



DECISION and FINDINGS

Date of adoption: 30 September 2013

Case No. 2012-19 & 2012-20

H & G

Against

EULEX

The Human Rights Review Panel, by way of electronic means in line with Rule 13 of its Rules of Procedure on 30 September 2013 with the following members taking part:

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

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

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

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaints were registered with the Panel on 19 November 2012.
2. On 22 and 24 January 2013, the representative of the complainants provided further information to the Panel.

3. Because of concerns pertaining to their security, the Panel acceded to the complainants' request not to have their names disclosed.
4. On 11 April 2013, the Panel communicated the complaints of H and G collectively, without prejudice to the possibility to later order a formal joinder of cases pursuant to Rule 20 of its Rules of Procedure.
5. The observations of the Head of Mission (HoM) were received on 10 June 2013 after which they were communicated to the complainants for further observations. The complainants did not make any additional submissions.
6. Considering the extent to which issues raised in the two complaints are overlapping, the Panel hereby orders the formal joinder of these two cases (H and G) pursuant to Rule 20 of its Rules of Procedure.

II. FACTS

Circumstances of the case

The following facts were established on the basis of information provided by the complainants:

Complainant H

7. On 28 June 2012, complainant H visited Kosovo as part of an official delegation of "Serbian Veterans" to lay a wreath at a monument at *Gazimestan*. The delegation was allowed passage and was able to reach the monument at *Gazimestan* *"together with all marks that we had on our shirts and T-shirts, such as the emblem of Serbian Veterans and the wreaths which we laid at the monument"*.
8. On the way back from *Gazimestan*, at around 14:00, at the crossing point at Merdare, the so-called Regional Operational Support Unit (ROSU) and the Kosovo Police (KP) stopped the vehicle in which the complainant was travelling together with a colleague and a driver.
9. The complainant and the other two individuals travelling with him were told to get out of the vehicle. The complainant says that he was asked about the mark of "Serbian Veterans" that was visible on the left side-pocket on his shirt. The complainant further states that during that time a team of the local Kosovo TV station "KTV" was present and filming the scene.
10. ROSU and KP [the complainant assumes that the KP belonged to the border police] officers searched the vehicle and checked their suitcases. According to the complainant *"[t]hey took from the trunk of the vehicle a Serbian Veterans flag and showed it to the cameras"*.

11. Then, pursuant to an order issued by a KP/ROSU commander, the complainant and his colleague were taken to the last [police] "container on the left side in the direction that leads towards Serbia".
12. Inside the container, a police officer told the complainant to take off his shirt [which bore a Serbian emblem] under the threat that the officer would otherwise rip it off. The complainant states that he was under the impression that the officer wanted to start a quarrel, so he obeyed and took his shirt off.
13. It is alleged that another police officer opened the door of the container and asked the police officer inside if he had already started the beating and if he needed any assistance in this regard.
14. It is further alleged that after a while, a man wearing a white shirt [apparently a senior officer according to the complainant] ordered the complainant to move into another container which the complainant believes was used as office space.
15. It is alleged that this senior officer then took off his pants to show a big bruise on his thigh which, purportedly, he had gotten during the morning at the same crossing point. It is alleged, that by doing so the police officer intended to provoke the complainant and to find out whether the complainant and his companions were aware of the morning's events, referring to a violent incident the complainant was did not know about.
16. Another person in civilian clothes who was carrying a gun then appeared and took some of the complainants' belongings away. It is alleged that some of these belongings were confiscated, in particular items that bore emblems of Serbian Veterans. Then, the police officer turned on the TV and said "You became famous now, they show you live on TV". Allegedly, subtitles on the TV program read: "Directly from Merdare, Serbian Nationalists stopped at Merdare".
17. It is stated that the complainant was provoked several times by KP when they asked if the beating had already started. Another man in civilian clothes allegedly stated that the complainant and his companions would be kept in detention for a month. When the complainant enquired about the reasons for such detention, he was told that they had breached the laws of the Republic of Kosovo.
18. At around 16:30, the complainant and his companions were ordered to continue their trip. The complainant stated that for all this time no EULEX staff "even showed up let alone was present there".
19. The complainant submitted a certificate of temporarily confiscated assets. It is not known if the complainant got his belongings back.

