



**SECOND DECISION ON THE IMPLEMENTATION OF THE  
RECOMMENDATIONS OF THE HUMAN RIGHTS REVIEW PANEL**

**Date of adoption: 10 January 2017**

**Case no. 2011-20**

**X and 115 other complainants**

**Against**

**EULEX**

The Human Rights Review Panel, sitting on 10 January 2017, with the following members present:

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

Assisted by  
Ms Noora AARNIO, 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, decided as follows:

**I. DECISION OF THE HUMAN RIGHTS REVIEW PANEL OF 22 APRIL 2015**

1. The Human Rights Review Panel decided on 22 April, 2015 that there had been a violation of Article 13 of the European Convention of Human Rights (Convention). It further decided that it was unnecessary to consider the complaint under Article 6 of the Convention.
2. The Panel accordingly made the following recommendations to the Head of Mission (HOM) under Rule 34 of its Rules of Procedure:

3. "That the HOM instruct the competent EULEX officials to enquire from the Kosovo authorities as to whether an investigation into this matter was ongoing and, if so, at what stage of the process the matter now stands. The HOM should inform the Panel of the result of this enquiry.
4. Having received that information, the HOM should instruct EULEX Prosecutors to consider whether or not to take over responsibility for this case pursuant to Article 7(A) of the Law No. 04/L-273 on the Jurisdiction and Competencies of EULEX Judges and Prosecutors as amended, (Law on Jurisdiction), taking account of the relevant circumstances, as highlighted above, in particular the need for the Mission to guarantee the effective protection of the rights of the complainant. The HOM should inform the Panel of the Prosecutor's decision in that regard.
5. The Panel respectfully requested the HOM to provide the Panel with the required information no later than 15 June 2015.
6. The Panel recalls that the Basic Prosecution Office, Mitrovica registered a complaint about a criminal offence having been committed, lodged by the complainants' representative, on 21 November 2013. Initially, EULEX assigned a prosecutor to deal with it; subsequently a mixed team of EULEX and Kosovo Prosecutors was assigned to the case. On 30 May 2014, the Law 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.
7. Pursuant to its Article 1A (1), the EULEX prosecutors have the authority to conduct criminal investigations in principle only in cases for which the decision to initiate an investigation has been filed before 15 April 2014. In the present case an investigation was initiated precisely on 15 April 2014. The case therefore could not be regarded as an ongoing case within the meaning of this provision and the investigation could not be conducted by the EULEX Prosecutors. Consequently, the investigation was taken over by the Kosovo prosecutors of the Basic Prosecutors Office in Mitrovica.
8. The present decision constitutes a follow-up to the Panel's decision of 22 April 2015 and the recommendations made therein. The power and authority of the Panel to follow-up on its decisions and recommendations is provided for in Rule 45 bis of the Panel's Rules of Procedure (see e.g. the decisions on the implementation of recommendations *W against EULEX*, 2011-07, 26 August 2014; *H&G against EULEX*, 2012-19&20, 27 May 2014)."
9. On 31 August 2015, the HOM informed the Panel about a number of measures which he had taken with regard to the recommendations of the Panel.

10. In particular, he wrote to the Acting Head of EULEX Executive Division and the Acting Chief EULEX Prosecutor requesting them to consider the decision of the Panel and to assess whether there would be a possibility to apply Article 7A of the Law no. 04/L-273 on Jurisdiction and Competencies of EULEX Judges and Prosecutors as amended (Law on Jurisdiction) to the criminal case subject to the Panel's decision and assign the case to a EULEX Prosecutor due to "extraordinary circumstances" within the meaning of this provision.
11. On 19 August 2015, the Acting Head and the Acting Chief Prosecutor informed the HOM that, as required by Article 7A, the case and the possibility of taking it over by EULEX Prosecutors had been assessed jointly by the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor. They concluded, nevertheless, that the "extraordinary circumstances" required by Article 7A had not been met and jurisdiction of the EULEX Prosecutors could not be triggered. However, the Acting Chief EULEX Prosecutor assured the HOM that, should such circumstances emerge in the future, the case and the applicability of Article 7A might be reconsidered.
12. Further, the Acting Chief EULEX Prosecutor submitted that in its decision on the merits of the present case the Panel had criticised EULEX for initiating the investigation one day after the so called "cut-off date" of 14 April 2014. He argued that there had not been so far any ruling to initiate investigation, but the case currently remained in the preliminary investigative phase with a view to determine whether a criminal offence has been committed and if so, who would be the suspect of that offence.
13. The Acting Chief EULEX Prosecutor also submitted that the complainants' representative had not responded to the inquiries sent by the local prosecutor and the information provided by the complainants' appeared to have very limited evidential value.
14. Despite the above, the local Prosecutor assigned to the case sent the criminal report to the Special Prosecution Office of Kosovo for assessment whether it would fall under their competence. The reply was negative; according to the Deputy Chief Prosecutor of the Special Prosecution Office, there was no indication of organised crime involvement in the case and thus it fell outside of its jurisdiction. Consequently, the case currently remains with the Kosovo prosecuting authorities.
15. The Acting Chief EULEX Prosecutor made assurances that the EULEX Prosecutor previously assigned to the case would be available to the local prosecutor in their mentoring and advising capacity.
16. Moreover, a detailed petition by any party could be addressed at any time to the Chief State Prosecutor of Kosovo and the Chief EULEX

