asked the HoM to provide additional information on the case. In particular, the Panel asked whether a criminal investigation in the case was pending before EULEX or Kosovo authorities. The Panel received the HoM's replies on 27 January and 25 July 2014 respectively.

9. On 27 August 2014, the Panel again asked the parties for additional observations on the merits of the case. The complainants and the HoM replied on 25 September and 24 November 2014 respectively.

10. As Mr John Ryan was Senior Legal Advisor for the United Nations Interim Administration Mission in Kosovo's (UNMIK) Human Rights Advisory Panel (HRAP) at the time when the complainants' case was examined by that Panel, he is not participating in the proceedings before the Human Rights Review Panel.

## II. THE FACTS

11. The facts of the case, as submitted by the complainants and as apparent from documents provided to the Panel, as well as from other relevant information may be summarized as follows:

### Background information on the IDP camps

12. During the 1999 conflict, many Roma from Roma Mahala (also known as the Fabrika or Mitrovica/Mitrovicë Mahala) and other parts of Kosovo fled to the northern part of Kosovo as a result of inter-ethnic violence and the destruction of their homes.

13. Some 600 internally displaced Kosovo Roma, Ashkali and Egyptians were subsequently placed into Internally Displaced Persons (IDP) camps.

14. The camps of Cesmin Lug/Cesminlukë (in Mitrovicë/Mitrovica municipality) and Žitkovac/Zhikoc (in Zvečan/Zveçan municipality) were established by the Office of the UN High Commissioner for Refugees (UNHCR) in 1999.

15. A third camp was built in Leposavić/Leposaviq in 1999, some 45 kilometers from Trepča.

16. In 2001, a fourth camp, Kablare, was established near Cesmin Lug/Cesminlukë. The first two camps and the fourth camp were located within 3 kilometres of the Trepča smelter.

17. The fifth camp, Osterode, was a former Yugoslav military camp used by the French KFOR from 1999-2005, afterwards converted into a camp for the internally displaced persons ("IDPs"). Osterode camp became operational in 2006. The camp was situated within the city of Mitrovicë/Mitrovica.

18. Although the camps were built as a temporary measure, efforts to find alternative accommodation were for a long time unsuccessful as suitable land for new housing could not be identified by local authorities.

19. The living conditions in the IDP camps were very poor. In addition to that, it was established as early as 2000 by the United Nations Interim Administration Mission in Kosovo (UNMIK), KFOR and World Health Organisation (WHO) that as a result of the former mining activities, the land in the area was severely polluted, especially with lead. Most of the persons living in the camps had blood lead concentrations exceeding medically acceptable levels.

20. The Roma residing in the camps were allegedly informed about the dangers to their health posed by the lead poisoning only in 2005.

21. The Žitkovac/Zhikoc and the Kablare camps closed in 2006.

22. In 2006, some of the residents of Cesmin Lug/Cesminlukë were relocated to Osterode. Some residents refused to move to Osterode as they did not consider it a better option from their residence at that time.

23. From 2001 until 2008, UNMIK was in charge of the camps. In May 2008, UNMIK handed over the responsibilities in respect of the remaining camps to the Kosovo government, namely the Ministry for Community and Return.

24. In January 2009, the management of the Cesmin Lug/Cesminlukë and Osterode camps was handed over from the Norwegian Church Aid to a local NGO, Kosovo Agency for Advocacy and Development (KAAD), funded by the Ministry for Community and Return. In April 2009, the Office of the Kosovo Prime Minister confirmed in a public declaration that it would deal with the lead contamination problem in the camps.

25. Eventually, the local Kosovo authorities allocated suitable land for construction of housing for the families living in the camps. The resettlement project, funded, among others, by the European Union and USAID, allowed the Cesmin Lug/Cesminluke camp to be evacuated and demolished in October 2010. The Osterode camp the Leposavić/Leposaviq camp closed in December 2012 and December 2013 respectively.

**Background information on the complainants**

26. The complainants are 116 Roma families and members of Roma families who resided in the above-mentioned camps. Many of the complainants are allegedly suffering from lead induced diseases.

27. At the time of filing the complaint with the Panel in June 2011, most complainants indicated as their address either the Cesmin Lug/ Cesminlukë, Osterode or Leposavić/Leposaviq camps.

28. It is not known to the Panel what is the current residence of the complainants.

**Proceedings against UN**

29. On 10 February 2006, the complainants filed a complaint with the UN for Third Party Claim for Personal Injury or Death.

30. On 4 July 2008, they filed further complaint concerning living conditions and health problems in the five UNMIK administered IDP-camps mentioned above before the UNMIK's Human Rights Advisory Panel (HRAP).

