



DECISION ON ADMISSIBILITY

Date of adoption: 11 December 2020

Case no. 2016-22

Radmila Šapić

Against

EULEX

The Human Rights Review Panel (“the Panel”), sitting on 11 December 2020 with the following members present:

Mr Guénaël METTRAUX, Presiding Member
Ms Anna BEDNAREK, Member
Ms Anna AUTIO, 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 11 December 2019,

Having deliberated through electronic means in accordance with Rule 13(3) of the Panel’s Rules of Procedure, 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 EULEX Kosovo (“the Mission”) that this case had been registered with the Panel.
3. On 28 June 2017, the Panel requested this complainant to provide additional information.
4. On 20 September 2017 and 17 October 2017, the Panel sent two further requests for additional information via the representative for Serb families of the Missing Persons Resource Center (MPRC), an NGO based in Pristina. The complainant did not submit any additional information.

5. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the then Head of Mission inviting her to submit her answers and written observations on the complaints no later than 26 January 2018.
6. The Mission, by letter of 4 January 2019, requested clarification on certain points related to the form of the complaint, and to the relationship between the complainant and the individuals mentioned in the complaint.
7. By letter of 17 January 2019, the Mission was requested again to provide answers to the questions by 16 February 2019.
8. By letter of 31 January 2019, the Panel requested the complainant to rectify the matters related to the form of the complaint, and to clarify her relationship with the individuals mentioned in the complaint. The complainant did so on 7 February 2019.
9. By letter of 8 April 2019, the Mission was requested once more to provide answers to the questions and written observations as soon as practical.
10. On 20 June 2019, the complainant was informed that the Panel was still in the process of examining her complaint.
11. The Mission's observations were received on 21 April 2020, and transmitted further by the Panel to the complainant on 8 July 2020.
12. On 28 July 2020, the Panel received the complainant's comments on the Mission's observations.
13. On 7 August 2020, the Panel transmitted the complainant's comments to the Mission.

II. STANDING

14. Considering the close family relationship between the primary victims and the complainant, namely a relationship between a mother and a father, and their daughter, the Panel is satisfied that the complainant may be regarded as a secondary victim of the alleged violations and, as such, a potential victim in accordance with Rule 25(1) of the Panel's Rules of Procedure.
15. Further, three other members of the complainant's extended family also disappeared in the events, as described below. When providing clarification on her complaint, the complainant indicated that those three members are mentioned in her complaint given that the circumstances in which they disappeared are related to those in which her parents disappeared, but that those three family members have closer living relatives than herself and should be contacted separately. The Panel will therefore review the case with regard to the disappearance of the parents of the complainant only.

III. FACTS

16. On or around 18 May 1998, many residents of the village Leçinë/Leočina left the village for safety reasons. The complainant's parents, residents of the village, remained in their house.

17. On or around 18 May 1998, an armed group entered the village and the family houses, including the house of the complainant's parents, according to a witness. This witness, a cousin of the complainant, managed to escape into a nearby forest. The witness heard screams and shots from inside the houses, and saw the armed group burn down the family houses.
18. There has been no trace of the complainant's parents.
19. Three other, more distant relatives of the complainant also disappeared on or around the same date. These individuals were the aunt of the complainant and her son, both present in the village at the time of the incident, as well as one other cousin of the complainant, who was last seen at a Serbian police check point on her way to the village. There has been no trace of these three individuals.
20. The disappearances were reported to the International Committee of the Red Cross (ICRC), the Yugoslav Red Cross, and to the United Nations Interim Administration Mission in Kosovo (UNMIK). The ICRC and the Yugoslav Red Cross opened tracing requests for the complainant's parents on 20 May 1998 and 24 June 1998, respectively.
21. During the period 2001-2002, the ICRC and the Association of the Families of the Missing took ante-mortem data from certain members of the family to facilitate the tracing.

