DECISION AND FINDINGS

Date of adoption: 11 December 2020

Case no. 2016-11

Petar Brakus

Against

EULEX

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

Mr Guénaël METTRAUX, Presiding Member
Mr Petko PETKOV, 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. On 27 June 2017, the Panel requested the complainant to provide additional information regarding the complaint.

3. On 20 October 2017, the Panel received additional information on the case in response to its request.

4. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), EULEX Kosovo, inviting the then Head of Mission to submit her answers and written observations on the complaint no later than 26 January 2018.

5. By letter of 17 January 2019, the Mission was requested again to provide answers to the questions posed by the Panel by 16 February 2019.

6. By letter of 8 April 2019, the Panel again requested the HoM to provide answers to the questions as soon as practical.

7. On 19 April 2019, the HoM submitted observations on the admissibility of the complaint.

8. On 26 April 2019, the observations of the HoM were sent to the complainant, and she was invited to submit her comments, if any, by 26 May 2019. The complainant did not avail herself of this opportunity.

9. On 11 September 2019, the Panel found this case to be admissible with regard to the alleged violations of Articles 2, 3, 8 and 13 of the European Convention on Human Rights ("the Convention"). In that Decision, the Panel further asked the parties to address the following questions:

    1. **The complainant**: Please provide information pertaining to the following:

        i. What contact, if any, did you have with the EULEX Mission or its representatives? If so, when? If not, why not?

        ii. Are you aware of any efforts by local authorities to investigate this case?

        iii. Has the Mission violated or contributed to the violation of the complainant's rights under Articles 2, 3, 8 and 13 of the Convention? If so, in what manner?

        iv. What are the consequences – personal, financial. legal and emotional – associated with the disappearance of your relative?

    2. **The Mission**: Please provide information pertaining to the following:

        i. Was a decision formally taken not to investigate this case? If so, when and by whom?

        ii. What steps, if any, did the Mission take to investigate this case?

        iii. What contacts, if any, did the Mission have with the relatives of the disappeared, and the complainant in particular?

        iv. What information, if any, regarding its investigative efforts, when, and by what means, did the Mission provide the relatives of the disappeared?

        v. If the Mission did not provide any information, why not?

        vi. Was the case-file pertaining to this case transmitted to local authorities? If so, when?

10. The parties were asked to make their submissions in relation to the above questions no later than 11 November 2019.

11. By electronic message of 9 October 2019, the Mission requested an extension of the deadline for it to submit its observations. On the same day, the Panel extended the deadline until 11 December 2019.

12. On 2 December 2019, the Acting HoM submitted additional comments on the merit of the complaint.

13. On 3 December 2019, the comments of the Acting HoM were sent to the complainant for information.

14. On an unspecified date at the beginning of 2020, the Panel learned that the complainant, Ms Anđelija Brakus, had passed away and that her son, Mr Petar Brakus, was interested to continue with the complaint.

15. On 4 March 2020, the Panel requested Mr Brakus to inform the Panel in writing of the death of his mother, and to confirm his interest to maintain the complaint. Mr Brakus was requested to provide this confirmation by 4 April 2020.

16. Due to the corona virus pandemic and the resulting suspension of postal services in Kosovo, the complainant was unable to respond within the set deadline.

17. On 10 September 2020, Mr Brakus submitted his formal confirmation to succeed his mother as the complainant in this case. The Panel considers that the circumstances outlined above constitute good cause and justify the extension of time being granted.

II. STANDING OF THE COMPLAINANT

18. Considering the close family relationship between the primary victim, the original complainant and the new complainant – i.e. a father and mother and their son – the Panel is satisfied that the new complainant may succeed the original complainant and 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.

III. FACTS

19. The facts, as they appear from the complaint, may be summarized as follows.

20. On 22 June 1999, Dušan Brakus, the father of the complainant, Petar Brakus, together with his son-in-law, visited the village of Nedakoc/Nedkovac, Vushtrri/Vučitrn Municipality, to examine the state of his house. According to his son-in-law, they were attacked by local villagers and the son-in-law managed to flee in the car, leaving his father-in-law behind. This was the last that his family heard about the fate of Dušan Brakus.

