



DECISION and FINDINGS

Date of adoption: 11 November 2015

Case No. 2014-32

L.O.

Against

EULEX

The Human Rights Review Panel sitting on 11 November 2015
with the following members present:

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

Assisted by
Mr John J. RYAN, Senior Legal Officer
Ms Joanna MARSZALIK, Legal Officer
Mr Paul LANDERS, 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 complaint was registered on 11 June 2014.
2. The complainant asked the Panel to withhold details about her identity, due to security concerns. The Panel has granted the request.
3. On 17 November 2014, the Panel decided to give notice of the complaint to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaint. It was also decided to examine the merits of the application at the same time as its admissibility (Rule 30 paras 1 and 2 of the Rules of Procedure of the Panel, hereafter ROP).

4. The observations of the HoM were received on 20 March 2015 after which they were communicated to the complainant for her additional observations.
5. On 11 May 2015, the complainant sent in her observations, which were sent onwards to the HoM for information.
6. On 27 October 2015, in reply to the Panel's request, the HoM submitted additional information in relation to the case. His submissions were forwarded to the complainant for information.

FACTS

I. CIRCUMSTANCES OF THE CASE

7. On 29 June 1999, A.A., who was the complainant's husband, called his daughter shortly after 13:00 to inform her that he was on his way home. He never came home and was never heard of since. His whereabouts or the location of his mortal remains is unknown. At the time, A.A. worked as a doctor at the Pristina hospital. He was of Serb ethnicity.
8. A.A.'s disappearance was immediately reported to senior officers of the British KFOR, the ICRC, the Red Cross of Serbia, the UNMIK Liaison Office in Belgrade and the governmental authorities of Serbia.
9. At the time of the filing of this complaint, A.A. continues to be reported as missing on the website of the International Commission of Missing Persons.
10. On 15 April 2009, L.O. lodged a complaint with the Human Rights Advisory Panel (HRAP) of UNMIK. In its decision of 23 April 2013, the HRAP found that there had been a violation of the complainant's rights under Articles 2 and 3 of the European Convention on Human Rights (the Convention). The HRAP found that it was unclear what investigative steps were taken between 1999 and 2002 to establish what happened to A.A. It further found that some investigative activity may have taken place in 2002 and 2004, although no details appeared on file as regard to what those might have been. In relation to investigative steps documented in the case file, the HRAP identified serious shortcomings and found that the activities undertaken appeared "cursory". The HRAP urged EULEX to take all possible steps in order to ensure that the criminal investigation into the disappearance of A.A. should continue in compliance with Article 2 of the Convention.

11. On 9 December 2008, UNMIK's responsibility for police and justice issues in Kosovo ended with EULEX taking over operational responsibilities.
12. On 18 June 2013, the UN Special Representative to the Secretary General (SRSG) confirmed that he would continue to urge EULEX and other competent authorities to continue to take all possible steps in order to ensure that the criminal investigation into the disappearance and possible killing of the complainant's relative would continue and the perpetrators brought to justice.
13. EULEX said it became aware of the case when the HRAP's decision was forwarded by UNMIK Rule of Law and liaison office on 2 July 2013.
14. On 25 July 2013, the Chief EULEX Prosecutor forwarded the case to the EULEX Mobile Team of Prosecutors for preliminary assessment. Some time thereafter, the EULEX War Crime Investigation Unit (WCIU) initiated an investigation into this case.
15. In mid-January 2014, the case was assigned to a EULEX Prosecutor, working in a Mobile Team together with a local Prosecutor. The investigative steps included pre-trial interviews, attempts to locate witnesses and a request for Mutual Legal Assistance.
16. On 7 April 2014, the complainant sent an email to the Special Prosecution Office of the Republic of Kosovo (SPRK) in which she authorized Ms Jovanka Stojavljevic-Savic to act on her behalf before EULEX, and enquired whether any records in her case were held and what investigative steps had been conducted.
17. On 14 April 2014, the SPRK forwarded the complainant's request to the EULEX Pristina Mobile Team Prosecutor informing her that SPRK held no records of the case and asking Mobile Team for information on the case.
18. On 2 May 2014, a Mobile Team EULEX Prosecutor informed the complainant's representative that the injured party could only be represented by a person who was a member of the Bar of Kosovo, so any information on the case could not be disclosed to her as the complainant's representative.
19. The complainant replied, referring the Prosecutor to Article 63 par. 3 of the CPC, which provides that the injured party may represent himself or herself and requested records concerning the fate of her husband.
20. On 15 May 2014, a EULEX Prosecutor replied that the complainant could represent herself in criminal proceedings. However, the matter was an ongoing investigation and there was a probability that copying or photocopying any materials in the case might endanger the