31. On 5 June 2009, the HRAP declared the complaint partly admissible. On 11 August 2009 the UN Special Representative of the Secretary General (SRSG) raised an objection as to the admissibility of the case based on the non-exhaustion of available legal avenues.

32. On 17 October 2009, the SRSG issued an Administrative Direction No. 2009/1 Implementing UNMIK Regulation No. 2006/12 on the Establishment of HRAP. Its Sections 2.1, 2.2 and 2.3 provide that any complaint, new or already pending, to the HRAP that is or may become in the future the subject of the UN Third Party Claims Process or Proceedings shall be deemed inadmissible. If such a complaint was already declared admissible, the question should be reassessed and determined anew.

33. Furthermore, this Administrative Direction restricted the temporal scope of the HRAP's jurisdiction by providing that no complaints filed with the HRAP shall be admissible, if submitted after 31 March 2010.

34. In its decision of 31 March 2010 the HRAP first considered UNMIK's new objection to admissibility arising from the Administrative Direction No. 2009/1. The Panel reiterated that it was within the discretion of the SRSG to determine the regulatory scheme of the complaint system before the Panel, and the Panel had no jurisdiction to examine the compatibility of the legal basis of its own functioning with human rights standards It noted that it could be seriously questioned whether the SRSG had the competence to alter some of the basic principles contained in UNMIK Regulation No. 2006/12 by an administrative direction which, despite the fact that it was named "implementing", significantly affected the legal framework of the Panel's functioning. However, it held that the fact remained that the provisions of that Direction formed part of the legal basis of the HRAP's functioning. The Panel concluded that, regretfully, it had no jurisdiction to deal with the arguments raised by the complainants concerning the illegality of the Administrative Direction. It noted further that the Administrative Direction removed from it the HRAP jurisdiction to examine whether the complainant had, prior to lodging his complaint with the HRAP, exhausted effective legal remedies. It further held that the applicants' substantive complaints fell *prima facie* within the ambit of the UN Third Party Claims Process and had therefore to be declared inadmissible.

35. The HRAP further held that after the Third Party Claims Process has been concluded, the complainants could request the HRAP to reopen the proceedings, despite the cut-off date of 31 March 2010 imposed by the Administrative Direction No. 2009/1.

36. On 25 July 2011, the UN Office of Legal Affairs declined to act further on the Third party Claims Process stating that it was a claim against the administration of Kosovo by UNMIK rather than a claim for injury of the individual Roma.

37. On 7 October 2011, the complainants requested the HRAP to reopen its proceedings.

38. On June 2012, the HRAP granted the complainants' request and reopened the proceedings and proceed with the examination of the merits of the complaint.

39. The proceedings are currently pending before the HRAP.

**EULEX involvement**

40. On 21 January 2010, a representative for the complainants requested, via an online-form, a meeting with the Head of Mission (HoM) of EULEX to discuss the situation in the IDP camps in North-Kosovo.

41. On the same day the Press & Public Information Office of EULEX replied, on behalf of the HoM EULEX, that no such meeting would be arranged and that the issue did not fall within the frame of the EULEX mandate.

42. On 2 February 2010, the complainants' representative sent a 46-page memorandum to EULEX Chief Prosecutor, requesting investigation and prosecution for serious crimes that had been and were being committed against the Roma residing in the IDP camps.

43. On 4 February 2010, EULEX Chief Prosecutor met the complainants' representative and informed him that no investigation of the alleged criminal offences would be instituted, as the case fell outside EULEX jurisdiction. He also advised that they should approach local institutions regarding the matter.

44. On 21 November 2013, the Basic Prosecution Office in Mitrovica registered a complaint, lodged by the complainants' representative. EULEX assigned a prosecutor to deal with the case. Subsequently, a mixed team of EULEX and Kosovo prosecutors was assigned to the case. The team met for the first time on 9 January 2014. The local prosecutor requested for time to allow him to acquaint himself with the material and to decide upon further steps.

45. An investigation was initiated on 15 April 2014.

46. On 30 May 2014 the 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 in Kosovo came into force with retroactive effect from 15 April 2014 (see Applicable law below). Pursuant to its Article 1. A (1) EULEX prosecutors have the authority to conduct criminal investigations only in cases for which the decision to initiate investigation has been filed before 15 April 2014 (see Applicable law below). In the present case an investigation was initiated on 15 April 2014 precisely (see para. 43 above). The case therefore could not be regarded as an ongoing case within the meaning of this provision. Consequently, on an unspecified date, the investigation was taken over by the Kosovo prosecutors of the Basic Prosecutors Office in Mitrovica.