21. His disappearance was reported to a number of international and local institutions dealing with missing persons. In particular, his spouse reported his disappearance to KFOR in Pristina on the day that he disappeared. His family also immediately reported his disappearance to the Serbian authorities in Kraljevo, Republic of Serbia, as well as to the United Nations Interim Administration Mission in Kosovo (UNMIK), the International Committee of the Red Cross and also to KFOR HQ and to the French Gendarmerie in Mitrovica.

22. On two occasions, the complainant was asked to review human remains, and he also gave a blood sample in 2002 for possible DNA identification, but his father's body has not been recovered.

IV. SUBMISSIONS OF THE PARTIES

The complainant

23. The complainant alleges that, in the exercise of its executive mandate, the Mission should have investigated the disappearance of his father and culpably failed to do so, in violation of his fundamental rights.

Head of Mission ("HoM")

24. The Mission's submissions on the merit of this case were received on 2 December 2020.

25. In response to the Panel's question as to whether a formal decision had been taken by the Mission not to investigate this case, the Mission responded that there was never a formal decision not to investigate this specific disappearance. The Mission added that:

> 'EULEX Kosovo's resources were not unlimited and it would have been unreasonable and ineffective to investigate all instances of war crimes and other serious crimes related to the conflict at the same time; therefore, the Mission had to necessarily prioritize certain cases over others. The non-investigation of this case was the consequence of the Mission's decision to prioritize the 'war crimes files' over the 'missing persons files'. As indicated in the Mission's initial observations on the admissibility of the complaint dated 19 April 2019, at the moment of the hand-over to EULEX of the *UNMIK War Crimes Unit – Ante-Mortem Investigation Report* on Dušan Brakus, the case was recorded in an UNMIK database; EULEX would like to specify that the database in question is the 'missing persons' database, not the 'war crimes' database.
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> During UNMIK times, reports of 'missing persons' appear to have been investigated by the UNMIK Police only to determine the whereabouts of, or the death of those reported missing. A large number of missing persons reports, most likely the majority of them, were never submitted to the UNMIK Department of Justice, which at the time exercised prosecutorial functions, or anyway investigated as potential war crimes or other serious crimes; they were left inactive for years in a sort of legal limbo and then transferred to EULEX. It is important to recall that also a large amount of 'war crimes' files had been left in a similar situation of legal limbo prior to the hand-over to EULEX. As already explained, this unfortunate state of affairs required in the early months of 2009, the review and assessment by EULEX Police and prosecuting authorities of around 1,200 criminal reports, most of them inactive.'

26. Asked what contacts the Mission had with the relatives of the disappeared, the Mission responded that it did not appear to have had any contacts with the complainant or other family members of the disappeared.

27. The Mission explained that it did not provide the relatives of the disappeared with any information regarding this case because,

> 'As indicated in the observations [on admissibility] of 19 April 2019, as part of the hand-over from UNMIK, EULEX received around 5,000 'missing persons' files. Given the limited resources available, it was not possible to proactively inform all relatives of missing or killed persons of what information the Mission held and whether the case was being investigated or not.'

28. As to whether the case-file pertaining to this case was transmitted to local authorities, the Mission stated that,

‘All documents pertaining to the disappearance of Dušan Brakus which were held by the EULEX War Crimes Investigation Unit – WCIU have been handed over to the Kosovo Police at some point in late 2018.’

29. As to whether the Mission had violated the complainant’s rights under Articles 2, 3, 8 and 13 of the Convention, the Mission first makes it clear that it does not contest the competence *ratione materiae* of the Panel over this case. However, the Mission reiterates its conviction that the Panel’s assessment of the Mission’s conduct under these provisions of the Convention in relation to the specific disappearance of Dušan Brakus must take into account the circumstances in which the Mission was called to implement its mandate.

30. The Mission invites the Panel in particular to give consideration to:

    a) the scale of the crimes in question (in particular, the fact that the conflict made perhaps as many as 13,000 victims) meaning that not all crimes could ever be investigated; and
    b) the state of the files inherited from UNMIK. In that regard, the Mission points to the inadequate and incomplete nature of the records – some 800,000 pages – that it was provided by UNMIK, which required the Mission to invest much time and resources in reviewing and organising these.