purpose of the investigation. On that basis, it was suggested that EULEX could not disclose any information to her.

21. On 19 May 2014, the complainant again requested the EULEX Prosecutor to provide details on investigative measures undertaken. The complainant indicates that she has received no reply to that further inquiry.
22. On 24 May 2014, the EULEX Prosecutor became aware that the Special Investigative Task Force (SITF) had requested information on the case from the War Crime Investigation Unit. On 25 May 2015, the SITF confirmed that they were investigating the case. The investigation by the Mobile Team was therefore closed.
23. It is apparent from information before the Panel that the SITF has been investigating the disappearance of the complainant's husband since March 2013 and was in regular contact with her, meeting her three times over the period of two years.
24. In his submissions of 27 October 2015 the HoM informed the Panel that, since the criminal investigation is currently pending, no detailed information about the investigative measures can be given. This is due, he explained, to the sensitive nature, confidentiality and integrity of the investigation as well as the security of the witnesses. The SITF has nevertheless informed that an International Legal Assistance request had been made. The SITF also indicated that the complainant had been informed about the current state of the investigation and future investigative steps to be taken.

II. COMPLAINTS

25. The complainant refers to two particular fundamental rights that are reflected in the following provisions of the European Convention on Human Rights (the Convention): Article 2 of the under its procedural head, which provides for an obligation to investigate cases of suspicious deaths; Article 3 Convention with regard to suffering the unknown fate of their relatives caused the complainants. The nature of the complaint also pertains to guarantees provided under Article 8 (right to respect for private and family life) and Article 13 (right to an effective remedy) of the Convention.

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 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.

.....

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 different 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.

7.7. As provided for in Law on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo (April 2014), EULEX Prosecutors working within the SITF shall have all the competency and autonomy necessary to continue the SITF investigation and to pursue any resultant criminal proceedings independently without interference or interruption. Paragraph 7.6 does not apply to EULEX Prosecutors working within SITF.

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 15.A SITF Provisions

1. As provided for in Law on Ratification of the International Agreement Between the Republic of Kosovo and the European Union on the European Union Rule of Law Mission in Kosovo (April 2014), within the SPRK, the Special Investigative Task Force (SITF) shall operate as a separate, independent investigative and prosecutorial function with all necessary powers and autonomy to do so.

2. The SITF shall not be subject to the direction or supervision of either the Chief Prosecutor or Deputy Chief Prosecutor of the SPRK nor the general supervision of the Chief State Prosecutor.

3. The SITF Prosecutors and investigators shall have the powers of the EULEX Prosecutors and EULEX police as provided for in the Law No. 03/L-053 on Jurisdiction and Competencies of EULEX Judges and Prosecutors in Kosovo.

26. The Special Investigative Task Force (SITF) was set up in 2011 to conduct an independent criminal investigation into allegations of war crimes and organised crime contained in the Council of Europe (CoE) report of January 2011 by Senator Dick Marty entitled: "Inhuman treatment of people and illicit trafficking in human organs in Kosovo" (the CoE report). In September and October 2011, the European Union Political and Security Committee amended the EULEX Operational Plan to provide for the establishment of the SITF as a separate entity but within the Mission framework. A prosecutor assigned to the SITF is therefore formally also a EULEX prosecutor. OPLAN provides that the SITF will operate partially from Brussels but with staff also in Kosovo. Regrettably, the OPLAN is not publically available. What is known, however, from publically available sources is that the mandate of the SITF is to investigate and, if warranted, prosecute individuals for crimes alleged in the CoE report. The SITF is an autonomous entity that derives its jurisdiction and legal authority from the European Union Council Decision establishing the EU Rule of Law Mission in Kosovo (EULEX). Hence, the SITF operates within the Kosovo justice system and in accordance with the applicable law in Kosovo. On 10 May 2012, the Albanian Parliament unanimously adopted a law on cooperation with the SITF. The law is framed to

