



**DECISION ON
THE IMPLEMENTATION OF THE PANEL'S RECOMMENDATIONS**

Date of adoption: 12 February 2021

Case no. 2016-13

Miomir Krivokapić

Against

EULEX

The Human Rights Review Panel (hereinafter “the Panel”), sitting on 12 February 2021 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. SUMMARY OF FACTS

1. The case pertains to the ‘enforced disappearance’ of a close relative of the complainant. It was established by the Panel that the European Union Rule of Law Mission, EULEX Kosovo (hereinafter “the Mission”) failed to investigate the circumstances of this disappearance, as it was required to do, and failed to keep close family members informed of the course of such an investigation. This resulted in and contributed to the violation of the fundamental rights of the complainant as protected, *inter alia*, under Article 2 (right to life) (procedural limb) and Article 3 (right not to be subject to torture,

inhuman or degrading treatment or punishment) of the European Convention of Human Rights (hereinafter “the European Convention” or “the Convention”).

II. PROCEEDINGS BEFORE THE PANEL

2. The complaint in this case was registered on 30 June 2016.
3. By letter of 1 July 2016, the Panel informed the Mission that this case had been registered with the Panel.
4. On 28 June 2017, the Panel requested this and other complainants to provide additional information regarding their complaints. The complainant initially responded through the representative for Serb families of the Missing Persons Resource Center (MPRC), an NGO based in Pristina, that he had no further information in relation to this case.
5. On 20 September and 17 October 2017, the Panel sent two further requests for additional information via the representative of the MPRC.
6. On 20 October 2017, the Panel received a response through the representative of the MPRC providing additional information in relation to the present case.
7. On 8 December 2017, the Panel transmitted a Statement of Facts and Questions to the Head of Mission (HoM), EULEX Kosovo, inviting the Mission to submit answers and written observations on the complaints no later than 26 January 2018.
8. By letter of 17 January 2019, the Mission was requested again to provide answers to the questions by 16 February 2019.
9. By letter of 8 April 2019, the Mission was requested to indicate when it would be able to provide answers to the questions, and once again was urged to respond as soon as possible.
10. The observations of the HoM were eventually received on 26 June 2019.
11. By letter of 24 July 2019, the observations of the HoM were communicated to the complainant and he was invited to reply to the Mission’s submissions if he wished to do so. No further submissions were received from the complainant.
12. On 11 September 2019, the Panel declared the complaint admissible in relation to Articles 2, 3, 8 and 13 of the European Convention (<https://hrrp.eu/docs/decisions/2019-09-11%20Admissibility%20Decision%202016-13%20signed.pdf>).
13. On 9 October 2019, the Mission requested an extension of the deadline to submit its responses to the Panel’s questions. The Mission was granted an extension of the deadline until 11 December 2019.
14. On 6 December 2019, the Mission submitted its responses to the Panel’s questions.

15. On 12 February 2020, the Panel rendered its 'Decision and Findings', finding the Mission responsible for the violation of the complainant's fundamental rights under Article 2 (procedural limb) and 3 of the European Convention. In that light, the Panel did not find it necessary to make determinations regarding possible violations by the Mission of Articles 8 and 13 of the Convention. On that basis, the Panel made the following recommendations:

RECOMMENDS the following:

- i. Considering the gravity of the violations under consideration, the Panel invites the Head of Mission to carefully consider the possibility and the need for the Mission to acknowledge the violation of the complainant's rights committed by the Mission;
- ii. The Panel invites the Mission to ensure that the case-file pertaining to this case and the present Decision are sent to the competent local authorities;
- iii. The Panel recommends that this case should be subject to monitoring by the Mission;
- iv. The Panel recommends that, as it did in Case 2017-02, the Mission should consider making recommendations to the authorities regarding possible future investigative courses that could help resolve this case; in that context, the Panel recommends that the Mission should emphasise to the authorities the importance of the victims' rights to the truth, the fact that the violation is ongoing, and to indicate that it welcomes information on the general course of the investigation;
- v. The Panel recommends that the Mission should report to the competent authorities in Brussels if it becomes apparent that local authorities are not fulfilling their obligations in that regard;
- vi. The Mission should take active steps to inquire with the authorities what steps, if any, are being taken to investigate this case and to report to the competent authorities of the European Union in Brussels if it becomes apparent that the authorities are not fulfilling their obligations in that regard;
- vii. The Panel recommends that the present decision should be provided to the relevant organs of the Mission; and
- viii. The Panel also recommends that the Head of Mission should ensure that the monitoring activities of the Mission should be conducted in a manner consistent with the Mission's human rights obligations and that it ensures that this part of its mandate contributes to the effective protection and promotion of those rights.