31. On that basis, the Mission invites the Panel to ensure that its assessment of what could have been done in those circumstances should be realistic and proportionate. In particular, the Mission explains that the combined effect of a large number of cases and limited resources caused the Mission to prioritize 1,200 case-files labelled ‘war crimes’ by UNMIK – over ‘missing persons files’ – and, within the former category, cases that appeared ‘more promising in terms of investigation outcomes’.

32. Regarding its duty to keep relatives of disappeared informed, the Mission said the following:

    ‘The Mission does acknowledge that, with a view to manage expectations more adequately and be more transparent, it should have done more to keep relatives and the wider public informed about the implementation of its mandate as well as its constraints and limitations. However, in the present case and in considering the fundamental obstacles presented, the Mission does not believe that the complainant’s rights were violated.’

33. Regarding the change in the Mission’s mandate and its effect upon this case, the Mission indicated that it retains an executive capacity to support the Kosovo Institute of Forensic Medicine in the conduct of activities such as site-assessments, exhumations and excavations and remains available should new credible information come to light.

34. The Mission also gives a general description of its monitoring activities, i.e., its observing and reporting of cases being dealt with by local authorities, although it does not suggest that it is currently monitoring the case relevant to the present complaint.

V. DELIBERATIONS

Importance of protected rights and interests

35. As a preliminary matter, the Panel wishes to underline the fact that the rights at stake in cases of enforced disappearance are among the most important of all fundamental human rights. In particular, such cases often involve issues pertaining to the right to life, the right

not to be subject to cruel and inhuman treatment, the right to truth, the right to respect for family life, and the right to have access to justice.

36. The nature and extent of the measures to be adopted by the competent authorities to guarantee the effective protection of these rights must be commensurate to and be measured against the importance that attach to these rights and to the underlying interests which they seek to protect. See, for example, *Milijana Avramović against EULEX*, Case no. 2016-17, Decision and Findings of 4 June 2020, para. 35.

Conducting a realistic assessment of the Mission's actions

37. The rights and interests protected by Articles 2 and 3 of the Convention must be ensured and guaranteed in all cases. However, the circumstances in which this is to be done might impact what can be done in practice and, therefore, what can be reasonably expected of the authorities. As a result, while the stakes could hardly be higher for victims, an assessment of the conduct of the authorities when seeking to protect their rights must account for the relevant circumstances in which those authorities found themselves at the time. However, difficulties associated with the circumstances as prevailed at the time – for instance, a conflict situation or a post-conflict situation – must be clearly distinguished from issues pertaining to available resources. While the authorities are not responsible for the former and must do as best they can in the circumstances at the time, the latter provide no valid justification to retreat from human rights obligations. Instead, it is the responsibility of those authorities to ensure that resources are organised, distributed and used in such a way as to ensure that its human rights obligations are kept and relevant rights remain effective. See, for example, *Milijana Avramović against EULEX*, Case no. 2016-17, Decision and Findings of 4 June 2020, para. 37.

38. 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, generally, *U.F. Against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 60; *L.O. against EULEX*, 2014-32, 11 November 2015, pars 43-45; *A,B,C,D against EULEX*,2012- 09 to 2012-12, 20 June 2013, para 50; *K to T against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 53; *Sadiku-Syla against EULEX*, 2014-34, Decision on Admissibility, 29 September 2015, paras. 35-37; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, Decision on Admissibility, 30 September 2015, paras. 72-74; see also *Human Rights Advisory Panel of UNMIK (HRAP)* Decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 35 and paras 70-71.

39. In particular, the EULEX Mission is not a State and 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, e.g., the Panel's decision in *A,B,C,D against EULEX,* 2012-09 to 2012-12, 20 June 2013, para. 50*; K to T against EULEX*, quoted above, para. 53; see also HRAP Decision in cases nos 248/09, 250/09 and 251/09, 25 April 2013, para. 35; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 49).

