



DECISION and FINDINGS

Date of adoption: 19 October 2016

Case No. 2014-34

Rejhane Sadiku-Syla

Against

EULEX

The Human Rights Review Panel sitting on 19 October 2016 with the following members present:

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

Assisted by
Mr John J. RYAN, Senior Legal Officer

Having considered the aforementioned complaint, introduced pursuant to Council Joint Action 2008/124/CFSP of 4 February 2008, the EULEX Accountability Concept of 29 October 2009 on the establishment of the Human Rights Review Panel and the Rules of Procedure of the Panel as last amended on 15 January 2013,

Having deliberated, decides as follows:

PROCEDURE

1. The Presiding Member of the Panel, Ms Magda Mierzewska, participated in the deliberations of this case by way of electronic communications in accordance with Article 13(3) of the Panel's Rules of Procedure.
2. The complaint was registered by Kushtrim Istrefi, lawyer, legal representative of Rejhane Sadiku-Syla on 4 July 2014.
3. On 27 August 2014, the Panel decided to give notice of the complaint to the Head of Mission (HoM) of EULEX Kosovo, inviting him to submit written observations on the complaint.

4. The observations of the HoM were received on 12 November 2014 after which they were communicated to the complainant for her additional observations.
5. On 1 December 2014, the complainant submitted her observations which were then transmitted to the HoM for information.
6. On 29 September 2015, the Panel declared the complaint admissible. The Panel found that it raised serious issues of fact and law under Articles 2 (right to life), 3 (freedom from torture, inhuman or degrading treatment), 8 (respect for private life) and 13 (right to an effective remedy) of the European Convention on Human Rights (“the Convention”), the determination of which required an examination of the merits of the complaint. The Panel invited the parties to submit any additional observations they may have had on the merits of the case.
7. Observations from the Head of Mission and the complainant were received on 2 March 2016 and 11 April 2016 respectively.

FACTS

I. CIRCUMSTANCES OF THE CASE

8. On 7 December 2000, Mr Syle Sadiku, the father of the complainant, disappeared from his house in the northern part of Mitrovica where he was attacked by a group of armed persons said to have been of Serbian ethnicity. The attack was witnessed by the complainant's sister who managed to escape and who was later evacuated by French KFOR troops. Since that date, the complainant has had no information about the whereabouts and fate of her father.
9. Between 8 December 2000 and 17 February 2001, French KFOR troops and UNMIK police took a number of witness statements from three unspecified family members of the disappeared. An aerial search of the area was also ordered. Those investigative steps were unsuccessful and Mr Sadiku or his remains have not been found. The case remained open but inactive.
10. In December 2008, the UNMIK database, their files and archives were transferred to the EULEX Department for Forensic Medicine (DFM). The case file concerning the disappearance of the father of the complainant includes the French KFOR attendance report from the scene of the incident and UNMIK police incident report including three witness statements.

It would appear, however, that the file of the criminal investigation was not handed over to EULEX Prosecutors by UNMIK. There is no

information available concerning the case in the EULEX Prosecutors' database.