IN ADDITION, in light of the Mission's submissions of 6 December 2019 in which the Mission indicated that not all cases could be investigated and that decisions on prioritisation had to be made, **THE PANEL ASKS THE MISSION TO PROVIDE THE FOLLOWING INFORMATION:**

- i. How many cases of enforced disappearance were received by the Mission from UNMIK?
- ii. How many of these have been investigated by the Mission over the course of its mandate?
- iii. How many of these resulted in criminal proceedings?
- iv. How many 'war crimes' cases were received by the Mission from UNMIK?
- v. How many of these were investigated by the Mission in the course of its mandate?
- vi. How many of these resulted in criminal proceedings?

- vii. What were the factors taken into consideration when making decisions on prioritisation of cases? Who made that decision? Has this been documented in any way? If so, please provide documentary evidence.
16. The Panel asked the Head of Mission to report upon the implementation of these recommendations and to respond to its enquiries at its earliest convenience and no later than 15 April 2020. Those submissions were received on 22 December 2020. Their substance is discussed below.

III. PRELIMINARY CONSIDERATIONS: THE VALUE AND IMPORTANCE OF THE AUTHORITY OF THE PANEL TO FOLLOW-UP ON ITS RECOMMENDATIONS

17. The present Decision is a Follow-up Decision adopted by the Panel in accordance with Rule 45*bis* of its Rules of Procedure.
18. The authority of the Panel to follow-up on its recommendations is undisputed. It is in accordance with its Rules and this procedural possibility is well established in the practice and jurisprudence of the Panel. See Annex A of the present decision listing cases in which follow-up decisions have been issued.
19. The procedural possibility for the Panel to follow up on its Recommendations is particularly important in light of limitations placed on its powers and authority. In particular, the Panel's decisions come in the form of non-binding recommendations. See, e.g., *Thomas Rüsche against EULEX*, Case No. 2013-21, Decision on the Implementation of the Panel's Recommendations, 13 June 2017, para. 7. See also HRRP, *Case-Law Note On Remedies For Human Rights Violations* (<https://hrrp.eu/docs/Case%20law%20note%20on%20REMEDIES%20FOR%20HR%20VIOLATIONS.pdf>). The non-binding nature of the Panel's recommendations means that, to be effective, the mechanism of accountability of which the Panel forms a part depends largely on the Mission's compliance with the Panel's recommendations.
20. Furthermore, the mandate of the Panel does not allow it to make recommendations for financial reparation even where they might have otherwise provided an adequate remedy for a violation of human rights by the Mission. See, e.g., *Zahiti against EULEX*, Case no. 2012-14, Decision on the Implementation of the Panel's Recommendations, 11 November 2014, para. 16; *X and 115 other complainants against EULEX*, Case no. 2011-20, Fourth Decision on the Implementation of the Recommendations of the Human Rights Review Panel, 11 December 2019, Operative Part; Annual Report 2016 of the HRRP, pages 2 and 48-50; and, again, HRRP, *Case-Law Note On Remedies For Human Rights Violations* (<https://hrrp.eu/docs/Case%20law%20note%20on%20REMEDIES%20FOR%20HR%20VIOLATIONS.pdf>). Whilst this has not prevented the Mission, *proprio motu*, to offer financial compensation to a victim of rights violation in a limited number of cases (see, e.g., *Zahiti against EULEX*, 2012-14, 11 November 2014, paras. 7, 11- 12 and 24-26), the inability of the Panel to recommend this sort of remedy or, more effectively still, to order financial compensation where appropriate, has limited the Panel's accountability powers quite significantly. The absence of possibility for the Panel to recommend

financial reparation even where it would have been appropriate means that the Panel might have to recommend steps and measures which do not provide a full or entirely adequate sort of remedy for a violation of rights which it has established. This highlights yet further the need for the Mission to pay close attention to those remedial recommendations being made by the Panel and, to the greatest extent possible, to implement those.

21. Without a full and effective commitment to upholding human rights standards by the Mission, the Panel's recommendations might create little more than the *appearance* of accountability on the part of the Mission. It is therefore essential for the Mission to demonstrate its *actual* commitment to those standards by implementing to the greatest possible extent the Panel's recommendations. The Panel issues follow-up decisions in cases where the Mission is found to have violated a complainant's human rights, as is the case here, as a means to ensure actual and effective accountability by the Mission for such violations. Considering how limited the powers of the Panel are, a failure by the Head of Mission to implement the substance of its recommendations would render the entire mechanism of accountability ineffective and illusory from the point of view of complainants.