40. In this regard, the Panel notes that the task given to the Mission was in many respects daunting. The number of cases that it was expected to investigate was extremely large and those cases were complex. The resources put at its disposal were in many respects insufficient and inadequate. Furthermore, the records transmitted to the Mission by UNMIK were in a poor state and required the Mission to spend a significant amount of time and resources merely trying to make sense of those.

41. The post-conflict situation in which the Mission had to operate also complicated its work even further. See e.g. *L.O. against EULEX*, 2014-32, 11 November 2015, para. 44 and references cited therein.

42. The Panel notes that Articles 2 and 3 of the Convention are non-derogable rights under Article 15(2) of the Convention. However, as noted above, what the authorities might be expected to do in a given case to secure these rights will depend in part on the circumstances prevailing at the time. In the present case, the Panel is particularly mindful of the fact that post-conflict circumstances had practical consequences for the Mission's ability to carry out actions with regards to those concerned by its executive mandate. These elements and considerations have, therefore, been taken into account by the Panel to determine what, in those circumstances, could legitimately be expected from the Mission in relation to the present case. See, for example, *Milijana Avramović against EULEX*, Case no. 2016-17, Decision and Findings of 4 June 2020, para. 41.

43. A few preliminary issues should be addressed here first. It should be noted that the guarantee contained in Article 2 of the European Convention is one of *means* and not *result*. It is indeed correct as a State or relevant authorities could not be faulted for failing to protect an individual's rights if they have done their utmost and what the law expected to protect those rights. However, as an obligation of means, the law expects that the means invested to guarantee the effective protection of fundamental rights are commensurate to the importance of the right concerned and the gravity of the potential violation which the authorities seek to prevent and remedy. In particular, in the case *Mustafa Tunç and Fecire Tunç* v. Turkey (Application no. 24014/05, Judgment, 14 April 2015 (Grand Chamber), paras 172, which the Panel adopted in case 2016-12 (para 63)), the European Court of Human Rights said this:

> 172. In order to be 'effective' as this expression is to be understood in the context of Article 2 of the Convention, an investigation must firstly be adequate (see *Ramsahai and Others v. the Netherlands* [GC], no. 52391/99, § 324, ECHR 2007-II). That is, it must be capable of leading to the establishment of the facts and, where appropriate, the identification and punishment of those responsible.
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> 173. The obligation to conduct an effective investigation is an obligation not of result but of means: the authorities must take the reasonable measures available to them to secure evidence concerning the incident at issue (see *Jaloud v. the Netherlands* [GC], no. 47708/08, § 186, ECHR 2014; and *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).
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> 174. In any event, the authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person responsible will risk falling foul of this standard (see *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 301, ECHR 2011).

The Panel will take due account of these considerations in assessing the Mission's response in this case.

44. The Panel will also 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, nor to affect the standard to which the Mission should be held in the light of its human rights obligations. See *L.O. against EULEX*, 2014-

32, 11 November 2015, para. 44; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX*, 2014-11 to 2014-17, 30 September 2015, para. 73-74; and *K, L, M, N, O, P, Q, R, S & T (K to T) against EULEX*, 2013-05 to 2013-14, 21 April 2015, para. 54; *Sadiku-Syla against EULEX*, 2014-34, 19 October 2016, para. 31; *D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., and I.R. against EULEX*, 2014-11 to 2014-17, 19 October 2016, par 57.

Absence of investigation

45. In the present case, there was no investigation by the Mission, interview of witnesses or relatives, request for documentation, contacts with UNMIK, or any apparent efforts to obtain documents that UNMIK had collected in relation to it. As discussed below, there was also no contact, or attempted contact with the relatives of the disappeared.

46. The reason advanced by the Mission for this situation is that it gave priority to cases that were classified by UNMIK as 'war crimes' rather than 'missing persons cases', and that were 'more promising in terms of investigative outcome'. The Panel finds such argument problematic for a number of reasons.

47. Firstly, the right to an investigation in cases of enforced disappearance is not optional and is unqualified. The Mission has failed to explain why the complainant would have had less of a right to truth and justice than any other victim in the same position.