Complainant G

20. On 28 June 2012, the complainant, together with a group of friends, went to Kosovo to lay a wreath at the monument at *Gazimestan*. The group arrived at the border crossing at Merdare at around 6:20 a.m. The group decided to leave the vehicle and to cross the border on foot.
21. It is alleged that while standing in line and waiting for their documents to be checked, a KP officer approached the group and addressed them in Albanian. One of the friends of the complainant allegedly asked the police officer to explain what he was speaking about, as nobody in the group of 12 persons was able to speak Albanian. Allegedly, the police officer pulled the first person from the line and asked him rudely "What are you doing here?" in Serbian.
22. The man answered that the group was on a pilgrimage and that they were intent on laying a wreath at the monument at *Gazimestan*. It is alleged that the KP officer shouted at the group in Albanian, and then said "What are you doing here; this is not your land anymore". It is alleged that the police officer noticed that the complainant and a few of his friends were wearing T-shirts with Serbian insignias.
23. The complainant stated that in order not to provoke anyone he was wearing a jacket over his T-shirt. However, KP noticed the T-shirt and an officer allegedly shouted at the complainant and pulled him at his sleeve, asking him to take it off. The complainant obeyed the order. Thereafter, the complainant was taken to a container where he and his backpack were searched.
24. The complainant states that he felt threatened all the time. According to his account, the whole group of 12 people was sent to the same container to be searched. When the complainant was searched, there were four KP officers present. When searching the complainant's backpack, KP discovered a Serbian flag. It is alleged that KP was throwing the complainant's belongings on the ground, and that one KP member stood and spit on them.
25. The complainant alleged that "[t]he same guy that was standing and spitting on my belongings, told me in Serbian language the following: 'I will piss on these things now and then I will return it to you', at the same time he was laughing". The complainant together with the other 11 individuals was kept in the container for about 40 minutes. It is alleged that all of them were checked and treated in the same way as the complainant.
26. The complainant further states that he was treated roughly and rudely by one KP who was insulting him because of his nationality. That police officer allegedly pushed the complainant out of the container, and kicked into the complainant's left thigh. Thereafter, the police officer told everyone to wait outside, except one juvenile, whom he

kept inside the container. After some 10 minutes, the juvenile came out of the container with "red traces" visible on his face. When the complainant asked him what happened, he did not say anything as *"he just wanted to move on further, not to cause any more troubles, although from his face you could see that they had used force"*.

27. Then, one KP officer came and ordered the group to wait to receive certificates for confiscated assets. When that police officer went back to the container, another officer came out from the container where the group had been interrogated and told the group *"that he has urinated over our belongings and if we want we can go inside and collect the stuff, we can take only water and food that was confiscated but not the personal assets (T-shirts and flags)"*.
28. It is alleged that after few minutes, one of the police officers came out with certificates of confiscation. The complainant stated that the certificate he was handed was not correct, as for instance, a hat that was confiscated did not have any Serb signs, as recorded in the statement. The complainant confronted the police officer. The latter allegedly drew a gun and told the complainant that they have *"permission to use it and told me to get lost as soon as possible"*.
29. Thereafter, the group passed the crossing point and continued towards *Gazimestan*. The juvenile with red marks on his face told he complainant that he had been harassed in the container, that KP used unnecessary force against him, that they had slapped him, that they were hitting him in the stomach and that one KP kicked him in the head.
30. The complainant alleges that *"[a]ll this time the EULEX Officers were absent. Because of the behaviour of the members of KP and their attitude toward us, we were not able to make contact with EULEX"*.
31. Upon their arrival in Gračanica, the case was reported to the Police and to EULEX. EULEX asked the complainants to submit the certificates for confiscated assets which they did. So far, the complainant did not hear from EULEX.

Facts relevant to EULEX's investigative efforts

32. In its observations of 10 June 2013, EULEX submitted that it is not aware of any investigation of these specific events by the KP. Further EULEX submitted that it did not conduct any investigation of these events.
33. With regard to complainant G, EULEX submitted that inquiries made by EULEX did not lead to any evidence of the receipt of a complaint or of the submission of certificates for confiscated assets.