allow the SITF to autonomously conduct investigative activities on Albanian territory, where CoE Rapporteur Dick Marty believes most of the alleged crimes took place. The SITF has also reached agreements in principle for cooperation frameworks with other states and organisations relevant to the investigation.

THE LAW

27. As discussed above, the complaint alleges that EULEX infringed Articles 2, 3, 8 and 13 of the Convention.

Submissions by the parties

28. In his submissions, the Head of Mission stated that the EULEX Prosecutors became aware of the case in 2013 when the decision of HRAP regarding this case was forwarded to the Mission.
29. Shortly thereafter, an investigation was initiated by the War Crime Investigation Unit of EULEX.
30. In June 2014, an investigation into this case was opened by the SITF. As mentioned above, in para. 24, the HoM informed the Panel that, he could not provide detailed information about the investigative measures taken by the SITF.
31. Regarding the issue of admissibility of the complaint, the HoM submitted that the Panel was only competent to examine alleged violations of human rights by EULEX. Therefore, all complaints concerning actions or inactions of the Government of the United Kingdom, KFOR, UNMIK or Kosovo authorities fall outside its competence and should be rejected as inadmissible.
32. The HoM acknowledged, however, that actions of the EULEX Prosecutors before the initiation of judicial proceedings fall in principle within the Panel's jurisdiction.
33. The HoM also submitted that the Panel was not competent to examine complaints on alleged violations of human rights which occurred before 9 December 2009. The complainant's husband disappeared in 1999. On that basis, the HoM relied on the Panel's holding in *Thaqi against EULEX* case (no. 2010-02) to suggest that there was no "genuine connection" between his disappearance and the Panel's jurisdiction. The HoM acknowledged that the initial investigation, the recording of events and contact details of witnesses were not without flaws. He added, however, that EULEX could not be held responsible for these nor for the failure to investigate the case which had been dormant for several years. On that basis, he suggests

that the “genuine connection” between the disappearance and 9 December 2009 as the starting point of the Panel’s temporal jurisdiction is lacking in the present case.

34. The HoM concluded that the failure to investigate the disappearance of the complainant’s husband as well as her consequent suffering are not attributable to EULEX and that no violation of the complainant’s rights were attributable to the Mission.
35. In her reply to the HoM observations, the complainant reiterated her submissions detailed in the application form lodged on 11 June 2014. She also submitted that it was apparent from the Statement of the SITF Chief Prosecutor that the SITF has concluded its investigation sufficiently to raise charges against certain senior officials of the KLA. Yet, the meeting they held with the complainant provided her with no details of the investigation that had been undertaken in respect of her husband’s abduction, the outcome of that part of the SITF investigation and what further steps would be taken to enable her to know the truth about her husband’s fate. In her opinion, that attitude violated her rights.
36. The complainant maintained that HoM’s submissions concerning investigative steps undertaken by EULEX were an incomplete and inadequate response. In particular, she points to what she considers to be the lack of transparency about the investigation and lack of information she received as to the next steps in the process.
37. The complainant rebutted the HoM’s assertion that she indicated her satisfaction with the way that the SITF was pursuing the investigation, as she had not been informed of the measures being undertaken by the SITF and therefore could not comment on them. She acknowledged the concerns raised regarding witness protection and protection of the SITF staff, but in her opinion EULEX/SITF could and should find a mechanism for communicating their investigative activities in a manner that did not continue to violate her rights.
38. Moreover, she submitted that the ongoing failure to provide an effective remedy for the systemic failings and violations over a period of almost sixteen years violated Article 13 of the Convention and Article 47 of the Charter of Fundamental Freedoms (right to an effective remedy and a fair trial).

