



DECISION ON ADMISSIBILITY

Date of adoption: 19 June 2019

Case no. 2016-09

Milorad Trifunović

Against

EULEX

The Human Rights Review Panel, sitting on 19 June 2019 with the following members present:

Mr Guénaël METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member

Assisted by:
Mr Ronald Hooghiemstra, 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 2019,

Having deliberated, decides as follows:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint in this case was registered on 30 June 2016.
2. By letter of 1 July 2016, the Panel informed the Mission that this case had been registered.
3. On 28 June 2017, the Panel requested this and other complainants to provide additional information regarding their complaints. The complainants initially responded through their Representative that they had no further information in relation to those cases.
4. On 20 September and 17 October 2017, the Panel sent two further requests for additional information to the said Representative.

5. On 20 October 2017, the Panel received a response from the Representative of the complainants providing additional information in relation to two cases, including the present one.
6. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), EULEX Kosovo, inviting her to submit her answers and written observations on the complaints no later than 26 January 2018.
7. By letter of 19 January 2019, the Mission was requested again to provide answers to the questions by 16 February 2019.
8. The observations of the HoM were received on 12 March 2019 after which they were communicated to the complainants for additional observations.
9. On 15 March 2019, the HoM's letter was submitted for information to the complainant, who was given until 15 April 2019 to make any further submissions in response to that letter.
10. The complainant did not avail itself of the possibility of making additional submissions.

II. COMPOSITION OF THE PANEL

11. Following the resignation of one of its permanent member, the Panel will sit in this matter with only two members in accordance with Rules 11 and 14 of the Panel's Rules of Procedure.

III. FACTS

12. On 22 June 1998, Miroslav Trifunović, a brother of the complainant, Milorad Trifunović, went to work by bus in the Belačevac mine, Municipality of Fushë Kosovë/Kosovo Polje. He and eight other workers were intercepted by members of the Kosovo Liberation Army (KLA) in the village Graboc i Poshtëm/Donji Grabovac, Municipality of Kosovo Polje. Miroslav Trifunović and other workers were ordered off the bus and taken in an unknown direction. He has not been heard of since that time up to the date of the filing of this complaint on 30 June 2016.
13. The complainant and his family notified the International Committee of the Red Cross (ICRC), the International Civilian Mission (ICM), the 'US Office' (understood to be a reference to the U.S. diplomatic representation in Pristina), the Cultural Center in Pristina and the Ministry of the Interior of the Republic of Serbia and the ICRC in Serbia, of the disappearance of Miroslav Trifunović.

IV. COMPLAINT AND STANDING

14. The complainant refers to two particular fundamental rights reflected in the following provisions: Article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (the Convention) under its procedural head, which guarantees a person's fundamental right to life and provides for an obligation to investigate cases of suspicious deaths; Article 3 of the Convention which guarantees a person's right not to be subject to torture or inhuman or degrading treatment or punishment. In addition to

these provisions, the Panel decided *proprio motu* to also communicate and examine the case under Articles 8 and 13 of the Convention. The same fundamental human rights are guaranteed by a number of other international treaties, including the International Covenant on Civil and Political Rights. These rights form part of a core set of fundamental human rights that are guaranteed to all as a matter of customary international law.

15. Considering the close family relationship between the primary victim - Miroslav Trifunović – and the complainant - Milorad Trifunović – the Panel is satisfied that the complainant may be regarded as a secondary victim of the alleged violations and that, as such, a potential victim in accordance with Rule 25(1) of the Panel’s Rules of Procedure.

V. SUBMISSIONS OF THE PARTIES REGARDING ADMISSIBILITY

The complainant

16. As summarised above, the complainant alleges that, in the exercise of its executive mandate, EULEX Kosovo should have investigated the disappearance of his brother and culpably failed to do so in violation of his and his brother’s fundamental rights.