EULEX as second responder

34. EULEX further submitted that its main role with regard to the Executive Police was to be ready as a second responder where it is requested to intervene by KP.

RELEVANT APPLICABLE LAW

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

Joint Action

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

Article 2 Mission Statement

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

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

Article 3 Tasks

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

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

- (b) ensure the maintenance and promotion of the rule of law, public order and security including, as necessary, in consultation with the relevant international civilian authorities in Kosovo, through reversing or annulling operational decisions taken by the competent Kosovo authorities;
- (d) ensure that cases of war crimes, terrorism, organised crime, corruption, inter-ethnic crimes, financial/economic crimes and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities;
- (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
- (i) ensure that all its activities respect international standards concerning human rights and gender mainstreaming.

Law on Jurisdiction

Article 17

17.1 For the duration of the EULEX KOSOVO in Kosovo, the EULEX police will have the authority to exercise the powers as recognized by the applicable law to the Kosovo Police and according to the modalities as established by the Head of the EULEX KOSOVO.

III. COMPLAINTS

- 37. The complaints relate to two incidents at the Merdare Crossing point, which are connected to the Vidovdan celebrations of 28 June 2012.
- 38. The complainants rely on a number of protected rights, including the right not to be subject to cruel, degrading or inhuman treatment (e.g., Article 3 ECHR; Article 7 ICCPR), the right to respect for private and family life (Article 8 ECHR; Articles 17/23 ICCPR), the right to freedom of thought, conscience and religion (Article 9 ECHR; Articles 18/19 ICCPR), freedom of expression (Article 10 ECHR; Article 19 ICCPR), the right to freedom of assembly and association (Article 11 ECHR; Article 21/22 ICCPR), the right to an effective remedy (Article 13 ECHR; Article 2 ICCPR), and the prohibition against discrimination (Article 14 ECHR; Article 26/27 ICCPR). They submit that their rights have been breached as a result of the facts complained of.

IV. THE LAW

39. It is for the Panel to determine the legal characterisation of the complaints to be examined. The Panel will examine the two cases under the following provisions: the right to respect for private and family life (Article 8 ECHR; Article 17 ICCPR); the right to freedom of thought, conscience and religion (Article 9 ECHR; Articles 18 and 19 ICCPR); the right to freedom of assembly and association (Article 11 ECHR; Articles 21 and 22 ICCPR) and the right to an effective remedy (Article 13 ECHR; Article 2 ICCPR).
40. The Panel reiterates the approach it has adopted in its decision of 20 June 2013, A, B, C & D against EULEX (Case No. 2012-09, 2012-10, 2012-11 and 2012-12). As the present case relates, like those, to the *Vidovdan* celebrations of 28 June 2012, the Panel's earlier findings regarding the planning and controlling of EULEX operations in the context of these events are applicable here. The Panel therefore refers to and adopts by reference its findings and conclusions as contained in its A, B, C & D decision, at paragraphs 45-49, to the extent that those are relevant to the present decision.

EULEX responsibility for human rights protection

41. The Panel accepts that given the limited executive mandate of EULEX, it cannot be held responsible for failing to guarantee an effective protection of human rights as such in Kosovo and that an impossible or disproportionate burden as regards policing cannot be imposed on the Mission.
42. The Panel notes, however, that it is the obligation of EULEX under the Council Joint Action to ensure that its activities should be carried out in compliance with international standards of human rights (see Article 3 (i), Council Joint Action 2008/124/CFSP; see paragraph 36 above). EULEX is therefore required to intervene to protect human rights wherever it knows or ought to have known at the time of a real and immediate risk that a violation might occur if it did not intervene (see, e.g., *Đorđević v. Croatia*, no. 41526/10, § 138-139, ECHR 2012 and references cited therein; *Osman v. the United Kingdom*, 28 October 1998, § 16). The nature of the response should be appropriate to the circumstances and, in turn, depend on what right or rights were at stake and on the seriousness of the threats to those rights (see the Panel decision in *Kahrs against EULEX*, no.2012-16, § 31).
43. Accordingly, the Panel will examine whether, in the present case, EULEX's actions or omissions, in so far as they affected the complainants in the context of the police operation on 28 June 2012, were consistent with the human rights obligations of EULEX arising in connection with the exercise of its executive mandate of EULEX as defined above.