The Panel’s assessment

Mandate of the Panel (Rule 25 § 1 of the Rules of Procedure) and inherent limitations placed on the Mission regarding the protection of human rights

39. 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 Freedoms and the International Covenant on Civil and Political Rights, which set out minimum standards for the protection of human rights to be guaranteed by public authorities in all democratic legal systems.

40. Before considering the complaint on its merits, the Panel has to decide whether to accept the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
41. According to Rule 25, paragraph 1, the Panel can only examine complaints relating to the human rights violations by EULEX Kosovo in the conduct of its executive mandate.
42. The Panel has already established that the actions of the EULEX Prosecutors and police are part of the executive mandate of the EULEX Kosovo and therefore fall within the ambit of the Panel's mandate (see, for instance, *K to T against EULEX*, cases nos 2013-05 to 2013-14, 21 April 2015, § 43; *Krlić against EULEX*, no. 2012-21, 26 August 2014, § 23; *Y against EULEX*, no. 2011-28, 15 November 2012, § 35).
43. The Panel has already had occasion to note 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 (see the Panel's decision in *A,B,C,D against EULEX* nos 2012-09 to 2012-12, 20 June 2013, § 50; *K to T against EULEX*, quoted above, § 53; compare also HRAP decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, § 35).
44. The Panel also takes notice of the difficulties necessarily involved in the investigation of crimes in a post-conflict society such as Kosovo (see *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011, § 70; HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, §§ 44 and 62 et seq.). Those difficulties should not, however, serve to camouflage or explain investigative shortcomings that are not in any meaningful manner connected to this particular sort of challenges. The Panel will, therefore, evaluate in each case whether a particular investigative step that was normally open would have been rendered impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation.
45. Expectations placed upon EULEX's ability to investigate and resolve complex criminal matters should therefore be realistic and not place upon the mission a disproportionate burden that its mandate and resources is not able to meet (see HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, §§ 70-71). In each case, the Panel is therefore expected to review whether there were concrete

and real obstacles that might have undermined the possibility for EULEX to conduct a prompt and effective investigation of a case. Such an evaluation is not intended to justify operational shortcomings unrelated to concrete and demonstrable challenges.

46. In every case, in particular a case of this seriousness, the investigative authorities are expected to act with reasonable promptness and expeditiousness and to invest resources commensurate with the necessity and possibility of resolving the case. Whilst no investigative authorities may be expected to resolve all cases brought before it, it is expected to act with such diligence, promptness and effectiveness as reflect the gravity of the matter being investigated (see *Varnava and Others v. Turkey* [GC], § 191, ECHR 2009; *Palić v. Bosnia and Herzegovina*, quoted above, § 63). A strict commitment and attachment to those standards is particularly important for a rule of law mission that is intended to serve as example of society's commitment to ending impunity and building into it a sense of accountability for serious violation of rights. Any standard short of this would risk creating a sense of acquiescence with impunity and disregard for victims' search for justice and accountability (HRAP decision in cases nos 248/09, 250/09 and 251/09, quoted above, § 80).
47. In the present context, there can be little argument that investigating the fate of the disappeared – regardless of religion or ethnicity – must be and must remain an operational priority for EULEX as a Rule of Law Mission for which it must be provided with adequate resources.

Sufficient temporal connection with the underlying conduct – The Panel's competence ratione temporis

48. As noted above, the HoM submits that the Panel lacks jurisdiction *ratione temporis* over this case absent a sufficient temporal connection between the underlying conduct and the filing of the complaint with the Panel. The Panel disagrees.
49. First, the complaint pertains, not to the actual killing or disappearance of the complainant's husband but to what the complainant says is an ongoing failure to fully and effectively investigate this case. In that sense, the complaint pertains to alleged violations of the procedural, as opposed to substantive limbs of Articles 2 and 3 (in addition to violations of Articles 8 and 13 of the Convention), which, in her view, are ongoing and continuous.
50. Secondly, the Panel notes that the complainant never desisted from pursuing her claim. For that purpose, she solicited every and all authorities (domestic and international, including UNMIK, the British Government, various branches of EULEX), which she thought could help her obtain information about this matter. The fact that a succession of authorities followed each other in investigating this

matter, not always with great clarity as regard their respective responsibilities, cannot fairly be laid at her door.