Head of Mission (“HoM”)

17. The HoM takes note of the case-law of the Human Rights Review Panel in similar cases and, on that basis, does not dispute the admissibility of this complaint under Article 2 and 3 of the Convention.
18. In her submissions, the HoM noted that as part of the hand-over of cases and case-files from UNMIK to EULEX Kosovo during the period between December 2008 and March 2009, a number of UNMIK police files referring to the disappearance of nine male individuals on 22 June 1998 were transmitted to the Mission; this included the case of Miroslav Trifunović. These disappearances were recorded by UNMIK under three case numbers. Some of these files made it to EULEX’s Institute of Forensic Medicine (IFM) whilst others were handed over to the EULEX Kosovo War Crimes Investigation Unit (WCIU). Regarding the latter, the file was handed over to EULEX as a closed ‘war crimes investigation’ and its content was reviewed in early 2009 by the WCIU and by a EULEX Kosovo Prosecutor in the SPRK.
19. Information contained in the files suggests that the case of Mr Trifunović had been reported to the Serbian authorities, to the International Committee of the Red Cross (ICRC) and to UNMIK. The file also contains a statement of the father of Mr Trifunović to the Serbian authorities dated 13 June 2002.
20. The HoM indicates that whilst the Mission is unable to ascertain whether relatives of Mr Trifunović contacted the WCIU or EULEX Kosovo Prosecutors, they were in contact with staff of the Forensic Medicine Institute “for several years now”.
21. The HoM also gave an extensive description of how such cases were reviewed and recorded by the Mission. The HoM points out in that context that out of the 5000 or so ‘missing person’ cases received by EULEX from UNMIK, about 2000 had been marked by UNMIK as ‘active’ whilst 3000 were marked as ‘closed’ – the latter category referring to those cases for which remains had been found at the time of hand-over. The HoM further describes the process of reviewing and categorizing files received from the UN,

which did not seem to have been properly organised or filed. The HoM indicates that this process was hampered by a number of practical factors, including: a lack of case management system; the high turn-over of staff; as well as the reconfiguration of the WCIU in 2014 which resulted in the deletion of its intelligence and research capacity.

22. The HoM notes that the Police Missing Person Unit (MPU) file pertaining to Mr Trifunović and either others “appears to have been transferred only to the EULEX Kosovo staff in the Institute of Forensic Medicine” with no indication that EULEX Kosovo WCIU received the same file. The HoM indicates that the reasons why the file was transferred to the Forensic Institute is unknown.
23. In contrast, the part of the file pertaining to that case held by the UNMIK Central Criminal Investigation Unit (CCIU) was received by the EULEX Kosovo WCIU as part of the hand-over of case-files from UNMIK and was forwarded to the EULEX Kosovo Prosecutor in the SPRK for assessment on 14 January 2009. An SPRK number was later assigned to that case-file.
24. On that basis, the HoM makes the following submission:

“[W]hile it can be said that EULEX Kosovo became aware of the disappearance of Mr Trifunović following the hand-over from UNMIK in 2008-2009, its police and prosecutorial authorities only became aware of the information contained in the CCIU/WCIU file and were not aware that additional information existed in a separate file transferred to the EULEX Kosovo staff in the Institute of Forensic Medicine.”