Prosecutor should they consider that the circumstances had changed and the conditions as set out in Article 7A of the Law on Jurisdiction were satisfied.

## **II. INFORMATION RECEIVED FROM THE COMPLAINANTS**

17. On 13 September 2015, the complainants submitted their reply to the information provided by the HOM. They disagreed with the submission of the HOM that the case was outside the jurisdiction of EULEX. They also maintained that, contrary to the assertions of the HOM, their representatives had not been contacted by EULEX Kosovo.

## **III. EVALUATION BY THE PANEL**

18. The Panel noted the steps taken by the HOM to implement the recommendations of the Panel as outlined in his letter of 31 August 2015.
19. The Panel was satisfied that the HOM implemented its recommendation to enquire with the local authorities whether or not the investigation was ongoing. It was noted in this context that the case was first brought to the attention of the Kosovo prosecution authorities in November 2013, almost two years earlier. The HOM did not provide any information as to whether or not any evidence had been taken during the investigation or if any witnesses had been questioned by the Kosovo prosecuting authorities.
20. Likewise, the HOM did not provide information as to the possible timeframe within which the case might be concluded. Nor was it established that victims were meaningfully involved in the ongoing process of investigation. It was not therefore shown to the satisfaction of the Panel that there was real progress in the investigation. In those circumstances, the right of the complainant to an effective remedy, pursuant to Article 13 of the Convention, still seemed to be adversely affected by the absence of a demonstrable effort to promptly and effectively investigate the case.
21. Furthermore, the Panel noted the decision of the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor not to assign the case to a EULEX Prosecutor. The Panel considered that the effectiveness of the investigation would have been greatly improved if it had utilised the expertise and resources of the Chief EULEX Prosecutor.
22. In view of the foregoing, the Panel considered that the steps taken to date by EULEX were not such as to ensure that the right of the complainant to an effective remedy was being effectively protected. Whilst the Panel need not decide the matter at this stage, it noted that

the apparent failure of the Kosovo authorities to diligently and effectively investigate the matter might be regarded, for the purpose of Article 13 of the Convention, as “extraordinary circumstances” ,(Article 7A), which would justify EULEX assuming responsibility for the case.

23. The Panel therefore invited the Mission to continue its liaising with the competent Kosovo authorities with a view to a follow up on the progress of the investigation.
24. The Panel further invited the HOM to provide information on the manner in which the notion of “extraordinary circumstances”, within the meaning of the said Article 7A, as a deciding criterion, is interpreted in practice in cases being taken over by the EULEX prosecuting authorities.

#### **IV. DECISION OF THE PANEL ON THE IMPLEMENTATION OF ITS RECOMMENDATIONS BY THE HEAD OF MISSION**

25. The Panel declared that the HOM had implemented its recommendations in its decision of 11 November 2015 in part only, and that the right of the complainant to an effective remedy continued to be adversely affected in the absence of a demonstrable effective investigation of the case.
26. The Panel invited the HOM to provide the clarification which it had sought in relation to the interpretation by EULEX Kosovo, of the “extraordinary circumstances” provision in Article 7A of the Law on Jurisdiction.
27. The Panel also invited EULEX Kosovo, through the HOM, to seek regular updates from the Kosovo authorities on the progress of their investigation.
28. The Panel further invited the HOM to update the Panel of the progress of the investigation no later than 28 February 2016 and it decided that it remained seized of the matter.

#### **V. COMMUNICATIONS – ADDITIONAL INFORMATION RECEIVED FROM THE HEAD OF MISSION REGARDING THE IMPLEMENTATION OF THE RECOMMENDATIONS OF THE PANEL**

29. The HOM replied to the Panel on 2 March 2016 in response to the recommendations of the Panel which were contained in its decision of 11 November 2015.