11. On 6 December 2013, the complainant submitted a letter to the EULEX HoM asking for information on the circumstances of the disappearance of her father and inquiring about any investigative or prosecutorial steps taken in this case.
12. On 20 December 2013, the complainant received a reply from the EULEX Office of the Chief of Staff. It stated that the EULEX DFM had confirmed that the remains of the father of the complainant were unaccounted for. Therefore, the case remained active and open in DFM. However, the letter did not address the complainant's inquiries regarding investigative or prosecutorial steps taken in this case.
13. On 5 February 2014, the complainant sent a second letter to the HoM seeking clarification in respect of the obligation of EULEX prosecutors to conduct an effective criminal investigation into the case and submitting further questions regarding various procedural aspects of the investigation.
14. On 14 February 2014, the Office of the Chief of Staff sent a reply to the effect that he could only reiterate the information provided in his letter of 20 December 2013.
15. On 26 March 2014, the complainant submitted a further letter, this time to EULEX Prosecutors of the Special Prosecution Office of the Republic of Kosovo (SPRK), formally requesting an investigation into the circumstances of the disappearance of her father.
16. On 3 April 2014, the complainant received a reply from the Head of SPRK stating that their database did not contain any information in relation to the case. He recommended that the complainant should contact the EULEX Mobile Team or the Basic Prosecution Office in Mitrovica to determine if they had information about the case.
17. On 22 April 2014, the complainant submitted a request to the EULEX Mobile Team of prosecutors with a request to investigate the disappearance of her father.
18. On 13 June 2014, the EULEX Mobile Team of Prosecutors informed the complainant that the "*EULEX Prosecution Office in Mitrovica database does neither contain any information on the case nor information about actions that might have been carried over in this case*". The Mobile Team also indicated that the matter did not fall within the scope of competence of the EULEX Prosecution Office as it related to a criminal matter which should be reported to the Basic Prosecution Office in Mitrovica, to which they had referred the case.

II. RELEVANT APPLICABLE LAW

COUNCIL JOINT ACTION 2008/124/CFSP of 4 February 2008 on the European Union Rule of Law Mission in Kosovo, EULEX KOSOVO

Article 2 Mission Statement

EULEX KOSOVO shall assist the Kosovo institutions, judicial authorities and law enforcement agencies in their progress towards sustainability and accountability and in further developing and strengthening an independent multi-ethnic justice system and multi-ethnic police and customs service, ensuring that these institutions are free from political interference and adhering to internationally recognised standards and European best practices.

Article 3 Tasks

In order to fulfil the Mission Statement set out in Article 2, EULEX KOSOVO shall:

(...)

(h) assume other responsibilities, independently or in support of the competent Kosovo authorities, to ensure the maintenance and promotion of the rule of law, public order and security, in consultation with the relevant Council agencies; and

Law No. 03/L-053 on the Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (as applicable until 30 May 2014)

Article 3 Jurisdiction and competences of EULEX judges for criminal proceedings

(...)

3.3. Before the commencement of the relevant stage of the proceeding, upon petition of the EULEX Prosecutor assigned to the case or working in the mixed team identified in Articles 9 and 10 of this law, or upon petition of any of the parties to the proceeding, or upon a written request of the President of the competent court or of the General Session 5 of the Supreme Court of Kosovo where the provisions related to the disqualification of a judge or lay judge foreseen by the PCPCK (Article 40-44 of the PCPCK) are not applicable, the President of the Assembly of EULEX Judges will have the authority, for any reason when this is considered necessary to ensure the proper administration of justice, to assign EULEX judges to the respective stage of a criminal proceeding, according to the modalities on case selection and case allocation developed by the Assembly of the EULEX Judges and in compliance with this law, for

the following crimes, when the investigation or prosecution is not conducted by the SPRK:

(...)

h) violating equal status of residents of Kosovo (Art. 158, PCCK)

Article 12 Authority of EULEX prosecutors in case of unwillingness or inability of Kosovo Public Prosecutors

12.1. At any stage of any criminal proceeding, if a Kosovo Public Prosecutor is unwilling or unable to perform his or her duties and this unwillingness or inability might endanger the proper investigation or prosecution of a criminal offence, or whenever there is a grounded suspicion of attempts made to influence the investigation or prosecution of a criminal offence, the Chief EULEX Prosecutor will have the authority to request the Chief Prosecutor of the competent office to assign the case a) to another Kosovo Public Prosecutor working within the same prosecution office, b) or to any EULEX prosecutor who will take the responsibility over the relevant investigation or prosecution.

12.2. If the Chief Prosecutor of the competent office rejects the request of the Chief EULEX Prosecutor, the Chief EULEX Prosecutor will inform the Chief Public Prosecutor of Kosovo and they will find a joint decision which will be respected by the Chief Prosecutor of the competent office.