47. Simultaneously, the EULEX prosecutor previously assigned to the case suggested to the Basic Prosecutors Office in Mitrovica to consider whether the case fell under the jurisdiction of the Special Prosecution Office of the Republic of Kosovo. There has been no formal ruling on that matter yet.

## APPLICABLE LAW

***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 No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (as applicable until 7 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 find 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***

**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.

.....

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. 04/L-077 on Obligational Relationships***

**Article 136 Basis for liability**

1. Any person that inflicts damage on another shall be obliged to reimburse it, unless it is proved that the damage was incurred without the culpability of the former.
2. Persons shall be liable for material damage and activities that result in major risk of damage to the environment, irrespective of culpability.
3. Persons shall also be liable for damage irrespective of culpability in other cases defined by law.

.....

**Article 179 Reimbursement of damage in case of physical injury or damage to health**

1. Any person that causes another physical injury or damages the health of another must reimburse the latter with the costs in connection with treatment, other necessary expenses there to connected and the earnings lost because of incapacity to work during treatment.
2. If owing to full or partial incapacity to work the injured party loses earnings, the injured party's needs are permanently increased, or the possibilities for the inured party's further development and progress are destroyed or reduced the liable person must pay a specific monetary annuity thereto as reimbursement for the damage.

.....

**Article 183 Monetary compensation**

1. Just monetary compensation independent of the reimbursement of material damage shall pertain to the injured party for physical distress suffered, for mental distress suffered owing to a reduction in life activities, disfigurement, the defamation of good name or reputation, the truncation of freedom or a personal right, or the death of a close associate, and for fear, if the circumstances of the case, particularly the level and duration of distress and fear, so justify, even if there was no material damage.
2. Upon the decision on the request for the compensation of immaterial damage, as well as for the amount of the compensation, the court shall evaluate the importance of the violation of goods and the purpose to which this compensation shall serve, also in order not to support the tendencies that are not compatible with the nature and the social purpose thereof.

***Law No. 03/L-006 on Contested Procedure***

**Article 14**

In the contentious procedure, regarding the existence of criminal act and criminal responsibility, the court is bound by the effective judgment of the criminal court by which the defendant has been found guilty.

## III. COMPLAINTS

48. The complainants claim that there should be an EULEX investigation into possible criminal offences committed against them. They submit that they have been denied access to justice and refused a remedy, judicial or otherwise, capable of dealing with the substance of their complaints about the living conditions and damage to their health and

well-being arising therefrom. The applicants rely on Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention).

## IV. THE LAW

### *1. The parties' submissions*

49. In his initial observations of 2 May 2012, the HoM stated that EULEX prosecutors were not under an obligation to investigate alleged criminal offences committed against the Roma camps' inhabitants. He pointed out that the complainants had claimed that the criminal offence of "causing general danger" (Article 365 of the Criminal Court of Kosovo) had been committed against them. That offence was not listed in article 3.3. of the Law no. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (the Law on Jurisdiction) which enumerated criminal offences triggering the competence of EULEX prosecutors. Further, EULEX noted that under Article 12 of the Law on Jurisdiction, EULEX prosecutors had the authority to take over an investigation or prosecution of any criminal offences, in case Kosovo prosecutors were unwilling or unable to perform their duties and this unwillingness or inability might jeopardize the proper investigation or prosecution. For that possibility to arise, however, the case had first to be brought before a local public prosecutor. If then a local prosecutor was unwilling or unable to deal with it, the complainants could notify the Chief EULEX Prosecutor, who would decide whether to assign the case to another Kosovo public prosecutor or to an EULEX prosecutor. EULEX argued that the complainants' had not brought their grievances about the alleged unwillingness of the prosecutors to examine the case to the attention of the local prosecuting authorities.

50. In reply, the complainants submitted that EULEX's argument that the investigation and prosecution of the crimes against the Roma camp inhabitants were not within its executive mandate was unfounded. Under its executive mandate EULEX was tasked to protect and uphold human rights in Kosovo and, especially, to intervene when the contested acts were motivated by racism. The local Kosovo or EULEX prosecuting authorities had refused to institute an investigation and had thereby failed in that duty.

51. They were of the view that EULEX's refusal to investigate the case violated the rights of the Roma under the Convention. They referred, in particular, to Articles 6 and 13 of the Convention.

52. In his observations of 20 December 2012 on the merits of the complaint, the HoM maintained his previous statement.

53. In their observations on the merits of 12 November 2012, the complainants reiterated that their rights under Article 6 of the

Convention have been violated by EULEX as they had no access to an effective remedy. Access to court was not limited by law, but in fact, when the Chief EULEX prosecutor refused to even consider initiating an investigation without providing reasons thereof (see par.43 above).