25. In January 2009, the EULEX Kosovo WCIU forwarded the UNMIK CCIU case-file to the EULEX Kosovo Prosecutor in the SPRK for review and assessment. The names of two suspects were mentioned in a 2007 analytical report contained in the file. The same report indicates that “there was no evidence to support the allegations against these two individuals”. The file contained what the HoM describes as “a very limited number of documents and very little information on Miroslav Trifunović.”
26. On 20 July 2009, the EULEX Kosovo Prosecutor in the SPRK issued a Ruling to dismiss the UNMIK police report based on article 208(1) of the Provisional Criminal Procedure Code of Kosovo. The reasoning underlying this decision is said to have been that the case file contained no elements that could lead to the identification of a possible suspect and also that it was deemed unlikely that further investigation by the police would provide sufficient information. The Ruling also lists five injured parties, not including Mr Trifunović. From this the HoM suggests that the EULEX Prosecutor must not have been aware of other information available to the Mission pertaining to Mr Trifunović. The HoM says, “[c]urrently EULEX Kosovo is unable to explain why the Ruling does not refer to all eight individuals mentioned in the UNMIK case file.”
27. In 2011 and 2012, the EULEX Kosovo staff at the Department of Forensic Medicine conducted excavations on a site where it was believed that the bodies of the nine missing employees of the mine could be buried. The excavation did not lead to any relevant findings.
28. The HoM also notes that the records transmitted by UNMIK does not reveal that UNMIK had taken any meaningful investigative steps prior to the handing over of the case-file to EULEX Kosovo.
29. The SPRK case-file was transferred by the EULEX Kosovo to the Kosovo institutions on 5 November 2018. The cover letter accompanying the case file indicated that the case

had been dismissed in July 2009, but invited competent Kosovo authorities to conduct their own review of the contents of the case and contact the WCIU in order to verify if they were still in possession of any further material pertaining to the case.

30. The HoM indicated that the Mission was not aware of any ongoing investigation by Kosovo authorities in relation to the disappearance of Miroslav Trifunović.
31. Regarding the legal characterisation of cases, the HoM says the following. The view was seemingly taken at the time that for a case to be regarded as a “war crime” case, the crime should have occurred between the period of February 1998 and 21 June 1999 when an armed conflict was thought to have existed in Kosovo. Under the “Law on SPRK” and the “Law on Jurisdiction”, in the period 2008-2014, EULEX Kosovo prosecutors had exclusive competence to prosecute cases of war crimes and other categories of serious crimes. The HoM indicates in that respect that:

“From a review of EULEX Kosovo records it emerges that whenever EULEX Kosovo prosecutors came across a case-file pertaining to alleged criminal offences (including murders and kidnappings) [that] occurred after 21 June 1999, they considered themselves incompetent and forwarded the cases to the relevant District Prosecution Offices. EULEX Kosovo understands that in the Human Rights Review Panel’s view, a number of these cases could have been investigated by the SPRK as “war crimes” or “crimes against humanity” provided that the elements of these criminal offences were deemed to exist. However, the Mission must conclude that at the relevant time, EULEX Kosovo’s prosecutorial authorities considered that, in light of the limited available resources and the high backlog of war crimes cases, forwarding these cases to the District Prosecution Offices was the right course of action.”

32. The HoM adds that, given the limited resources at the Mission’s disposal, the WCIU “prioritized the review of the so-called ‘war crimes files’, over the ‘missing persons files’.” The HoM further notes that EULEX Kosovo investigated and prosecuted instances of enforced disappearance “in the framework of the war crimes cases.”
33. The HoM also says that efforts to compile all the information available to the different EULEX Kosovo units into the ZyLAB began only in 2017 and could not be completed prior to the hand-over to Kosovo institutions (in June 2018).
34. The HoM’s submissions regarding the merits of this case will be addressed at a later stage of the proceedings.

VI. THE PANEL’S ASSESSMENT

Mandate of the Panel (Rule 25, paragraph 1, of the Rules of Procedure) and competence ratione materiae

35. As noted above, the HoM does not dispute the admissibility of this case.
36. Having reviewed the relevant requirements of admissibility, the Panel is satisfied that the case is indeed admissible.
37. 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.