12.3. In urgent situations, or when the delay might affect the conduct or the result of the investigation, prosecution or the fairness of the proceeding, the Chief EULEX prosecutor will be entitled to undertake any urgent procedural activity or to assign any EULEX prosecutor or Kosovo Public Prosecutor to the case for such purpose.

Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo

Article 3 Amending and Supplementing the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (as applicable as of 31 May 2014)

.....

3. After Article 1 of the basic Law, a new article 1.A is added with the following text:

Article 1.A Ongoing cases

For purpose of this law an ongoing case means:

1. Cases for which the decision to initiate investigations has been filed before 15 April 2014 by EULEX prosecutors in accordance with the law;
2. Cases that are assigned to EULEX judges before 15 April 2014.

.....

9. Article 7 of the basic Law is reworded as following:

Article 7 General authority and competences of EULEX prosecutors

7.1. EULEX prosecutors will have the authority and responsibility to perform their functions, including the authority to conduct criminal investigations as stipulated in Article 2.1 of this Law, unless foreseen different by this Law.

7.2. The EULEX prosecutors will be competent to investigate and prosecute the crimes that fall under the competence of the SPRK in accordance with the law on SPRK.

7.3. EULEX prosecutors are integrated into Kosovo Prosecutorial system and will discharge their functions in compliance with the applicable legislation in Kosovo.

7.4. Cases conducted by EULEX prosecutors as stipulated in Article 2.1 of this Law will continue to be managed in accordance with relevant provisions of the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation of EULEX Judges and Prosecutors in Kosovo (2008) and Law on SPRK (2008).

7.5. EULEX KOSOVO will appoint prosecutors to assist in the implementation, according to the agreement, of the EU-facilitated Dialogue between Kosovo and Serbia.

7.6. In carrying out their functions, EULEX prosecutors will closely consult and coordinate their activities with the Chief Prosecutor in charge of the office, where they are assigned.

....

10. After Article 7 of the basic Law, two new Articles 7.A and 7.B are added with the following text:

Article 7.A Authority of EULEX prosecutors in extraordinary circumstances

In extraordinary circumstances a case will be assigned to a EULEX prosecutor by a joint decision of the Chief State Prosecutor and EULEX KOSOVO competent authority.

Law No. 03/L-052 on Special Prosecution Office of the Republic of Kosovo

Article 5 Exclusive competence of the SPRK

5.1 The SPRK will have exclusive competence to investigate and prosecute the following crimes, also in the forms of attempt, and the various forms of collaboration to the crimes of:

.....

e) crimes Against Humanity (Art. 117, PCCK);

f) war Crimes in Grave Breach of the Geneva Conventions (Art. 118, PCCK), War Crimes in Serious Violation of Laws and Customs Applicable in International Armed Conflict (Art. 119, PCCK), War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions (Art. 120, PCCK), War Crimes in Serious Violation of Laws and Customs Applicable in Armed Conflict not of an International Character (Art. 121, PCCK);

...

n) organized Crime (Art. 274, PCCK), Intimidation during Criminal Proceedings for Organized Crime (Art. 310, PCCK);

.....

Article 9 Subsidiary competence of the SPRK

9.1 The SPRK will have subsidiary competence, according to the modalities set forth in Article 10 of this Law, to investigate and prosecute the following crimes, also in the form of attempt, and the various forms of collaboration to the crimes of:

.....

b) inciting National, Racial, Religious or Ethnic Hatred, Discord or Intolerance (Art. 115, PCCK);

.....

h) murder (Art. 146, PCCK), Aggravated Murder (Art. 147, PCCK);

i) hostage Taking (Art. 143, PCCK);

j) violating equal status of residents of Kosovo (Art. 158, PCCK);

k) kidnapping (Art. 159, PCCK);

.....

III. COMPLAINTS

19. The complainant submits that EULEX violated her rights pursuant to Articles 2 and 3 of the European Convention on Human Rights (the Convention) under their procedural limb.
20. In particular, the complainant submits that EULEX Prosecutors have failed to initiate an investigation in accordance with Kosovo law and

mandate of EULEX, have unduly delayed the investigative process and have referred the case to local prosecutors thereby neglecting the seriousness of the case, the geographical location of the crime (northern Mitrovica) and the war crime and inter-ethnic elements of the crime.