IV. COMPLAINT

22. The complainant makes general reference to the Universal Declaration of Human Rights (UDHR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention"). The complainant does not refer to any particular human rights or to specific provisions of these instruments.
23. From the tenor of the complaint, it is apparent that it relates to an alleged violation of the following fundamental rights: Article 2 of 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; and, Article 3 of the Convention which guarantees a person's right not to be subjected to torture or inhuman or degrading treatment or punishment.
24. In addition, the complaint might be relevant to Articles 8 and 13 of the Convention, which guarantee, respectively, an individual's right to private and family life, and the right to an effective remedy.
25. Moreover, the complaint might be relevant to certain economic and social rights, such as the right to social security and the right to an adequate standard of living, as stipulated under Articles 9 and 11, respectively, of the International Covenant on Economic, Social and Cultural Rights (ICESCR), and under Article 22 and 25, respectively, of the UDHR.

V. SUBMISSIONS OF THE PARTIES

The complainant

26. The complainant alleges that the Mission, in the exercise of its executive mandate, should have investigated the disappearance of her parents and culpably failed to do so in violation of her human rights.

The Mission

27. The Mission submits that it became aware of this case after the hand-over of cases and case files from UNMIK in the period December 2008-March 2009.
28. When the handover from UNMIK to EULEX took place in 2008-2009, the cases related to the complainant's parents were considered "open/inactive" by the UNMIK WCU-Missing Persons Unit, and "closed/pending new information" by the UNMIK CCIU. The cases were handed over under agreements between UNMIK and EULEX for the handover of over 50 prosecution case files classified by UNMIK as "war crimes", 1,187 police case files classified by UNMIK as "war crimes", and around 5,000 police case files classified by UNMIK as "missing person cases", the latter including the files pertaining to the complainant's parents.
29. The Mission states that EULEX War Crimes Investigation Unit (WCIU) received from the UNMIK War Crimes Unit (WCU) "a number of investigation reports containing basic information on the disappearance of the complainant's parents", indicating that the cases related to the disappearances should be kept "open", and that no information was available. In addition, the EULEX WCIU received some further documents from the years 2000-2001 originating mainly from the UNMIK Central Criminal Investigation Unit (CCIU).
30. The Mission also provides an extensive account of the large-scale recording, storing and categorization of the cases and case files during and following the handover from UNMIK. The Mission further outlines the many challenges, including limited resources and discrepancies with regard to the case files, associated with its efforts to organize the case files. The Mission notes that given these challenges, the WCIU prioritized the review of the "war crimes" files, over the "missing persons" files. It further prioritized those "war crimes" files that seemed more promising in terms of investigative findings.
31. The Mission further notes that the Council Joint Action 2008/124/CFSP of 4 February 2008 did not contain any explicit reference to "enforced disappearances" with respect to the executive mandate of the Mission in the criminal justice system at the time. Kosovo legislation in force at the time foresaw enforced disappearances as constituting, under certain circumstances, crimes against humanity, not war crimes. The Mission states that it nevertheless investigated and prosecuted instances of enforced disappearances in the framework of war crimes cases.
32. As for the present case, the Mission in its submissions refers to a number of investigative steps it took. These can be summarised as follows:
 - i. On 18 July 2009, the EULEX Prosecutor issued a request to conduct an investigation into the alleged kidnapping of the complainant's parents and of two other individuals. The Mission states that "[i]t would appear that the 18 July 2009 'request to conduct an investigation' was not followed up by the WCIU".
 - ii. On 18 October 2013, another EULEX Prosecutor with the Special Prosecution Office of the Republic of Kosovo (SPRK) issued a 'letter of entrustment' requesting the WCIU to locate an eye witness of the incident, and other individuals not related to the victims in the present case. When the WCIU followed up on the request, it learned that the eye witness had died in the meantime, and that although interviews with the other individuals had been carried out, these did not lead to the discovery of any useful information.
 - iii. Consequently, on 2 December 2013, a EULEX Prosecutor dismissed the criminal report because, "in light of the information gathered until that point, there was 'no indication on who the possible suspects could be and on possible evidence to be used in further criminal proceedings.' In the dismissal, the

EULEX Prosecutor also indicated that the decision did not preclude 'the possibility of filing a new criminal report should additional evidence come to light' and that the injured party could make an appointment with the EULEX Prosecution to discuss the case if he wished to. The dismissal mentioned only one injured party; the address of this injured party was located in Serbia outside the boundaries of Kosovo".