54. The complainants further repeated that Article 13 of the Convention was violated by lack of remedy to enforce the Convention rights. Article 13 required that competent authorities deal with the substance of the relevant Convention complaint and grant appropriate relief. The remedy required by Article 13 had to be effective, in particular it could not be unjustifiably hindered by acts or omissions of the respondent authorities. The complainants maintained that they had sought relief in five different venues, to no avail. When Kosovo authorities failed to provide appropriate remedy, responsibility fell to EULEX to investigate crimes against applicants within the ambit of the exercise of their executive powers. However, the EULEX prosecutor interpreted his mandate not in accordance with the law thus arbitrarily depriving them of any review, violating Article 13. Moreover, the refusal to open an investigation limited the complainants' chances to seek and obtain compensation in civil proceedings because the events and facts had not been established in a criminal investigation.

55. In his final observations of 24 November 2014, the HoM addressed the applicability of Articles 6 and 13 of the Convention to the present case. He reiterated that the executive powers which EULEX prosecutors and judges were accorded, were related to cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes and other serious crimes. The situation in IDP camps did not, therefore, fall within the mandate of EULEX judges and prosecutors. Consequently, Articles 6 and 13 could not be applied and EULEX could not be held accountable for violation of the rights protected by them. In any event, the complainants were not denied access to court and their case is currently pending before local prosecutors.

56. Moreover, the HoM stated that the complainants could initiate civil proceedings and claim damages. Under the Law no. 04/L-077 on Obligational Relationships (Law on Obligations), any person who inflicts culpable damage on another shall be obliged to reimburse it. Further, the Law on Obligations provides for reimbursement for physical injuries or damage to health (Article 179) and monetary compensation in case of immaterial damage (Article 183). The proceedings should be initiated in accordance with the Law no. 03/L-006 on Contested Procedure. He noted, however, that civil proceedings might be stayed pending criminal proceedings relevant to the civil claim, in accordance with Article 14 of the Law on Contested Procedure.

57. In reply, the complainants maintained that they had unsuccessfully sought civil compensation from UNMIK since 2005. They pointed out that a potential problem with initiating civil proceedings for

compensation at this time is the statute of limitations. Another would be to find a law that was applicable in their case, as the legal system was still chaotic in Kosovo. To date, Kosovo does not possess a unified civil law, but pieces of legislation on individual civil matters, scattered over a variety of laws and lack an overall frame. As a result, the same legal issues were dealt with in different legal acts and often in a conflicting manner. Some major pieces of legislation were missing and gaps needed to be filled. These conditions made it extremely difficult to apply the law correctly. For those reasons, the possibilities of civil proceedings for compensation in the existing legal framework were very remote.

***b. The Panel's assessment***

58. The complainants submit that they have been denied access to justice and that they were deprived of a remedy capable of dealing with the substance of their complaints. They referred to Articles 6 and 13 of the Convention which, in so far as relevant, provide:

> **Article 6 Right to a fair trial**
>
> 1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law (...).
>
> **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.

59. The Panel reiterates that it has declared inadmissible the complaints relating to the alleged responsibility of EULEX originating from the general living conditions at the camp, environmental pollution, alleged health damage, the lack of adequate medical care and the failure to relocate the residents of the camp. The scope of its admissibility decision of 5 October 2012 is, therefore, limited to the applicants' complaints with regard to alleged violations of Articles 6 and 13 of the Convention.

60. The Panel notes that on 21 November 2013 the Basic Prosecution Office in Mitrovica registered a complaint lodged by the complainants. Subsequently the case was assigned to a mixed team of EULEX and Kosovo prosecutors. The team met on 9 January 2014, after which the local prosecutor was given time to acquaint himself with the case material. Eventually, an investigation was initiated on the basis of a prosecutor's decision dated 15 April 2014.The Panel observes, firstly, that under Article 1. A (1) of the 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 in Kosovo, which entered into force on 7 May 2014, the mission retained jurisdiction in respect of "ongoing" cases within the meaning of this provision. A case was to be regarded as ongoing if a decision to initiate investigation had been filed by the EULEX prosecutors prior to 15 April 2014. Under that law, the date on which the victims filed a report with the competent authorities was therefore immaterial to determining for the purpose of that law whether a case was ongoing. The party had no control or influence over when a decision to initiate investigation would be given.

61. Hence, despite the fact that the complainants in the present matter brought their case to the attention of the authorities in November 2013, they could not exert any influence on their case being regarded as "ongoing" and, as such, retained by EULEX.