IV. FOLLOW-UP ON PANEL RECOMMENDATIONS

22. As a preliminary matter, the Panel would note and reiterate that the violations attributed by the Panel to the Mission are of an extremely serious nature. They pertain to some of the most important fundamental rights guaranteed to an individual. Furthermore, the violation attributed to the Mission lasted for a long and significant period of time. It showed a grave dereliction of its duties and obligations in relation to the victim. In those circumstances, the Panel expect the Mission to take effective steps to ensure that this violation is adequately and fully repaired. Based on what follows, however, it is apparent to the Panel that the Mission's response has fallen far short of that expectation.
23. Each of the Panel's recommendation and the Mission's response thereto will be considered in turn.
24. The first Panel recommendation was to the following effect:

'Considering the gravity of the violations under consideration, the Panel invites the Head of Mission to carefully consider the possibility and the need for the Mission to acknowledge the violation of the complainant's rights committed by the Mission;'

25. In place of an acknowledgment of the Mission's responsibility for these violations, the Head of Mission expressed

'deep regret that the Mission was unable to investigate the disappearance of Arsenije Krivokapic'.

As has been indicated by the Panel in earlier cases, an expression of regrets is not the same as an acknowledgment of responsibility when it comes to remedying rights

violations. The Panel regrets that, once again, the Mission through its Head would decline to acknowledge its responsibility for the violation of the complainant's rights.

26. The Panel's second recommendation was:

'The Panel invites the Mission to ensure that the case-file pertaining to this case and the present Decision are sent to the competent local authorities;'

27. The Head of Mission indicated that all files and case-files in possession of the Mission have now been handed over to local authorities. The Panel is therefore satisfied that its second recommendation was implemented in full.

28. The Panel's third recommendation was:

'The Panel recommends that this case should be subject to monitoring by the Mission;'

29. In response to that recommendation, the Head of Mission provided a lengthy rendition of what he understands to be the scope and nature of the Mission's current mandate. In particular, the Head of Mission suggested that the Mission's current 'monitoring' mandate did not include any competence to advise or make recommendations regarding cases. The Head of Mission also suggested that 'EULEX can support the competent authorities by providing recommendations addressing structural issues and can perform additional tasks upon request'. He added that should the authorities commence an investigation into the case of Mr Krivokapić, the Mission will monitor it.

30. The Panel is not convinced that the above explanation provides a full and accurate picture of the Mission's responsibilities. First, having been found in violation of the Complainant's fundamental rights, the Mission can now be expected to remedy those violations. This requires effective steps being taken by the Mission, and the change in the Mission's mandate does not change the nature of the Mission's obligation to provide an effective remedy. Second, the Mission is still bound by an obligation to act in accordance with basic human rights standards. This requires that its current mandate be interpreted in light of those obligations. The views submitted above by the Mission do not appear to factor in those two considerations.

31. It is also apparent that if the Mission sits idle in the hope of local authorities taking on what used to be the Mission's responsibilities, the likelihood that this might never happen is real. This is apparent from the fact already that many and perhaps all of the cases of enforced disappearance that have come to the Panel and which were found not to have been investigated effectively by the Mission do not appear to be investigated by the local authorities either. The Mission, aware of this situation, cannot, therefore, in good faith claim to be expecting this to take place unless steps are taken to see to it that this is the case.

32. The Panel notes, furthermore, several public statements by officials of the Mission, including the Head of Mission, to the effect that the Mission remains deeply concerned by the issue of disappeared persons. If that is indeed the case, and the Panel wishes to assume that it is, the Mission must do more than passively sit by and wait for local

authorities to act, while the Mission itself failed to fulfill its own obligations for a decade or so.

33. The Panel therefore understands that the Mission's 'monitoring' role is also one that involves monitoring what cases or types of cases are not subject to investigation by local authorities where they are expected and legally required to do so. Any other interpretation of the Mission's mandate would mean that the Mission could be seen as complicit to the failure by the authorities to meet their human rights obligations. Such a situation, if it were to occur, would be inconsistent with the Mission's commitment to and binding human rights obligations. It would also be fully inconsistent with the principles of rule of law, which the Mission has the mandate to promote in Kosovo.

34. The Panel's fourth recommendation was:

'The Panel recommends that, as it did in Case 2017-02, the Mission should consider making recommendations to the authorities regarding possible future investigative courses that could help resolve this case; in that context, the Panel recommends that the Mission should emphasise to the authorities the importance of the victims' rights to the truth, the fact that the violation is ongoing, and to indicate that it welcomes information on the general course of the investigation;'

35. What has been said above in paragraphs 29-33 applies here. The Panel is not satisfied by the explanation given by the Head of Mission to refrain from taking any active step to ensure that the present matter should be investigated.