THE LAW

21. The complainant alleges that EULEX actions infringed Articles 2 and 3 of the Convention. These provisions, in so far as relevant, read:

Article 2 Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3 Prohibition of torture

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

22. In light of the content of the complaint and information received from the parties, the Panel decided to communicate the case and to examine it also under Articles 8 and 13 of the Convention, which read as follows:

Article 8 Right to respect for private and family life

"1. Everyone has the right to respect for his private and family life (...)

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

Article 13 Right to an effective remedy

"Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

Submissions by the parties

The Head of Mission ("HoM")

23. In his response to the Panel's enquiry whether EULEX Prosecutors would be competent to prosecute the case pursuant to "exceptional circumstances" of Article 7(A) of the amended Law on Jurisdiction (*Sadiku-Syla against EULEX*, no. 2014-34, decision on admissibility of

29 September 2015, conclusion), the Head of Mission (HoM) replied that the “exceptional circumstances” within the meaning of this provision had been detailed in the Administrative Instruction on the Special Prosecution Office of Kosovo on the Description and Allocation of Tasks and the Manner of Cooperation between the Chief Prosecutor of SPRK and the (EULEX) Deputy Chief Prosecutor of SPRK in the Administration and Management of the SPRK. According to its Article 4.4, these exceptional circumstances include: “unwillingness or inability on the part of the Kosovo Prosecutor; expertise and experience of the EULEX Prosecutor would ensure the proper investigation of the criminal prosecution of the case at hand; that there is a grounded suspicion of attempts to influence the investigation or the criminal prosecution; that the case under investigation touches upon the interests of the EU Member States or the EULEX staff in Kosovo.” Where these requirements were considered to be met, a detailed petition had to be addressed to the Chief State Prosecutor or the Chief EULEX Prosecutor, highlighting the claimed extraordinary circumstances. The decision to apply Article 7(A) in a particular case was taken jointly by those two prosecutors and it was not for a EULEX Prosecutor alone to decide to take over the case.

24. The HoM stated that the file of the criminal investigation on the disappearance of the father of the complainant had never been transferred by UNMIK to EULEX and had, therefore, never been investigated by the EULEX Prosecutors. It appeared that the only information about the investigation had been found in the database of the DFM, where the case was said to have remained open but inactive.
25. The HoM submitted further that the complainant’s father had gone missing after the end of the conflict so that his case did not belong to the category of war crimes but other serious crimes over which the SPRK had only subsidiary competence.
26. The HoM further suggested that upon completion of its mandate UNMIK had transferred both the so-called “active” cases (relating to ongoing investigations) and “inactive” files to EULEX. However, files in cases which had been terminated and/or dismissed or transferred by UNMIK to the Kosovo authorities had not been provided to EULEX. Hence, the fact that EULEX did not possess a certain file was therefore not related to the organisation of the Mission. All the files received from UNMIK had been reviewed by EULEX Prosecutors, irrespective of their status.
27. The HoM concluded that EULEX had not violated the complainant’s rights. Although it was the mandate of the Mission to investigate war crimes and other serious crimes, it would be disproportionate and unrealistic to expect that EULEX would prosecute and solve all pending cases. According to the HoM, it was not for EULEX to provide all the victims of conflict-related crimes with the effective remedy

against violations of their rights by other organisations or the Kosovo authorities. The fact that the father of the complainant was still registered as missing in the Department of Forensic Medicine's database does not make EULEX responsible for the failure to investigate the case.