62. Secondly, the Panel cannot but note that, had the prosecutor's decision to initiate the investigation (taken on 15 April 2014) been given merely one day earlier, the case would have fallen within the ambit of the notion of "ongoing" cases. Hence, EULEX authorities would have retained jurisdiction to conduct an investigation of the case. EULEX failed to explain its decision not to act prior to that cut-off date and provided no reason that would have prevented it from doing so.

63. In this connection, the Panel observes that the 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 in Kosovo which entered into force on 7 May 2014 provided, in the context of determination of which cases were considered to be ongoing, for a cut-off date with a retrospective effect. It has not been shown or argued that consideration has been given to the manner in which the application of this retrospective effect affected the complainant's case.

64. Thirdly, it is noted that under Article 7 (A) of the Law No. 04/L-273 it was possible for EULEX prosecution to apply an exception to the general principle that cases which were not considered ongoing within the meaning as described above were to be dealt with by the Kosovo authorities (see Applicable Law above). It was possible for EULEX prosecution to take over cases if it was warranted by exceptional circumstances. Again, EULEX failed to explain why, in light of all circumstances relevant to this case, it was reasonable for EULEX Prosecutor not to seize themselves of this case. Particularly relevant in that regard was the fact that the case had not been properly investigated up to that point. This should have alerted that a failure to act in this matter would likely result in depriving victims of access to an effective remedy.

65. The Panel further observes that the present case relates to facts going back as far as 1999. The facts of the case related, *inter alia*, to one of the most important of all fundamental human rights, the right to life. It gave rise to a number of proceedings in which residents of the

camps sought relief and compensation from bodies and organisatons they considered responsible for their plight; to no avail. There was also a clear ethnic element inherent to the case in that the residents were Roma. Proceedings were instituted before various bodies of the United Nations with a view to providing some form of redress to the inhabitants of the camps, giving rise to a number of decisions, including these of the Human Rights Advisory Panel (see paragraphs 31-35 above), again to no avail.

66. These circumstances, taken together, can be said to carry the weight and gravity relevant to considering whether, in the exercise of diligent prosecutorial discretion, exceptional circumstances within the meaning of Article 7 (A) obtained and whether the case should not therefore be retained by EULEX prosecution. It is true that the law conferred 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 interpreting that requirement. However, that discretion cannot be exercised arbitrarily. It must be exercised diligently in light of all relevant circumstances and 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 was given by the EULEX prosecuting authorities to the question of whether the circumstances of the case warranted qualifying it as exceptional for the purposes of this statute. Nor has it been demonstrated that the human rights consequences of their decision was given its due weight.

67. The decision of the Mission not to open an investigation until after the cut-off date of 14 April 2015 negatively affected the complainants' ability to seek and obtain an effective relief for the harm done to them. The Panel notes that, according to Article 14 of the Law 03/L-006 on Contested Procedure, a civil court is bound merely by a final judgment given in criminal proceedings finding the accused guilty (see Applicable Law above). There is no basis for finding that the absence of criminal investigation or of a final judgment in a criminal case makes it impossible in law to seek civil liability before civil courts against persons in respect of whom Kosovo civil courts have jurisdiction. Still, the Panel is of the view that EULEX's failure to initiate an investigation, given the seriousness of issues involved, the lengthy period which elapsed since the material events, the difficulty for the complainant to obtain evidence absent such an investigation, seriously undermined the ability of the complainants to seek compensation through civil liability and gravely compromised their ability to obtain an effective remedy for the harm which they suffered.

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

1. *Holds* that there has been a violation of Article 13 of the Convention;

2. *Holds* that that it is not necessary to consider the complaint under Article 6 of the Convention.

3. *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:

   i. The HoM should instruct competent EULEX officials to make enquiries with Kosovo authorities whether an investigation in this matter is ongoing and, if so, at what stage of the process the matter stands. The HoM should inform the Panel of the result of this enquiry.

   ii. Having received that information, the HoM should instruct EULEX Prosecutors to consider whether to take over the responsibility of this case pursuant to Article 7(A) of the Law No. 04/L-273 taking into account all relevant circumstances, as highlighted above, in particular the need for the Mission to guarantee the effective protection of the complainants' rights. The HoM should inform the Panel of the Prosecutor's decision in that regard

The Panel respectfully asks the HoM to provide the Panel with the requested information no later than 15 June 2015.

For the Panel,

Joanna MARSZALIK
Legal Officer

Human Rights Review Panel HRRP Kosovo

Magda MIERZEWSKA
Presiding Member