36. The Panel's fifth recommendation was:

'The Panel recommends that the mission should report to the competent authorities in Brussels if it becomes apparent that local authorities are not fulfilling their obligations in that regard;'

37. Once again, what has been said above in paragraphs 29-33 applies here. If local authorities do not meet their human rights obligations, the Mission cannot be permitted to act as if it were not aware of that fact, or that if it is aware, that it has no ability to play a role in addressing the situation. The Panel has rendered many decisions which should have caused concern to the Mission about what appears to be the systemic failure by local authorities to investigate cases involving allegations of enforced disappearance linked to the conflict.

38. In light of this, it would be incompatible with the Mission's human rights obligations to fail to act on that knowledge. Insofar as he feels that the Mission does not have the necessary mandate to act upon this matter, the Head of Mission should raise the issue with competent EU authorities with a view to ensure that such authority is duly granted or that EU authorities should take direct steps to address and raise this with local Kosovo authorities; and that the matter be duly mentioned in the reports the Mission drafts yearly addressing the current rule of law situation in the country.

39. The Panel's sixth recommendation was:

‘The Mission should take active steps to inquire with the authorities what steps, if any, are being taken to investigate this case and to report to the competent authorities of the European Union in Brussels if it becomes apparent that the authorities are not fulfilling their obligations in that regard;’

40. As discussed above, instead of taking the recommended steps, the Mission sought to explain its inability to act based on its narrow interpretation of its mandate and obligations. For the reasons outlined above, the Panel is not satisfied with that explanation and invites the Head of Mission once again to consider the matter.

41. The Panel’s seventh recommendation was:

‘The Panel recommends that the present decision should be provided to the relevant organs of the Mission;’

42. In response, the Head of Mission indicated that it was immediately circulated to all relevant units of the Mission and said that ‘relevant European Union authorities in Brussels are also routinely informed about all the decisions of the Panel and they are also receiving its Annual Report’. The Panel’s Decision was also transmitted to competent authorities and more specifically the Kosovo Police and the SPRK. Upon their request, EULEX also provided the SPRK with the relevant police case number with a view to enable such authorities to locate the case and relevant documentation’.

43. The Panel is satisfied that the Mission has implemented its seventh recommendation in full.

44. The Panel’s eighth recommendation was:

‘The Panel also recommends that the Head of Mission should ensure that the monitoring activities of the Mission should be conducted in a manner consistent with the Mission’s human rights obligations and that it ensures that this part of its mandate contributes to the effective protection and promotion of those rights.’

45. The Head of Mission did not address this recommendation. For reasons outlined above, the Panel is concerned that the current interpretation by the Mission as to its mandate might not be consistent with the Mission’s human rights obligations. It appears, instead, that its failure to voice its concern with the failure of local authorities to investigate certain categories of cases – including the present one – could create the false impression that those authorities are acting in compliance with their own obligations. To the extent that the Mission’s monitoring mandate is intended to give EU authorities and states an accurate picture of the situation in Kosovo as far as rule of law efforts are concerned, that picture would be entirely incomplete and distorted by the Mission’s narrow interpretation of its responsibilities.

46. In addition, in its Decision, the Panel said this:

IN ADDITION, in light of the Mission's submissions of 6 December 2019 in which the Mission indicated that not all cases could be investigated and that decisions on prioritisation had to be made, **THE PANEL ASKS THE MISSION TO PROVIDE THE FOLLOWING INFORMATION:**

- i. How many cases of enforced disappearance were received by the Mission from UNMIK?
- ii. How many of these have been investigated by the Mission over the course of its mandate?
- iii. How many of these resulted in criminal proceedings?
- iv. How many 'war crimes' cases were received by the Mission from UNMIK?
- v. How many of these were investigated by the Mission in the course of its mandate?
- vi. How many of these resulted in criminal proceedings?
- vii. What were the factors taken into consideration when making decisions on prioritisation of cases? Who made that decision? Has this been documented in any way? If so, please provide documentary evidence.

47. The Head of Mission's letter contains no response, no acknowledgment and no information in relation to the above. This failure to address the Panel's enquiries could create the appearance that the Head of Mission has not given consideration or due weight to the Panel's request on that point despite the expectation that the Mission would cooperate with the Panel in the fulfilment of its mandate. The Panel therefore reiterates those requests and respectfully asks the Head of Mission to provide a detailed response thereto.