The complainant

28. In reply, the complainant dismissed the argument of the HoM that the case did not fall under the provisions of Article 7(A) of the amended Law on Jurisdiction. She pointed out that the Kosovo Prosecution lacked the willingness and ability to investigate cases of enforced disappearances, as acknowledged in the 2015 EU Progress Report on Kosovo. Moreover, EULEX Prosecution had experience and expertise to ensure proper investigation and prosecution in the present case.
29. Furthermore, the complainant argued that the nature of the case required that it be handled under Article 7(A), as it concerned enforced disappearance. The obligation to investigate such cases and punish those responsible, both in times of war and peace, attained a status of *jus cogens* and it was important that the perpetrators were charged with enforced disappearance and not with other criminal offences, such as abductions or murder.

The Panel's assessment

General legal considerations

30. The Panel has already had occasion to point out that the EULEX Mission is not a State and that 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 (HRRP, D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, 2014-11, 2014-12, 2014-13, 2014-14, 2014-15, 2014-16 and 2014-17, cited above, § 72; see also L.O. against EULEX, no. 2014-32, 11 November 2015, § 42; compare also HRAP opinion in cases nos. 248/09, 250/09 and 251/09, 25 April 2013, § 35). This is so because the Mission does not possess all the attributes and resources typically available to States in the performance of their governmental functions. However, to the extent that the Mission has the mandate and resources relevant and necessary to fulfil a function similar to that of a government as part of its executive functions, it is required to perform those in compliance with the applicable human rights standards.
31. The Panel also takes note of the difficulties necessarily involved in the investigation of serious crimes in a post-conflict society such as Kosovo (see European Court of Human Rights (ECHR), *Palić v. Bosnia and Herzegovina*, no. 4704/04, 15 February 2011, § 70, *mutatis mutandis*; HRAP opinion in cases nos 248/09, 250/09 and

251/09, cited above, §§ 44 and 62 et seq. and its opinion in cases nos 168/09, 169/09 and 312/09; 6 June 2013, § 77; HRRP, L.O. against EULEX, cited above, § 44). Such a situation might indeed complicate the search for evidence, the protection of witnesses or the performance of certain investigative or forensic tasks. The fact that an investigation or prosecution is taking place in a post-conflict situation cannot, however, explain each and every investigative shortcoming unless those are reasonably connected to particular difficulties associated with that situation. The Panel, therefore, evaluates in each case whether a particular investigative step that was normally open would have been rendered impossible or impractical by reasons associated with post-conflict circumstances independent of those conducting the investigation.

32. Furthermore, as a rule of law mission, EULEX is expected to pay particularly close attention to the need for the restoration, maintenance and reinforcement of the rule of law. The effective investigation and prosecution of serious crimes is a particularly important feature of this aspect of mandate of EULEX. It is therefore essential that the Mission should interpret the requirement of “exceptional circumstances” within the meaning of Article 7(A) of the Law No. 03/L-053 on Jurisdiction, Case Selection and Case Allocation (see Relevant applicable law) in a way that is consistent with the fulfilment of that mandate. There is little difference between the ability of a State or a rule of law mission to prioritise the investigation of such crimes and to devote adequate time and resources to this operational priority (see HRRP, D.W., E.V., F.U., G.T., Zlata Veselinović, H.S., I.R. against EULEX, cited above, § 75; L.O. against EULEX, cited above, §§ 46-47).
33. Enforced disappearance is at once a serious crime and a violation of human rights. It involves a multi-faceted type of violation of fundamental human rights, “in particular the right to life, liberty and security of persons, the right not to be subjected to torture, freedom from arbitrary arrest or detention, and the right to a fair and public trial” (Resolution No. 828 (1984) of the Parliamentary Assembly of the Council of Europe, § 4). Enforced disappearance is therefore considered to be one of the most serious forms of human rights violations and has been described as an “affront to human dignity” and a “grave and abominable offense against the inherent dignity of the human being” (Inter-American Convention on Forced Disappearance of Persons, 1994, Preamble).
34. Over the course of time, the prohibition of “disappearances” has come to be regarded as an independent, self-standing guarantee binding on the States as a matter of universally-recognized fundamental rights. This is reflected in various regional and international instruments and in the case law of important human rights bodies. Because of its seriousness, there is also a growing acceptance that an act of disappearance may constitute, in certain circumstances, a crime against humanity (as recognised by Article 7(1)(i) of the Statute of the

International Criminal Court). The essence of that offence is not only that it amounts to a serious human rights violation of the missing person (and their close relatives); it is also connected to the authorities' reactions and attitudes to the situation when it has been brought to their attention (ECHR, *Varnava and Others v Turkey*, Application no. 16064/90 et al, Judgment of 18 September 2009, para. 200; see, also, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002, and *Imakayeva v. Russia*, no. 7615/02, § ..., ECHR 2006-XIII (extracts), § 164).