44. As a preliminary matter, the Panel notes that EULEX is not expected to provide better policing than the resources put at its disposal would allow. EULEX is obliged, however, to take necessary and reasonable measures within the scope of its competence to provide for the effective protection of the human rights of those who find themselves on the territory of Kosovo.
45. This is also the case where, as in the present case, the conduct of KP presents a real risk that these rights might be violated. In such a case, EULEX is expected to provide safeguards – including operational ones – capable of ensuring that KP acts in accordance with its obligations and, where they fail to do so and put the effective exercise of these rights at risk, to intervene appropriately to prevent any violation, and, should this be necessary for that purpose, even to reverse or cancel KP operational decisions in accordance with Article 3b) Joint Action.
46. The Panel observes that by participating in the celebrations at Gazimestan the complainants sought to exercise their right to freedom of assembly and their right to freedom of conscience. While they were not prevented from participating, they were subject to inappropriate treatment at the Merdare crossing point, which negatively affected those rights. The complainants were intimidated and provoked by the KP.
47. It has not been shown or argued that EULEX police witnessed the incident complained of, or that they were present at the containers where the complainants were brought to. It has therefore not been established on the basis of the material before the Panel that EULEX has been directly responsible for any failure to address or prevent the incident in question. However, the absence of necessary foresight in connection with the planning of the annual Vidovdan celebrations, and, as a result, the absence of a sufficient number of EULEX police officers at the scene gives rise to concern.
48. The Panel notes the absence of detailed operational documentation and contingency planning. It could have been foreseen by EULEX that the Merdare entry point, as one of the main crossing points, would be used by large numbers of participants in the Vidovdan celebrations to enter Kosovo.
49. EULEX provided information to the Panel of a violent encounter between KP and participants in the Vidovdan celebrations from Serbia at the Merdare crossing point on the material day at around 7:30 am, involving dozens of people and resulting in up to 32 KP and an unknown number of civilians injured. This incident showed that crossing points were not properly secured and that violence was likely to occur on this occasion later in the day.
50. This incident should have alerted EULEX to the fact that crossing points were not properly secured on that day and that violence was

likely to occur on these locations. The absence of an adequate number of EULEX officers at the Merdare crossing point after that incident demonstrates a lack of foresight on the part of EULEX. Increasing the number of EULEX officers would have contributed to deter any kind of behaviour by KP that might have amounted to possible human rights violations. It could also have enabled EULEX officers on site to intervene to stop or prevent any human rights violations to which they have been witness. It has not been shown that it would have been overly onerous for EULEX to do so.

51. EULEX provided conflicting figures regarding the number of EULEX officers who were on duty during the Vidovdan events and regarding their exact whereabouts. According to the information available to the Panel, only two EULEX police officers were present at times at the Merdare crossing points, conducting MMA activities. In the Panel's opinion it is clear that this figure was inadequate to deal with the Vidovdan events, even bearing in mind the limited resources of EULEX. The absence of an adequate number of EULEX officers at the Merdare crossing point despite EULEX's awareness of the risks involved demonstrates a lack of foresight on the part of EULEX.
52. The undisputed fact that the operation was KP-led does not release EULEX from its own responsibility to ensure that its involvement in these events and operations was consistent with relevant human rights standards. In particular, the Panel has not been provided with information that adequate steps were taken to ensure proper coordination with KP in order to secure effective protection of participants against violence or other sorts of violations of their rights, including preventive measures to ensure that KP's actions were consistent with relevant human rights standards. In this regard, the Panel emphasises that it is of particular importance that KP is properly trained and advised on applicable human rights standards regarding the general treatment of participants in this sort of events as well as about the conditions for lawful seizure of their property.
53. The Panel concludes that, as a result of insufficient resources allocated to the Vidovdan operation by EULEX with a view to ensuring respect for human rights, inadequate training and insufficient operational guidelines, complainant H and G were denied the full and effective enjoyment of their right to respect to private life, freedom of assembly as well as right to exercise their religion safely and without unnecessary hindrance.