- iv. In June 2018, the Mission's prosecutorial unit initiated a request for mutual legal assistance to Serbia, through the Kosovo Ministry of Justice, as the unit noted that the dismissal had not been notified to the injured party.
 - v. On 8 June 2015, EULEX received from UNMIK the Opinion of the UNMIK Human Rights Advisory Panel of 14 December 2014 in cases 264/09 and 265/09, issued upon an application filed by the complainant's brother. On 24 June 2015, the Mission forwarded this Opinion to the Kosovo Chief State Prosecutor together with an invitation to assess the case and forward it to the competent prosecuting authorities.
 - vi. On 28 June 2015, the Office of the Chief State Prosecutor informed EULEX that the case had been transmitted to the SPRK.
33. The Panel has had the opportunity to view the confidential documents pertaining to the steps described in the above paragraph.
34. There is no indication that the Mission informed complainant regarding any information in possession of the Mission or the steps the Mission took in respect to this case. There is also no indication that the Mission tried to contact the complainant.
35. Asked whether, to the Mission's knowledge, this case is being investigated, the Mission responded that, in accordance with Council Decision (CFSP) 2018/856 of 8 June 2018 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, the Mission no longer has a mandate to investigate, prosecute and adjudicate cases. The Mission did not answer the Panel's question and, instead, 'encouraged [the complainant] to seek any information from the competent Kosovo institutions'.
36. Asked whether the Mission had violated the fundamental rights of the complainant, the Mission suggests that the complainant does not refer to any particular violation or violations of fundamental rights by EULEX. The Mission notes, furthermore, that the legal characterisation of the matter – pursuant to Article 2 and 3 of the Convention – was made by the Panel, not the complainant.
37. As regards substance, the Mission does not contest the admissibility of the complaint.
38. The Mission appears to address the merits of the complaint in its submissions by stating that "[c]oming to the merits of the complaint relating to [the complainant's parents], EULEX does not dispute that the complainant, as an indirect victim of the violations alleged, has a right to an effective investigation into the disappearance of her parents. However, it maintains that its relevant units took all reasonable steps to investigate the case and did not violate the complainant's rights". The Mission makes certain further submissions apparently related to the merits of the case. The Panel notes that its Statement of Facts and Questions of 8 December 2017 related to the admissibility of the complaint, and the Panel will review submissions on the merits of the case separately at the merits stage.
39. The Mission made submissions with regard to what it says is the Panel's lack of competence *ratione personae* insofar as the disappearance of the further three persons, members of the complainant's extended family, is concerned. As outlined in paragraph 15 above, the complainant provided clarification on the matter in her subsequent

submissions. Consequently, the Panel need not assess the admissibility of the complaint with respect to these other three persons.

VI. THE PANEL'S ASSESSMENT

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

40. 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 for 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. The Panel may also in its work make reference to, *inter alia*, the International Covenant on Economic, Social and Cultural Rights, and the Universal Declaration of Human Rights.
41. Before considering the complaint on its merits, the Panel has to decide whether to proceed with the complaint, taking into account the admissibility criteria set out in Rule 29 of its Rules of Procedure.
42. According to Rule 25, paragraph 1, the Panel can only examine complaints related to human rights violations by EULEX Kosovo in the conduct of its executive mandate.
43. The Panel has already established that the actions of the EULEX prosecutors and police form in principle part of the executive mandate of the Mission and therefore fall within the mandate of the Panel (see, for instance, *Latif Fanaj against EULEX*, 2016-06, 14 September 2011, para. 65; *K to T against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 43). The Panel sees no reason to deviate from its established case law in the present case.

Does the complaint allege a violation of rights by the Mission?

44. As a preliminary matter, the Mission suggests that the complainant does not allege or impute a violation against the Mission. Such an argument has already been raised and rejected in an earlier case. It must be rejected again for the same reasons.
45. In its Decision on Admissibility in the case of *Milijana Avramović Against EULEX* (2016-17) of 11 December 2019 (<https://hrrp.eu/docs/decisions/2019-12-11%20Admissibility%20Decision%202016-17.pdf>), the Panel said the following (paras 47 *et seq*):
 47. In its submissions, whilst not directly challenging the admissibility of this case, the Mission suggests that the complainant does not make any specific allegations against EULEX and does not even mention EULEX in her complaint. The Mission therefore 'requests the Panel to assess whether case 2016-17 can be considered an actual complaint against the Mission and should not otherwise be treated as a mere and legitimate request for information on the status of the investigation'.
 48. The requirements of form and substance regulating the content of a complainant before the Panel are outlined in the Panel's Rules of Procedure

(see Rules 25 and following). Assessed against these Rules, the Mission does not suggest that the complaint contains any formal defect that would affect the admissibility of this case.