51. Thirdly, the Panel notes that EULEX has been and continues to be involved (through the SITF) in the investigation of this matter. Such conduct indisputably comes within the competence, *ratione temporis*, of the Panel. For the purpose of guaranteeing the effective protection of the complainant's rights, this period cannot meaningfully be separated from the investigation that has been conducted up to this point (compare *Thaqi against EULEX*, no. 2010-02, 14 September 2011, §§ 85-89).
52. Based on the above, the Panel is of the view that it has jurisdiction *ratione temporis* over this case as there exists a "genuine connection" between the alleged violation of the complainant's rights and the Panel's jurisdiction (*Thaqi against EULEX* case, quoted above, §§ 85-89).

The Panel's competence ratione materiae

53. The HoM does not appear to dispute that the Panel would have competence *ratione materiae* over this matter.
54. This is already apparent from the fact the Mission's Prosecutors have been involved in the investigation of this case. This is apparent also from the fact that such acts might constitute war crimes or an ethnic-based crime over which the EULEX Prosecutors have competence (Articles 5 and 9 of the Law No. 03/L-052 on Special Prosecution Office of the Republic of Kosovo).
55. The Mission's executive involvement and, therefore, the Panel's own competence, over the matter is also apparent from the United Nations' indication that it would urge EULEX "and other competent authorities" to continue to take all possible steps in order to ensure that the criminal investigation into the disappearance and killing of the complainant's family member. This clearly demonstrates the understanding of the HRAP and that of the United Nations that EULEX was indeed competent to deal with this particular case (see the Special Representative to the Secretary General decision of 18 June 2013 in L.O. case before the HRAP).
56. Furthermore, the Panel notes that the HoM does not dispute that the complainant as close relative of the disappeared is competent and has standing before the Panel to seek a remedy for what she regards as the violation of her rights.

Investigation prior to the involvement of SITF into this case

57. The Panel will consider the complaint in relation to two separate phases: first, prior to the SITF “taking over” the responsibility to investigate this case; secondly, after the SITF had informed the Mission that it would investigate this case.
58. Concerning the first period (pre-SITF), the Panel notes the HoM’s submissions that a number of steps were taken to investigate this case. The information provided by the HoM regarding these is not such as to enable the Panel to verify the nature and extent of those efforts.
59. The Panel notes 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). In this case, the alleged violation could not be any more serious. One could therefore have expected the Mission to involve significant resources (in personnel, time and resources) into this case. The Panel has not received any indication that this was the case and draws the necessary inferences from the absence of such information.
60. From the information made available, the Panel notes that there is no indication that witness statements were taken by the EULEX Prosecutors or that any credible forensic investigation was conducted by the Mission. Nor does the Panel have any indication of the lines of investigation that were pursued in this case or what efforts were made to identify suspects. No information was provided to the Panel to suggest that the EULEX Prosecutors had contacted potential sources of information (as, for instance, the British Government). Nor were statements apparently taken from the complainant, her daughter or any other close relative who might have had information of value to the investigation. There was apparently only one direct verbal contact between the complainant and the Mission, which also appears to have reacted only when prompted to do so by the complainant. Such a record is not such as to guarantee the procedural protection guaranteed by Article 2 and 3 of the Convention. It may also be said to have negatively affected the complainant’s enjoyment of her rights under Article 8 and 13 of the Convention.
61. The Panel notes, furthermore, that the Mission’s response to the complainant’s efforts appear to have been far from adequate. Her many efforts resulted only in her receiving the bare minimum amount of information and only when she pressed for answers. Little that is apparent to the Panel was done to keep her involved in or abreast of the process.
62. The Panel must also underline the importance that investigative authorities should attach to the manner in which they communicate with victims of rights violations or their close relatives. In that regard, the suggestion by the EULEX Prosecutor that the complainant could not be represented in this matter and tone in which this was