FOR THESE REASONS, THE PANEL UNANIMOUSLY

FINDS that the Head of Mission has failed to implement in full the Panel's Recommendations;

MUST REQUEST that the Head of Mission should once again consider the Panel's Recommendations that have not been complied with in full in light of the gravity of the violations committed by the Mission in this case, in particular, these:

- The Panel's first recommendation;
- The Panel's third recommendation;
- The Panel's fourth recommendation;
- The Panel's fifth recommendation;
- The Panel's sixth recommendation;
- The Panel's eighth recommendation;

And, in that light, **INVITES THE HEAD OF MISSION** to adopt measures in response to the Panel's recommendations that truly reflect the depth of the Mission's commitment to upholding human rights standards and to repair the harm caused to the Complainant in this case;

IN ADDITION, in light of the Mission's submissions of 6 December 2019 in which the Mission indicated that not all cases could be investigated and that decisions on prioritisation had to be

made, **THE PANEL REITERATES ITS REQUEST FOR THE MISSION TO PROVIDE THE FOLLOWING INFORMATION:**

- i. How many cases of enforced disappearance were received by the Mission from UNMIK?
- ii. How many of these have been investigated by the Mission over the course of its mandate?
- iii. How many of these resulted in criminal proceedings?
- iv. How many 'war crimes' cases were received by the Mission from UNMIK?
- v. How many of these were investigated by the Mission in the course of its mandate?
- vi. How many of these resulted in criminal proceedings?
- vii. What were the factors taken into consideration when making decisions on prioritisation of cases? Who made that decision? Has this been documented in any way? If so, please provide documentary evidence.

RECOMMENDS FURTHER that the present Decision be circulated to all relevant organs of the Mission and to relevant European Union organs and officials in Brussels;

REMAINS SEIZED of the present matter;

INVITES THE HEAD OF MISSION to inform the Panel of its response to the present Decision at the earliest possible time and no later than 21 May 2021.

For the Panel:

Guénaël METTRAUX
Presiding Member

Anna BEDNAREK
Member

Anna AUTIO
Member

ANNEX A: TABLE OF VIOLATIONS WITH FOLLOW-UP DECISIONS – December 2020

	Case	Admissibility	Findings	Follow up	Second	Third & More	Status
1	2010-01	8 APR 2011	8 APR 2011	23 NOV 2011			Closed
2	2010-07	8 JUN 2011	8 JUN 2011	23 NOV 2011			Closed
3	2011-07	5 OCT 2012	10 APR 2013	26 NOV 2013	26 AUG 2014		Closed
4	2011-20	5 OCT 2012	22 APR 2015	11 NOV 2015	10 JAN 2017	27 MAR 2019; 11 DEC 2019	Pending
5	2011-27	13 JUN 2017	5 DEC 2017	19 JUN 2019			Closed
6	2012-09 et al	10 APR 2013	20 JUN 2013	5 FEB 2014			Closed
7	2012-14	7 JUN 2013	4 FEB 2014	11 NOV 2014			Closed
8	2012-19 & 20	see 2012-09	30 SEP 2013	27 MAY 2014			Closed
9	2012-22	---	11 NOV 2015	29 FEB 2016			Closed
10	2013-03	1 JUL 2014	12 NOV 2014	11 NOV 2015			Closed
11	2013-21	11 JAN 2017	11 JAN 2017	13 JUN 2017			Closed
12	2014-11 et al	30 SEP 2015	19 OCT 2016	7 MAR 2017			Closed
13	2014-18	12 NOV 2015	12 NOV 2015	11 JAN 2017			Closed
14	2014-32	11 NOV 2015	11 NOV 2015	19 OCT 2016	7 MAR 2017		Closed
15	2014-34	29 SEP 2015	19 OCT 2016	7 MAR 2017			Closed
16	2014-37	19 OCT 2016	19 OCT 2016	10 JAN 2017			Closed
17	2016-09	19 JUN 2019	11 DEC 2019				Pending
18	2016-10	19 JUN 2019	13 FEB 2020				Pending
19	2016-11	11 SEP 2019	11 DEC 2020				Pending
20	2016-12	11 SEP 2019	12 FEB 2020				Pending
21	2016-13	11 SEP 2019	12 FEB 2020				Pending
22	2016-14	19 JUN 2019	11 DEC 2019				Pending
23	2016-17	11 DEC 2019	4 JUN 2020	11 DEC 2020			Pending
24	2016-23	4 JUN 2020	11 DEC 2020				Pending
25	2016-24	11 DEC 2020	11 DEC 2020				Pending
26	2016-28	28 MAR 2019	11 SEP 2019	11 DEC 2020			Pending
27	2017-02	27 MAR 2019	19 JUN 2019	11 DEC 2019			Pending
28	2019-01	4 JUN 2020	11 DEC 2020				Pending