49. Regarding the question of the nature of the complaint and whether it concerns acts attributable to the Mission, the Panel would highlight the following. Firstly, consistent with its Rules of Procedure (and the OPLAN), the Panel is only competent to assess complaints of rights violations *against the Mission*. Rule 25, paragraph 1, of the Panel's Rules of Procedure thus provides that '[a] complaint may be filed by any person other than EULEX Kosovo personnel who claims to be the victim of a human rights violation by EULEX Kosovo in the conduct of its executive mandate'. In that sense, the filing of a complaint with the Panel must per force and can only pertain to an allegation of a rights violation said to be attributable to the Mission.
 50. Second, regarding the substance of the complaint, as is apparent from the complaint form used by this and other complainants, all complaints to the Panel contain an allegation of a rights violation (see complaint form, let B) that is attributed, as per the complaint form, to EULEX (see complaint form, point V). This complaint is therefore properly a complaint of rights violations against the Mission.
46. These findings apply *mutatis mutandis* to the present case and answer the Mission's submissions. The Panel is therefore satisfied that the complaint complies with the requirements of form and substance required under the Rules and is satisfied that the complainant is in fact alleging that the Mission violated her rights.
 47. The Mission also submitted that the Facts and Questions submitted to the Mission by the Panel were not legally sound as they suggested that the complainant had referred to the violation of particular rights whereas it was in fact the Panel that characterised the facts alleged under particular legal norms. The Mission appears to misapprehend the role of the Panel: what norms apply to a particular case is the responsibility of the Panel itself (*jura novit curia*), and the Panel is not bound by the way in which either party characterises the facts of the case from the legal point of view. The fact that the complaint form to the Panel includes a section in which the complainant may invoke specific human rights instruments or provisions does not alter the Panel's role and responsibility in the legal characterisation of the case.
 48. Furthermore, the Panel would note that a great many complainants are not legally trained and come before the Panel unrepresented so that the Panel must ensure that the basis upon which the Panel renders its decision accurately reflects the facts of the case even if one party or the other has not fully or properly articulated those.
 49. The Panel also notes that the principle of *jura novit curia* is well-established in the European Court of Human Rights case law. See e.g. *Şerife Yiğit v. Turkey [GC]*, no. 3976/05, Judgment of 2 November 2010, para. 52, in which the Court stated:

"[S]ince the Court is master of the characterisation to be given in law to the facts of the case, it is not bound by the characterisation given by the applicant or the Government. By virtue of the *jura novit curia* principle, it has, for example, considered of its own motion complaints under Articles or paragraphs not relied on by the parties and even under a provision in respect of which the Court had declared the complaint to be inadmissible while declaring it admissible under a different one. A complaint is characterised by the facts alleged in it and not merely by the legal grounds or arguments relied on [...]."

50. In this particular instance, it is clear, from the nature of the factual allegations contained in the complaint – as was the case in a large number of prior similar complaints – that the fundamental rights relevant to this complaint are those guaranteed, *inter alia*, in Articles 2, 3, 8 and 13 of the Convention.
51. The Panel also notes, on a general point, that enforced disappearances may impact the economic, social and cultural rights of primary and secondary victims, in addition to their civil and political rights. There is a wide range of economic, social and cultural rights recognised under the UDHR and the ICESCR which an enforced disappearance may affect, from the rights to health and education, to the rights to social security, property, and housing.
52. The Working Group on Enforced or Involuntary Disappearances has observed, with regard to the suffering caused by enforced disappearances to the relatives of those forcibly disappeared, that “[t]he emotional upheaval is thus exacerbated by material deprivation” (see *General comment on women affected by enforced disappearances* adopted by the Working Group on Enforced or Involuntary Disappearances at its ninety-eighth session, A/HRC/WGEID/98/2, para. 12). One circumstance in which there may be an impact on the economic, social and cultural rights is where the disappeared person has provided for the family, or held legal title to family property or assets, or a claim to certain benefits or payments. An effective investigation into a disappearance may have the direct consequence of establishing the disappeared person’s legal existence or death, and therefore the title to property and access to support that the family members may be able to claim (see *Report of the Working Group on Enforced or Involuntary Disappearances, Addendum, Study on enforced or involuntary disappearances and economic, social and cultural rights*, A/HRC/30/38/Add.5, paras. 25-27).
53. As with the legal characterisation under the Convention rights above, the complainant did not make any specific allegations as regards economic, social and cultural rights. The circumstances of the case, namely the relationship between the complainant (daughter) and the primary victims (the complainant’s parents), nevertheless direct the Panel to solicit further information from the complainant in this regard.
54. The Mission will therefore be invited to address the substance of each of the fundamental rights of potential concern to the present complaint, as outlined above.