48. Secondly, practical considerations (such as the number of cases and the limited resources of the authorities concerned) might mean that some cases could be prioritised over others. This does not, however, under any circumstances, erode the essence of that right, i.e., remove or lessen the obligation to carry out an effective investigation. Even where difficult circumstances prevail, the authority must take all reasonable steps in the circumstances. Therefore, where an investigation is temporarily not possible, other means and mechanisms must be put in place to ensure that the rights in question are sufficiently preserved and their essence guaranteed. In particular, steps must be taken to ensure that the possibility of an investigation, even if delayed, is preserved and not lost by reason of delays in formally commencing it.

49. Thirdly, from the human rights point of view, the legal characterisation of an act of 'disappearance' as a war crime or as something else (e.g., a crime against humanity; a murder; a violation of human rights; an ethnically-motivated crime; or an act of unlawful detention) is not materially relevant to the authorities fulfilling their legal obligations. Furthermore, there is no apparent reason why this particular case might not have amounted to a war crime (under a variety of possible legal labels) and the Mission did not suggest that it could not have qualified under that umbrella.

50. In this case, the Panel notes that the absence of investigation was compounded by the absence of communication with the relatives of the disappeared. Furthermore, the Mission took no steps to provide for alternative remedies to alleviate the effect of this absence of investigation upon the rights of those concerned. Its purported 'prioritisation' therefore resulted in a complete absence of investigation, remedy and truth as far as this case is concerned.

51. The Panel notes in this context that the post-conflict situation in which the Mission had to operate did not in any way prevent the Mission to take these actions. Nor does a lack of resources provide a valid explanation for its failure to even look into this case.

52. In this respect, the Panel would add the following. Firstly, it was the Mission's responsibility to ensure that it organised itself and distributed its resources in a manner

consistent with its human rights obligations. As a 'rule of law' Mission, it is clear that responsibilities having to do with the rule of law should have been institutional and operational priorities.

53. Secondly, where necessary to prioritise certain activities over others, it should have ensured, at the very least, that (a) a clear strategy and policy to that effect was devised and publicised (and which, to the Panel's knowledge, never existed) and that (b) prioritisation did not result in the abandonment of its human rights obligations, in particular in respect of those rights that are absolute in character.

54. Considering that the Mission was replacing local authorities in many of its executive responsibilities, it was for the Mission to ensure that this was done in full compliance with those human rights responsibilities that were associated to that role. A lack of resources provides no justification for a failure to do so. If anything, this should have required the Mission to request resources it was lacking or, where this was refused, to clearly and candidly publicise the fact that it would only be able to deal with a narrow set of executive responsibilities. This does not appear to have occurred.

55. Transparency, while not a substitute for conducting an effective investigation or meeting other human rights obligations, is an important element of accountability and victims of human rights violations were entitled to know what the Mission was *really* able to do to redress the violations of their rights. While challenging, the post-conflict situation in which the Mission had to operate does not provide a satisfactory explanation for the large-scale failure to deal with the present case and other cases of this sort. The European Court of Human Rights has made it clear – albeit in relation to states – that human rights obligations are to be met also in the context of an ongoing armed conflict, including the procedural requirements under Article 2 of the Convention to carry out an effective investigation (see, e.g., *Al-Skeini v United Kingdom*, Application no 55721/07, Judgment, 7 July 2011; *Jaloud v Netherlands*, Application no 47708/08, Judgment, 20 November 2014).

56. The failure of the Mission to deal with cases such as the present one might have been rendered more difficult by its limited resources and by the challenges posed by the post-conflict situation in which it had to operate. But a failure to plan properly and develop detailed and transparent strategies to deal with those cases is at least if not more significant in explaining the fact that the present case was not investigated and that no effort was made to reach out to the victims.