30. With regard to the invitation to the HOM to provide information on the manner in which the notion of “extraordinary circumstances” within the meaning of Article 7A as a decisive criterion for cases being taken over by EULEX prosecuting authorities was interpreted in practice, the HOM responded as follows:
  - It was to be noted that that the application of Article 7A required a joint decision by the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor, thus each case was assessed jointly.
31. The HOM stated that the procedure for the assessment of the existence of such circumstances was agreed by the Chief State Prosecutor of Kosovo and the Acting Chief EULEX Prosecutor in October 2014. Specifically, it was agreed that the following criteria would apply in any such assessment:
  - Whether the expertise and experience of EULEX prosecutors would ensure the proper investigation and prosecution of the case;
  - There is a grounded suspicion of attempts to influence the investigation or prosecution;
  - The case under investigation or prosecution touched upon the interests of EU member states or the involvement of any EULEX staff member in Kosovo.
32. The HOM said that should one or more of these criteria be satisfied, then the Chief and Deputy Chief of the Special Prosecutor of the Republic of Kosovo (SPRK), or the Chief Prosecutor of the Basic Prosecution Office, Mitrovica, together with the EULEX Prosecutor would jointly file a motivated proposal to the Chief State Prosecutor of Kosovo and the Chief EULEX Prosecutor in order to assign the case to an EULEX Prosecutor, either exclusively or jointly, in a mixed team, depending on the circumstances of the case.
33. Since there had been an involvement of EULEX prosecutors in the case at hand at an early stage, none of the criteria outlined above was considered to have been met. The case did not present any features that would require the special prosecutorial expertise that EULEX prosecutors could provide; there were no indications of an attempt to influence the investigation; the local prosecutors demonstrated a willingness and an ability to work on the case, thus, initially, a mixed team was created. Furthermore, the case did not appear to touch upon the interests of the EU Member States nor was any involvement of a EULEX staff member in the case.
34. The HOM also stated that the case had been, and continued to be, in the preliminary phase of the investigative process in order to determine whether or not a criminal offence had been committed and

if an offence had been committed, which offence it might be and who the suspect(s) might be. The representative of the complainants did not respond to the recent inquiries that had been sent to them by the local prosecutor and the information provided by the complainants thus far seemed to be of limited evidential value.

35. In relation to the enquiry of the Panel with regard to the then current status of the case, the HOM stated that the EULEX prosecutor met with the local prosecutor to discuss the steps which had been undertaken. As the local prosecutor initially assigned to the case had by now been suspended, on a suspicion of misconduct in office, the case was assigned to another local prosecutor. This local prosecutor regretted that he was unable to undertake any investigate steps since the case had been assigned to him as he claimed to be overloaded with the investigation of more urgent cases in which the defendants were in detention on remand. However, the local prosecutor informed the EULEX prosecutor of his intention to consult the State Prosecution Office in order to obtain guidance on the case and he said that he would proceed thereafter based on the outcome of his consultation with the State Prosecution Office.
36. The local prosecutor, however, stated that the criminal offence that was most likely to emerge in the case was that of "Causing General Damage" which was punishable under Article 365 of the Kosovo Criminal Code, (Law no. 04/L-082). In that event, the statutory limitation period prescribed in Article 106 of the Kosovo Criminal Code would be taken into consideration and there was thus a high likelihood that this offence had by now become statute barred. This meant, in effect, that the criminal report would have to be dismissed.
37. The HOM stated that the Chief EULEX Prosecutor had provided his assurance that the EULEX prosecutor previously assigned to the case could, in any event, be made available to the local prosecutor in a mentoring and advising capacity, outside of the executive function of EULEX Kosovo. In addition, as mentioned above, a detailed petition by any party could be addressed at any time to the Chief State Prosecutor as well as to the Chief EULEX Prosecutor if it was considered that the circumstances had altered so that the conditions set out in Article 7A of the Law on Jurisdiction would be met. The HOM also said that the Chief EULEX Prosecutor had further transmitted the decision of the Panel and its own (Chief EULEX Prosecutor) analysis of the case to the Chief State Prosecutor of Kosovo for his consideration.

## **VI. FURTHER COMMUNICATIONS WITH THE HEAD OF MISSION**

38. The Secretariat of the Panel subsequently wrote to the HOM on 12 July 2016 to inform him that the Panel was about to examine the case

further with a view to the issuance of a second follow-up decision. In that regard, the Panel wished to know from the HOM if there was any additional information available and in particular, as to whether there had been progress in the investigative proceedings. The Panel also asked the HOM if the EULEX prosecutor had been involved in a mentoring and monitoring capacity. The Panel requested a response from the HOM by 19 August 2016.