Miscellaneous considerations

55. As mentioned above, the Mission has suggested in response to some of the Panel’s questions that the complainant should address these questions to the local authorities.
56. The Panel wishes to make it clear that these proceedings are not intended to direct the complainant to any third party. Consistent with the Panel’s Rules of Procedure, the proceedings are intended to verify the Mission’s compliance with its own obligations as the human rights duty-bearer bound by international human rights law. To the extent that steps are to be taken in furtherance of that purpose, it is the responsibility of the Mission to take steps with regard to the local authorities. The Panel also invites the Mission to desist from similar submissions in future proceedings.
57. Where taken, such steps could be relevant to the Panel’s assessment of the sufficiency and adequacy of the Mission’s response in light of the human rights under consideration. The Panel therefore invites the Mission to indicate as part of its submissions on the merit of this case what steps, if any, the Mission has taken to discuss and raise the present matter with the local authorities.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

DECLARES ADMISSIBLE, without prejudging the merit of the matter, the complaint with regard to alleged violations of Articles 2, 3, 8 and 13 of the European Convention of Human Rights, and of Articles 9 and 11 of the International Covenant on Economic, Social and Cultural Rights;

INVITES THE MISSION to clarify the following in its submissions on the merit of this case:

- i. What submissions does the Mission wish to make with respect to the substance of the aforementioned human rights?
- ii. What steps, if any, have been taken by the Mission towards local authorities in relation to this case? In particular, has the Mission inquired with local authorities whether (a) they were aware of the existence of that case and (b) whether they are currently investigating it and, if not, (c) why.
- iii. What role, if any, does the Mission intend to play in future in relation to this unresolved case of enforced disappearance? What concrete measure or action does the Mission consider within its (current) powers to seek to advance the investigation and resolution of this case? If the Mission does not intend to take any steps with respect to this case, why not?
- iv. Were the documents in relation to this case transmitted to the local Kosovo Authorities following the Mission's change of mandate in June 2018 and reduction of executive competence?
- v. Did the Mission attempt to identify relatives, including living children, of the disappeared persons in the present case, other than the relative identified in the Mission's submissions and the related confidential documents? If not, why not?
- vi. Did the Mission attempt to contact the complainant or the relatives of the complainant's disappeared parents beyond the steps outlined in the Mission's submission and the related confidential documents? If not, why not?

In addressing the above, the Panel invites the Mission not to reiterate submissions that have already been made and rejected as being without merit in earlier cases.

INVITES THE COMPLAINANT to respond to the following:

- i. Please describe the support or assistance, or housing, that your parents provided for you and your family before their disappearance.
- ii. Please describe the personal and emotional effects that the disappearance of your parents has had on you and your family.
- iii. Please describe the legal and financial effects that the disappearance of your parents has had upon you and your family. Please also describe any difficulties or hardship you may have experienced as a result of the fact that your parents remain disappeared, in seeking access to any support, payments, or legal title, such as those listed in the questions below. For example:

- a. Have you had full, partial or no access to any benefits, wages, pension payments, social assistance, and bank accounts that your parents were or would have been entitled to?
- b. Have you inherited the legal title to any property, including housing, that your parents may have owned?
- c. Have you had any financial expenses as a result of the disappearance of your parents that have not been compensated for?

AND ASKS the parties to respond to the above and make any other submissions regarding the merit of this case no later than 28 February 2021.

For the Panel,

Guénaël Mettraux
Presiding Member

Anna Bednarek
Member

Anna Autio
Member