35. Victims of such acts are not limited to the disappeared, but may also include close relatives of disappeared persons, who suffer from the continuous anguish of not knowing the fate of their loved ones (see, in the context of Article 3, ECHR, *Kurt v. Turkey*, judgment of 25 May 1998, Reports of Judgments and Decisions 1998-III, §§ 130-34; *Khadzhaliyev and Others v. Russia*, no. 3013/04, §§ 120-121, 6 November 2008, see also Resolution No. 828 (1984), cited above, § 2). It is essential for the authorities to be mindful of the emotional distress by the involvement of those relatives in such investigative processes, (see ECHR, *Orhan v. Turkey*, no. 25656/94, § 358, 18 June 2002). When assessing the responsibility of the authorities in regard to such cases, the particular vulnerability of this category of victims must therefore necessarily be taken into account.
36. Consequently, the response expected of the authorities – in this case the Mission – must be commensurate with the gravity of the alleged violation and the importance of the protected rights. In the case of disappearances, this would involve, in the normal course of events, an obligation on the part of competent authorities to diligently, promptly and thoroughly investigate such cases with a view to establish the fate of the (primary) victim and to prosecute, try and punish those found to be responsible (see, e.g., *Nydia Erika Bautista de Arellana v. Colombia*, Communication No. 563/1993, Views of the Human Rights Committee, 27 October 1995 par. 8.6). This investigative effort must be aimed at and be capable of clarifying the whereabouts and fate of the disappeared and, as the case may be, identify those responsible for such act (see, e.g., *Varnava and Others v Turkey*, cited above, para. 191; *Oğur v. Turkey*[GC], no. 21594/93, § 88, ECHR 1999-III; *Hugh Jordan v. the United Kingdom*, no. 24746/94, §§ 105-09, 4 May 2001; and *Douglas-Williams v. the United Kingdom* (dec.), no. 56413/00, 8 January 2002). In this context, the Panel notes that the prompt handling of such cases by the authorities – as regards the initiation of an investigation, its conduct and finalisation – is vital to the maintenance of public confidence in their adherence to the rule of law and in preventing any appearance of collusion in, or tolerance of unlawful acts (see HRAP decision in cases nos. 248/09, 250/09 and 251/09, cited above, § 80).
37. In cases of this seriousness, the investigative authorities are to invest resources commensurate with the necessity and possibility of resolving the case (*L.O. against EULEX*, cited above, § 47). Whilst no

investigative authorities may be expected to resolve all cases brought before it, they are expected, in every case, to act with such diligence, promptness and effectiveness as reflect the gravity of the matter being investigated (see *Varnava and Others*, cited above, § 191, ECHR 2009; *Palić v. Bosnia and Herzegovina*, cited above, § 63).