39. The HOM replied on 17 August 2016 to say that the case now fell under the exclusive competence of the local prosecutor in the Basic Prosecution Office of Mitrovica and, further, that the EULEX prosecutors were not in fact involved in any formal mentoring and monitoring activity. However, the HOM stated that the team leader of the EULEX prosecutors in Mitrovica had met with the newly assigned local prosecutor on 2 February 2016 and again on 3 August 2016 in order to establish if any further progress had been made in the investigation.
40. During the course of the meeting on 2 February 2016, the EULEX Prosecutor informed the newly assigned local prosecutor about the meeting which had taken place earlier with the Kosovo prosecutor who was previously assigned to the case and what investigative steps had been taken.
41. The EULEX Prosecutor also informed the newly appointed local prosecutor about the decision and recommendations of the Panel as well as their wish to learn of any further investigative steps which might have been taken. The newly appointed local prosecutor expressed his regret that he had not been able to take any investigate steps in the case and he said that he was overloaded with other more urgent cases in which the defendants were in detention under remand. Furthermore, the said local prosecutor was not prepared to have a further follow up meeting due to his workload and commitments.
42. At the next meeting on 3 August 2016, the local prosecutor stated that he had not taken any other investigative steps since the previous meeting on 2 February, 2016. However, he did state that he had reviewed the case and had concluded that the case could progress in two possible directions. Firstly, the case could be tried under the charge of "Causing General Danger" and secondly, the case could be tried under the charge of "Organised Crime", which would mean that the case would fall under the exclusive competence of the Chief State Prosecutor. He seemed to favour the first option, which would lead to the closure of the case based on the statutory time limit as prescribed in Article 106 of the Criminal Code of Kosovo, (Law no. 04/L-082).
43. The EULEX Prosecutor scheduled a follow up meeting with the local prosecutor for 10 August 2016 but this meeting was later cancelled by the local prosecutor on the basis that he had more urgent tasks to attend to.



44. The HOM stated in conclusion that due to the lack of progress in the case and the absence of genuine engagement by the local prosecutor in the case, the Chief EULEX Prosecutor had requested the EULEX Advisory Unit on Justice Matters to monitor the case on a formal basis on 10 August 2016.

## **VII. SECOND EVALUATION BY THE PANEL**

45. The Panel takes note of the further additional steps taken by the HOM to implement the recommendations of the Panel.
46. However, the Panel considers that these steps have not been such as to ensure that the right of the complainants to an effective remedy is being effectively protected.
47. The Panel notes that the Chief EULEX Prosecutor provided his assurance that the EULEX prosecutor previously assigned to the case may be available to the local prosecutor in a mentoring and advising capacity outside the executive function of EULEX (Letter from HOM, 2 March 2016).
48. The Panel further notes that the Chief EULEX Prosecutor requested the EULEX Advisory Unit on Justice Matters to monitor the case on a formal basis because of the absence of progress and the lack of a genuine engagement on the part of the local prosecutor on 10 August 2016 (Letter from HOM 17 August 2016).
49. Having examined the latest information provided by the HOM with regard to the implementation of the recommendations of the Panel,

## **THE PANEL UNANIMOUSLY**

*Declares* that the HOM has not been able to further implement the recommendations of the Panel thus far, as contained in its original Decision and Findings of the Panel on 22 April 2015.

*Declares* that the rights of the complainant to an effective remedy, continues to be adversely affected by the absence of a demonstrable effective investigation in the case.

*Invites* the Mission, through the HOM, to seek regular updates from the Kosovo authorities on the progress of the investigation, in particular, the status of the formal monitoring of the case by the EULEX Prosecutor.

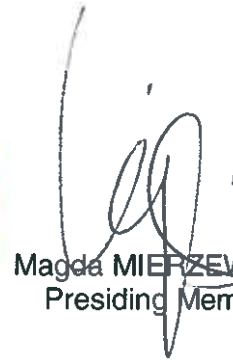
*Invites* the Mission to continue its liaising with the competent Kosovo authorities with a view to following up on the progress of this case.

*Invites* the HOM to update the Panel of the progress of the said investigation by 28 February 2017.

For the Panel,



Noora AARNIO  
Legal Officer



Magda MIERZEWSKA  
Presiding Member