communicated to the complainant is particularly unfortunate. The communication in question not only reflected a lack of tact. It was also incorrect from the legal point of view. The Panel need not decide whether Article 63(1) of the CPC was indeed applicable to this matter. In any case, paragraph 2 of that provision would have provided a sufficient legal basis for the Prosecutor to regard the complainant's representative as having been validly empowered to represent her. In the alternative, the EULEX Prosecutor could have treated the request as having been made by the complainant herself 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 representation as a necessary condition (as is also evident from paragraph 3 of that provision). Furthermore, when performing their function, EULEX officials are at all times required to ensure that they act in a manner consistent with the effective protection of human rights. The EULEX Prosecutor's narrow and, ultimately, erroneous reading of Article 63 CPC did not meet that standard.

63. 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 complainant's requests for information in no way affected the Mission's *proprio motu* obligations to guarantee the effectiveness of the complainant's 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).
64. In those circumstances, the letter of the EULEX Prosecutor of 2 May 2014 provides further evidence that the rights of the complainant were not fully and effectively guaranteed by EULEX – in particular as concern her right to have access to a remedy pursuant to Article 13 of the Convention.
65. Based on the above, the Panel finds, on the basis of the information provided, that EULEX's investigative efforts were insufficient and inadequate to guarantee the effective protection of the complainant's rights under Articles 2, 3 (procedural limbs), 8 and 13.

Post-SITF period – The status of SITF vis-à-vis EULEX mission

66. The Panel now turns to consider the situation once the SITF had notified the Mission that it was investigating this case.
67. As a preliminary matter, the Panel notes the lack of transparency and clarity that affects the legal regime under which the SITF operates. Whilst the Panel need not deal with this aspect of the matter in depth, it wishes to underline the general importance of transparency to the

legitimacy and credibility of any investigative, prosecutorial or judicial enterprise.

68. The Panel is more particularly concerned by two issues that are of relevance to the effective fulfilment of its responsibilities in the present case. The first pertains to the status of the SITF within the EULEX mission and, in particular, whether they answer to the HoM. The second issue pertains to the question of whether the SITF enjoys some sort of primacy or exclusivity over cases that it opts to investigate.
69. Concerning the first issue and as noted above, the SITF is formally part of the Mission. As such, its activities come in principle within the competence of the Panel. The lack of transparency concerning its mandate, its legal basis and its institutional relationship to the rest of the Mission makes any review of its activities almost impossible for the Panel. The HoM's inability to provide more information in that regard leave the Panel with little alternatives but to draw certain inferences from this lack of information (*Al Nashiri v. Poland*, no. 28761/11, judgment of 24 July 2014, § 375; *Shamayev and Others v. Georgia and Russia*, no. 36378/02, § 503, ECHR 2005-III).
70. Concerning the second issue, the Panel has not been provided with any legal basis that would give the SITF primacy over the EULEX Prosecutors. Nor has the Panel received any indication of a legal text that would permit the EULEX Prosecutors to abandon an investigation if and when they have been notified of the SITF's intentions to investigate this case.
71. Whilst the involvement of the SITF may ultimately assist the complainant's search for answers and justice, the Panel is of the view that, up to the present point, the involvement of the SITF has not demonstrably contributed to securing effective protection for her rights. Absent clearer and more detailed information about the SITF's actions and contribution to investigating this case, the Panel must draw the necessary inference that the complainant's rights have been and continue to be violated. This is true, in particular, of her (procedural) rights under Articles 2 and 3 of the Convention as well as her rights to have access to a remedy and to the full enjoyment of her family rights (Article 13 and 8 of the Convention, respectively).