57. Thirdly, while prioritisation of cases might be reasonable where cases demanding the authorities' actions are too numerous for its capacities, the decision to prioritise must fulfil certain basic requirements. *First*, it should not discriminate on impermissible grounds prohibited by human rights law. See, generally, Article 14 ECHR; Articles 2 and 7 Universal Declaration of Human Rights; Articles 4(1) and 26 ICCPR; and Article 1(3) of the UN Charter. *Secondly*, as was made clear by the ECtHR (cited, *supra*, in paragraph 30), the obligation to conduct an effective investigation requires the authorities to take the reasonable measures available to them to secure evidence concerning the incident at issue (*Mustafa Tunç and Fecire Tunç* v. Turkey, Application no. 24014/05, Judgment, 14 April 2015 (Grand Chamber), paras 173-174). In this case, the Mission did not engage in <u>any</u> process of evidence collection. In fact, it did not even ask UNMIK or other authorities for the dormant files which they had or might have in their possession. This leads the Panel to a fourth concern associated with the course of action taken by the Mission. *Furthermore*, such prioritisation can under no circumstances result in a complete abandonment of relevant standards of protection of human rights, in particular where, as in the present case, the rights concerned are absolute in character.

58. To explain its failure to investigate this case, Mission suggests that it had to prioritize cases that appeared 'more promising in terms of investigation outcomes'. In the absence of any preliminary investigation of this case, the Panel is not convinced that such an evaluation could have been carried out fairly, in an informed manner and in a manner that guaranteed the effective protection of the rights of those concerned. The Panel is unconvinced that the Mission could have been in a position to make such an assessment without asking for the UNMIK file and without conducting any interviews or contact those closest to the disappeared. The Panel is, therefore, not satisfied that the Mission's priority assessment was based on a sufficient and reliable basis to secure and guarantee the rights of those concerned.

59. Furthermore, before making the above judgment call that would have such significant consequences for the rights of the complainant, the Mission would have reasonably been expected to seek the assistance and cooperation of other authorities if and when the latter might have in their possession information and/or resources of relevance to the former's efforts to conduct an effective investigation. See, generally, *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 64, referring to: *Case of Güzelyurtlu and Others v. Cyprus and Turkey*, Application no. 36925/07*,* Judgment, 29 January 2019, paras 229 and 232-233. The Mission failed to reach out to those with (potential) information about this case and it has provided no explanation for that failure.

60. In light of the above, even if the Mission had been authorised to give priority to certain cases of this nature (at least temporarily), it did not act in this case in a manner that would be compatible with the effective preservation of the rights of the complainant. Its complete failure to investigate this case and to take even the most basic of steps to have in its possession all available information before deciding not to investigate it constitutes a serious violation of its human rights obligations under Article 2 (procedural limb) and 3 of the European Convention on Human Rights. It reveals a lack of diligence and propriety in the exercise of a critical element of its mandate.

Failure to inform close relatives of the disappeared

61. International human rights law demands that in a case such as the present one, relatives of the disappeared should be kept sufficiently informed of the course of the investigation of the case and the course of proceedings. See, generally, *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 97; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 66; *Desanka and Zoran Stanisić against EULEX*, 2012-22, 11 November 2015, para. 66; *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-73; HRRP, *Case-Law Note on the Duty to Investigate Allegations of Violations of Rights*, pp 28-30; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005, paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.

62. This requirement is intended to ensure that relatives can meaningfully contribute to and participate in the process. It also seeks to diminish the strain and pain of not knowing what happened to their loved one. See also *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 66; *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 96.

63. The obligation to keep victims abreast of investigative efforts is particularly important in a case involving acts of enforced disappearance as surviving relatives might have no other source of information regarding the fate of their relative(s), and they will continue to live in the hope that the fate of their relative(s) will one day be elucidated. As a result, close

relatives of the disappeared victims suffer emotionally from the absence of information regarding the fate of their loved one. See *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 98; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 87; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 78. Such a requirement is a necessary element of the protection of the rights of the victims in the investigation of such a case. See, e.g., *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 98; *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 77; *Desanka and Zoran Stanisić against EULEX*, 2012-22, 11 November 2015, para. 66, referring to *L.O. against EULEX*, 2014-32, 11 November 2015, paras. 60-61, 72-74; *Zufe Miladinović against EULEX*, 2017-02, 19 June 2019, para. 86; see also *Ahmet Özkan and Others v. Turkey*, Application no. 21689/93, ECtHR Judgment of 6 April 2004, paras. 311-314, *Isayeva v. Russia*, Application no. 57950/00, ECtHR Judgment of 24 February 2005, paras. 211-214; *Al-Skeini and Others v. United Kingdom*, Application no. 55721/07, ECtHR Judgment of 7 July 2011, para. 167.