38. Before considering the complaint on its merits, the Panel has to decide whether to proceed with the complaints, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
39. 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 in the justice, police and customs sectors.
40. The Panel has already established that the actions of the EULEX prosecutors and police form part of the executive mandate of EULEX Kosovo and therefore fall within the ambit of the mandate of the Panel, (see, for instance, *K to T against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 43; *Krlić against EULEX*, 2012-21, 26 August 2014, para. 23; *Y against EULEX*, 2011-28, 15 November 2012, para. 35). This is the case of positive acts or culpable failures.
41. The rights subject to the present complaint are among the most important of all fundamental rights. They touch upon core interests of the alleged victims and must be guaranteed in all circumstances. The practice of enforced disappearance constitutes an egregious violation of these rights. This is reflected, *inter alia*, in the fact that it is now regarded and characterised as a crime against humanity, in particular, in the Statute of the International Criminal Court (Rome Statute, Article 7(1)(i)) and in the Law on Specialist Chambers and Specialist Prosecutor's Office (Law No.05/L-053) (Article 13(1)(i)).
42. The Panel is satisfied that the events under scrutiny came *ratione materiae* within the scope of responsibility of the Mission, in particular but not only, through the mandate of its Prosecutors and Forensic Institute. The Panel notes in that regard that the case-file was in fact subject to a review by the EULEX Kosovo.
43. The implications of the changes in the mandate of the Mission following the conclusion of the executive mandate of the Mission in June 2018 and the implications thereof for the purpose of this case will be addressed, where necessary, in its decision on the merits. Parties are invited to address that issue if they wish to make further submissions in relation to the merits of this matter.

Competence ratione temporis

44. The Panel's competence *ratione temporis* is not disputed by the HoM and the Panel is satisfied that this requirement is met and that the complainant complied with the requisite 6-month deadline within which to file a complaint.
45. The Panel notes that, *ratione temporis*, it is competent to consider the actions of the Mission until 14 June 2018. After that date, the Mission did not have any executive responsibilities over that case. Activities carried out after that date could be relevant, however, to evaluating the extent to which the Mission has fulfilled its human rights obligations. The Panel therefore invites the Mission to make reference in its submissions to any effort undertaken by the Mission to ensure that this case was being investigated (if any), including after that date or any other step taken which the Mission considers relevant to the fulfilment of its human rights obligations.

Competence ratione personae

46. The HoM does not dispute the Panel's competence *ratione personae* and the Panel is indeed satisfied that it is competent in that respect too.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

DECLARES ADMISSIBLE, without prejudging the merits of the matter, the complaints with regard to alleged violations of Articles 2, 3, 8 and 13 of the European Convention of Human Rights;

ASKS THE PARTIES to address the following questions:

I. TO THE HEAD OF MISSION:

- i. Were files pertaining to this case in possession of the Forensic Institute ever shared with EULEX Prosecutors? If not, what is the reason?
- ii. What steps (if any) were taken by the Mission to ensure coordination between its various organs to centralise and share information pertaining to ongoing investigation of serious criminal offences, including cases of "enforced disappearances"?
- iii. Is the Mission competent to monitor this case without local authorities having initiated an investigation into it? If not, what is the Mission empowered to do when, in its view, local authorities fail to fulfil their – procedural – obligations under Article 2 or 3 of the Convention?
- iv. Please also provide a copy of the letter of 5 November 2018 accompanying the transfer of the case to the Kosovo authorities.
- v. In its submissions, the Mission indicated that 'it was deemed unlikely that further investigation by the police would provide sufficient information' (see, above, para 26). What were the factors or considerations leading up to that conclusion? Who was it made by and when?
- vi. In its submissions (summarized in paragraph 21 above), the Mission indicates that as a result of reconfiguration of the WCIU in 2014, the Mission's intelligence and research capacity was deleted. Who took that decision? Based on what factors and considerations?

II. TO THE COMPLAINANT:

- i. What contact did you have with the EULEX Mission during the period 2008-2014 in relation to this case? In particular, what was the nature and extent of your contacts with the EULEX's Forensic Institute?
- ii. Were you informed that, in 2009, EULEX Kosovo decided to close the case involving the disappearance of nine mine workers including your relative?

- iii. Please describe the effect – financial, personal and emotional – that the disappearance of your relative has had upon you.

For the Panel,

Guénaël Mettraux
Presiding Member

Anna Bednarek
Member