Confidentiality of sensitive criminal investigations and the protection of rights of victims

72. The HoM has rightly referred to the importance and need to guarantee a sufficient level of confidentiality to protect the integrity of ongoing investigative efforts. Confidentiality is warranted and particularly justified in a case such as the present one where the protection of witnesses and informants is paramount. In such a case, the Panel does not suggest that victims are entitled as a matter of right to the full

or unrestricted disclosure of the entire investigative file nor to an exhaustive debriefing of the case.

73. The Panel notes, however, that as a matter of human rights law, victims of serious human rights violations, their close relatives as well as, to a lesser extent, the general public are entitled in principle to being sufficiently apprised of the tenor of an investigation (*Ahmet Özkan and Others v. Turkey*, cited above, §§ 311-314, 6 April 2004; *Isayeva v. Russia*, cited above, § 211-214; *Al-Skeini and Others v. United Kingdom*, no.55721/07, 7 July 2011, §167, ECHR 2011). This is intended to ensure both that the authorities act in all cases with the necessary diligence and care and with a view to ensure that the rights of victims are being duly accounted for. Whilst the line is one that is difficult to draw in the abstract, the information provided to those most directly concerned by the investigation must be such as to enable them to satisfy themselves that the matter is being duly and properly looked into and that all relevant and reasonable efforts are being made to establish the fate of their relative and identify those responsible for it.
74. Based on the available information, the Panel has come to the view that the Mission has failed to provide enough information to the complainant regarding this investigation and to do so in a manner and with the timeliness necessary and appropriate to the case. The Mission has not provided reasons justifying, for instance, that relatives could not have been regularly informed of advances in the investigation or why they could not be told, in general terms, what efforts were being made and how far the matter had progressed. Nor has the Mission explained its lack of activity in this matter nor its inability or failure to provide more information to the complainant. The Panel reiterates the importance that an investigative body is expected to act with a degree of activity in informing victim or close relatives of the victim and to show the necessary amount of care in dealing with the emotional distress that victims are likely to encounter when communicating with them. The conduct of the Mission in the present case falls short of that standard.

FOR THESE REASONS,

The Panel, unanimously

DECLARES THE COMPLAINTS WITH REGARD TO ARTICLES 2 AND 3 (PROCEDURAL LIMBS) AND ARTICLES 8 AND 13 OF THE CONVENTION ADMISSIBLE,

FINDS A VIOLATION OF THOSE RIGHTS, and

DECLARES that in the light of its above findings of fact and law the Panel finds it appropriate to make recommendations to the HoM, and

RECOMMENDS THE FOLLOWING REMEDIAL ACTION

- 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 instruct all organs of the Mission who are in contact with alleged victims of rights violation (or their close relatives) 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 interlocutor. If necessary, the HoM should consider adopting guidelines laying down in more details what this general instruction might imply in concrete circumstances.
- c. The HoM should ensure that all investigative bodies within the Mission (the SITF and the EULEX Prosecutors) have at their disposal the necessary resources and support to accomplish their mission effectively and in a manner consistent with the effective protection of human rights of all those involved. For that purpose, and if considered necessary, the HoM should request additional resources for these organs so that they may perform their functions promptly, diligently and effectively in all cases.
- d. The HoM should seek to clarify the relationship between the Mission and the SITF with a view to ensure the effective protection of rights and guarantee that whichever entity is in charge of the matter provides adequate and sufficient information to the complainant. If necessary, authorisation should be sought from the EU to make public the legal basis regulating the work of the SITF. This would also greatly contribute to bringing increased transparency and accountability to this mechanism.
- e. The HoM should impress upon the SITF and the States supporting its activities the importance of such cases being fully and effectively investigated and that wherever suspects are identified that they are being brought to justice promptly and fairly.
- f. The HoM should impress upon the competent officials of the SITF the importance and necessity to inform victims of the general aspects of their investigation so as to make them aware of their efforts and commitment to obtaining justice on their behalf.

For the Panel,

John J. RYAN
Senior Legal Officer

Magda MIERZEWSKA
Presiding Member