Investigative steps

54. The Panel further notes that, based on the information provided to the Panel, no investigative steps were taken after the Vidovdan celebrations in June 2012 with a view to investigating the violations alleged by the complainants.

55. The Panel notes, however, that there is no indication before the Panel that any EULEX authority knew of these two incidents or that they were ever brought to EULEX's attention.
56. In those circumstances, the Panel finds that EULEX's failure to investigate these two incidents does not constitute a violation of the complainants' rights which may be attributed to EULEX.

FOR THESE REASONS, THE PANEL, UNANIMOUSLY,

1. *Holds* that there have been violations of Articles 8, 9 and 11 of ECHR, as well as Articles 17, 18, 21 and 22 of the ICCPR in respect of both complainants;

2. *Finds* it appropriate, in the light of its above findings and to the extent that the HoM has not already done so in compliance of the recommendations made by the Panel in the cases **2012-09 A., 2012-10 B., 2012-11 C., 2012-12 D.**, to make the following recommendations to the HoM under Rule 34 of its Rules of Procedure:

- i. That HoM acknowledges that the complainants' rights have been breached by EULEX.
- ii. That HoM requests all relevant branches and organs of EULEX, which possess information regarding last year's Vidovdan events, to provide him with a full and complete overview of EULEX's actions during these events. On that basis, that the HoM ensures that any information in EULEX's possession regarding possible human rights violations committed in this context (including any violation attributable to KP officers) is provided to the competent Kosovo authorities for follow-up action and investigation. Should EULEX later determine that such cases were not fully and adequately investigated, that EULEX consider taking over the responsibility of investigating these cases.
- iii. The HoM is invited to enquire with competent investigative and prosecutorial authorities in EULEX whether investigative steps could be taken in relation to the incident involving complainants H and G.

The Panel invites the HoM to inform the complainants, directly or through the competent investigative organs of EULEX, of the result of these enquiries. The complainants are at liberty to report to the Panel in relation to any outstanding matter when they are contacted by EULEX.

- iv. Should EULEX play any part in the 2014 Vidovdan celebrations, that the HoM ensures that, the competent authorities of EULEX–
- a) conduct a risk assessment with a view to the establishment and identification of possible sources of risks to the effective protection of the human rights of participants in the said Vidovdan celebrations. For that purpose, that competent EULEX authorities refer to and learn lessons from the shortcomings identified in the Vidovdan operation in June 2012 and as are recorded in the present decision;
 - b) submit to HoM a detailed plan with regard to the involvement of EULEX in the forthcoming Vidovdan celebrations on 28 June, 2013. Such a plan to include a detailed description of the means and resources required to ensure that EULEX officers perform their executive mandate responsibilities effectively, in particular with regard to the protection and preservation of the human rights of the participants in these events. This will include, if necessary, the option for EULEX officers to call for reinforcements. This plan to also include adequate means of communication and transportation to ensure that prompt intervention is possible where necessary in order to pre-empt or put an end to human rights violations;
 - c) ensure adequate coordination between the EULEX Mission on the one hand and KP and competent Kosovo authorities on the other so that there is effective protection of the participants in these celebrations. That EULEX also ensure that KP officials involved in such matters are made fully aware that the perpetration of violence upon participants will not be tolerated and that mechanisms of accountability will be in place to punish wrongdoers;
 - d) in line with the resources reasonably available for such purposes, assign a sufficient number of EULEX officers to this task, commensurate with the importance of those Vidovdan events and in accordance with the potential risk of human rights violations;
 - e) provide clear guidelines and instructions to all EULEX police officers involved in this operation, in particular with regard to the circumstances under which they would be obliged to intervene to protect the human rights of participants.
- v. Regarding potential investigation and reporting of misconduct, that the HoM also ensures that EULEX officers involved in the Vidovdan operation carefully record any instance of human rights violations which they may witness or which are reported to them. That EULEX, in turn, investigate each of these alleged incidents and/or transmit this information to the

competent Kosovo investigative authorities with a view to ensure effective investigation of any such cases.

The HoM is invited to inform the Panel of the measures he has undertaken in connection with the present Decision by 5 November 2013.

For the Panel,

12.12. 
John J. RYAN
Senior Legal Officer




Magda MIERZEWSKA
Presiding Member