Application of the general principles to the circumstances of the case

38. The Panel will now consider the complaint in relation to two separate stages: first, prior to the entry into force Law No. 04/L-273 on Amending and Supplementing the Laws Related to the Mandate of the European Union Rule of Law Mission in the Republic of Kosovo, and secondly, after that Law became applicable. The Panel will once again stress that it is not competent to examine the disappearance of the complainant's relative itself for which EULEX cannot be held responsible for obvious reasons. Nor will be Panel consider the initial failure to investigate which might be attributable to other authorities prior to the creation of the EULEX Mission. It will only consider those acts and omissions of the Mission itself that are said to have occurred from the point at which the Mission commenced to operate (see *Sadiku-Syla against EULEX*, 2014-34, Decision on Admissibility of 29 September 2015, § 50).
39. As regards the first period, the Panel has already had occasion to underline the obligations of the Mission to diligently record and, in turn, duly register grievances formally brought to its attention and to communicate those to the competent bodies within the Mission (see HRRP, *Becić against EULEX*, 2013-03, 12 November 2014, §§ 58–60, *mutatis mutandis*). The Mission is also responsible to ensure that the hand-over of files from UNMIK to EULEX and the organisation of case files is conducted in such a way that ensures the effective performance of the function of the Mission and protection of human rights in that context (see, e.g., admissibility decision in *Sadiku-Syla*, cited above, § 61).
40. In the present case, as noted above (§ 10) and in the admissibility decision given in the present case by the Panel (§ 51), information pertaining to the case was in the possession of the Mission since 2008 (albeit within the framework of its forensic branch). On that basis, the Mission should have ensured through proper organisation and communication between its various branches that information of this importance was communicated to the competent investigative authorities. It has not been argued by EULEX, let alone shown, that there has been any communication between the DFM and the prosecutorial authorities as to any possible steps to be taken in connection with the disappearance of the father of the complainant. In this particular case, the HoM has offered no explanation as to why important information that was available to the DFM was not provided to the investigative organs of the Mission.

41. The Panel also notes the following in this context. A person alleging a violation of this sort cannot be expected to conduct his/her own investigation of the case, nor should he/she be required to check with or consult the various institutions in the hope of identifying one that might be responsible for the case (see also HRRP, *L.O. against EULEX*, case No. 2014-32, Decision and Findings, 11 November 2015, para. 63). In order to guarantee the effective protection of human rights in these types of cases, it is imperative that the responsibility to coordinate investigative (and prosecutorial) efforts is and remains with the authorities themselves. They, not the victims, bear the responsibility to ensure the effective protection of the rights of those who have suffered prejudice.
42. The Panels concludes that, owing to the failure of the Mission to ensure that relevant information was brought to the attention of its investigative and prosecutorial branches, no proper investigation of this case may be said to have taken place during the first period of time under examination.
43. As regards the period following the entry into force of the law amending of the Law on Jurisdiction, the Panel takes the following view. As noted by the Panel in an earlier case, Article 7 (A) of the Law No. 04/L-273 gives EULEX prosecution the ability to apply an exception to the general principle that cases which were not considered ongoing as of the cut-off date of 14 April 2014 were to be dealt with by the Kosovo authorities (compare, *X and 115 other complainants against EULEX*, 2011-20, § 64). This provision cannot result in undermining or qualifying the responsibility of the Mission to act at all times in a manner consistent with relevant human rights standards (see, e.g., *H & G against EULEX*, 2012-19 & 2012-20, 30 September 2013, §§ 41 *et seq.*).
44. Among the considerations relevant to the existence of “exceptional circumstances” are the following: first, whether an effective investigation of the case has been conducted up to that point. A negative answer would militate in favour of EULEX Prosecutors exercising their “exceptional” competence. In the present case, It has not been argued, let alone shown, that the case was ever subject to an effective investigation for any significant period of time by any entity. Secondly, it is relevant whether the case concerns important rights and violations of extreme gravity. Such considerations would again weigh in favour of the “exceptional” involvement of EULEX Prosecutors. The case under consideration pertains to the fundamental rights. Also, there was a very real possibility that the disappearance of the complainant’s father was based on ethnic or religious considerations, thereby going further into the jurisdictional territory over which the Mission has competence. In a post-conflict environment where ethnic and religious relations might still be tense and fragile, such cases are obvious investigative priorities. Furthermore, the underlying facts of the present case go back to December 2000. The complainant has had to live since then with the

trauma and emotional distress of not knowing the fate of her father. This, again, does not appear from the record to have been considered relevant to the Mission in its determination of “exceptional circumstances”. Thirdly, if the EULEX Prosecutors decide not to exercise their “exceptional” competence, a question arises whether there is a genuine and real prospect of local authorities carrying out their responsibility in relation to that case. In the present case, there is no indication that this would be the case or, in any event, it does not seem that any steps were taken in order to establish the facts relevant for the existence of such a prospect (see also, *X and 115 other complainants*, § 66). Lastly, in this particular case, a failure to ensure that information relevant to this case was transmitted from one organ of the Mission to another is attributable to the Mission itself. This adds weight to the suggestion that the circumstances of the case are “exceptional” within the meaning of Article 7(A) of the Law No. 04/L-273.