64. Competent authorities will not easily be permitted to disregard or ignore this obligation. See *S.H. against EULEX*, Decision and Findings, case no. 2016-28, 11 September 2019, para. 67; *U.F. against EULEX*, 2016-12, Decision and Findings, 12 February 2020, para 98.

65. The Panel also notes that the right to truth in relation to human rights violations is not only an individual right. It is also a collective right, serving to preserve memory at the level of society and acting as a safeguard against the recurrence of violations. See *General Comment on the Right to the Truth in Relation to Enforced Disappearance, Report of the Working Group on Enforced or Involuntary Disappearances (2010)*, Document A/HRC/16/48, Preamble. In the post-conflict context of Kosovo, investigations of enforced disappearances contributed – and continue to contribute – to promoting truth, to the collective memory of such human rights violations, and to ensuring their non-recurrence. See, for example, *Dragiša Kostić against EULEX*, Case no. 2016-10, Decision and Findings of 13 February 2020, para. 74 and references there; *Milijana Avramović against EULEX*, Case no. 2016-17, Decision and Findings of 4 June 2020, para. 59.

66. Asked by the Panel why the Mission did not seek to contact relatives of the disappeared, the Mission responded that it could not reasonably have contacted the relatives in all of the approximately 5,000 ‘missing persons cases’, and that, therefore, it did not seek to contact the relatives in this case.

67. The Panel considers this explanation to be unsatisfactory. Even if the Mission’s decision not to investigate had been acceptable, that did not qualify or limit its obligation to keep relatives informed as they reflect two separate obligations arising from the same right(s). Instead, the absence of information on the part of the Mission might have continued to feed the family’s hope that the matter would eventually be brought to justice, as they were entitled to expect.

68. The obligation outlined above is not optional and is important. The efforts deployed by the Mission to meet it – or, rather, the lack thereof – do not reflect the importance of the interests that were at stake. The Mission’s failure would have further contributed to leaving the complainant in a state of uncertainty, causing him additional emotional distress.

69. Based on the above, the Panel finds that the Mission has failed to fulfil its obligation to inform the complainant as it was required to do and, in so doing, violated his fundamental rights as guaranteed under Articles 2 (procedural limb) and 3 of the European Convention of Human Rights.

70. In light of the Panel's findings in relation to Articles 2 and 3 of the Convention, it is not strictly necessary for the Panel to make specific findings regarding the rights guaranteed under Article 8 of the Convention. However, the Panel wishes to highlight the fact that one of the most serious consequences of the violation of the complainant's rights pertain to his family life. For two decades now, he has been living without his father, and without his emotional and financial support, compounded by the painful uncertainty of his fate. His right to respect for his family life has therefore clearly been affected by the situation.

Right to a remedy

71. This case reflects a much broader reality and a larger institutional problem, which the Panel has observed in this and other cases that have come before it.

72. The record of these proceedings suggests that many and perhaps most cases of enforced disappearance dating back to the Kosovo conflict and its aftermath have been left un-investigated and un-resolved. They first came under the responsiblity of the United Nations; Then of EULEX Kosovo; And now local, Kosovo, authorities. Despite the involvement of multiple authorities over the course of two decades, most of those cases have remained un-investigated or in a state of limbo. As a result, victims have had little justice and truth, and little visibility over what was being done by those with a responsibility to act to protect and guarantee their rights.

73. At every stage, victims would have been entitled to believe, expect and hope that the new authorities would do better than the previous one. They must have been greatly disappointed that their hopes did not materialise. Most cases of enforced disappearance remain, incredibly and unforgivably, un-investigated two decades on. Literally hundreds of them passed through the hands and responsibility of EULEX Kosovo without their being investigated.

74. When asked about the current state of some of the cases – including the present one – that spent 10 years under EULEX responsibility, the Mission now refers to the Kosovo authorities as being exclusively responsible for those. Human rights are not, however, a bucket that authorities should pass from one to another. EULEX Kosovo had, for a decade, the responsibility to investigate these cases – including this one – and it failed to do so. Handing over its executive functions and responsibilities in the criminal justice sector to the local authorities does not set aside its responsibility for the human rights violations it committed in the past. It must now repair the consequences of its own actions and decisions.

75. In that light, the Panel considers that the Mission has violated and is currently violating another right of the complainant, namely, his right to an effective remedy as guaranteed, *inter alia*, by Article 13 of the European Convention of Human Rights, Article 8 of the Universal Declaration of Human Rights, and Article 2(3) of the International Covenant on Civil and Political Rights. See also *Kudla v. Poland*, Application no. 30120/96, Judgment, 26 October 2000, in particular, para. 152.

76. The Panel invites the Head of Mission to give careful consideration to the consequences of these findings and what measures should be put in place to provide an effective remedy for the violation of the complainant's rights. The fact that the complainant's rights have been violated for two decades, one of which under the responsibility of EULEX Mission, should justify that the steps taken should be such as to reflect the gravity and duration of these violations as well as the need for effectiveness in remedying those. See, generally, *Church of Jesus Christ of Latter-Day Saints v. the United Kingdom*, Application no. 7552/09, ECtHR Judgment, 4 March 2014, in particular, para. 41; *Husayn (Abu Zubaydah) v. Poland*, Application no. 7511/13, ECtHR Judgment, 24 July 2014, para 540;

Kaya v. Turkey, Application no. 158/1996/777/978, ECtHR Judgment, 19 February 1998, para. 106; *Mahmut Kaya v. Turkey*, Application no. 22535/93, ECtHR Judgment, 28 March 2000, in particular, para. 124.

Miscellaneous

77. At some point in the second half of 2018, the case file pertaining to Mr Brakus was handed over to the competent Kosovo institutions. The Mission notes that it retains an executive capacity to support the Kosovo Institute of Forensic Medicine, and that it stands ready to support Kosovo institutions in any efforts to find Mr Brakus, and any other missing persons. In addition, the Mission states that, while it cannot advise Kosovo institutions on individual cases, it does provide recommendations addressing systemic issues, and it is supporting the administration of criminal investigations, as well as providing relevant training to Kosovo Police.

78. There is no indication of an investigation having been started by the local authorities into the present case. There is no impediment to the Mission making inquiries about this and other similar cases with local authorities. Nor is the Mission in any way prevented from inquiring about the 'fate' of cases it was required and failed to investigate for the purpose of ensuring that it now provides for an effective remedy for the resulting violations of rights.

79. The Panel therefore invites the Mission of making use of all its powers and competence to ensure that the cases it failed to address during its previous incarnations are last and finally investigated or, if they are not, that the Mission should take effective steps to seek to address or denounce the matter. In light of its ongoing human rights obligations, mere silence and passivity will not provide an effective remedy.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS that the Mission has violated the fundamental rights of the complainant as guaranteed under Articles 2 (procedural limb), 3, and 13 of the European Convention of Human Rights;

FINDS FURTHER that the violations are serious and ongoing and that they, therefore, call for the adoption of remedial measures commensurate to those;

FINDS IT UNNECESSARY to make findings under Article 8 of the Convention;

INVITES THE HEAD OF MISSION, in particular, to give consideration to the following:

i. Acknowledge the violation of the complaint's rights by the Mission;

ii. Provide a copy of the present decision to
   a) relevant organs of the Mission,
   b) relevant political authorities in Brussels and to
   c) the local authorities competent to investigate this case;

iii. Order that this case be monitored by the competent organs of the Mission;

iv. Query with the competent local authorities what steps, if any, have been taken to investigate this case and what future steps are being planned;

v. Reach out to the complainant with a view to finding a way to remedy the violation of her rights.

vi. Inform the Panel of any other measure considered relevant and necessary by the Mission to fulfil its responsibility to remedy violations of human rights attributed thereto.

THE PANEL RESPECTFULLY ASKS THE MISSION to report upon the implementation of these recommendations and to respond to its enquiries at its earliest convenience and no later than 28 February 2021.

For the Panel,

Guénaël METTRAUX
Presiding Member

Petko PETKOV
Member

Anna AUTIO
Member