45. The law confers on EULEX prosecuting authorities a discretionary power to take over cases which they consider exceptional in nature. It is not for the Panel to replace the EULEX authorities in the application of that requirement. However, the discretion of the Mission in that regard cannot be exercised arbitrarily without the consideration of all relevant factors and circumstances. It must be exercised in a manner that is consistent with the effective protection of human rights. In this case, it has not been argued, let alone shown, that consideration had been given by the prosecuting authorities of EULEX to the question of whether the circumstances of the case warranted qualifying them as “exceptional” for the purposes of this statute.
46. In conclusion, the Panel is satisfied that, *prima facie*, the circumstances of the case could be regarded as falling within the ambit of “exceptional circumstances” of Article 7(A) of the amended Law on Jurisdiction and that the Mission would therefore have remained competent in principle to investigate them after the amendment of the Law on Jurisdiction. For these reasons, the Panel finds that the violation of the rights of the complainants by the Mission continued even after the amendment of that Law on account of the failure of the consideration of the case under this provision.

CONCLUSION

47. Having regard to the circumstances of the case seen as a whole, the Panel finds that the investigative efforts of EULEX were insufficient and resulted in a violation of the rights of the complainant guaranteed by Articles 2 and 3 of the Convention in respect of the right to life and the prohibition of torture and by Article 13, the right to an effective remedy, in conjunction with Article 2 of the Convention.

48. Given its findings concerning Articles 2, 3 and 13 of the Convention, the Panel considers that it is not necessary to examine the case also in the light of Article 8 of the Convention.

FOR THESE REASONS, THE PANEL, UNANIMOUSLY,

1. *Holds* that there has been a violation of Articles 2 and 3, and of Article 13 in conjunction with Article 2 of the Convention; and
2. *Finds* it appropriate, in the light of its above findings of fact and law, to make the following recommendations to the Head of Mission under Rule 34 of its Rules of Procedure:
 - a. The HoM should make a declaration acknowledging that the circumstances of the case amounted to a breach of the complainant's rights attributable to the acts [and /or omissions] of EULEX in the performance of its executive mandate;
 - b. The HoM should instruct all organs of the Mission who are in contact with victims of alleged violations of human rights guaranteed by Articles 2 and 3 of the Convention in the context of forced disappearances to ensure that in all communications with them they communicate with the necessary amount of expeditiousness, diligence and care necessary to account for the emotional distress of their interlocutor(s). If necessary, the HoM should consider the adoption of guidelines which lay down in more precise details what this general instruction might imply in concrete circumstances.
 - c. The Panel is fully aware of the challenges and difficulties which result from the reduction of the resources of the Mission due to reconfiguration etc. However, within the confines of these resources and in a manner commensurate with the importance that the Mission attaches to the effective protection of human rights, the Panel invites the HoM to ensure that investigative bodies within the Mission have at their disposal all the necessary resources and support to accomplish their mission effectively and in a manner consistent with the effective protection of the human rights of all those involved.
 - d. The HoM should impress upon the EULEX investigative bodies the importance of cases of disappearance continuing to be an investigative priority so that they are fully and effectively investigated and

that wherever suspects are identified that they are brought to justice promptly and fairly.

The HoM is invited to draw to the attention of the competent investigative and prosecutorial authorities within the mission to the factors listed above as being relevant to the "exceptional" competence of EULEX prosecutors and to impress upon them the importance of taking these factors into account in their assessment of whether or not they should seek to take over responsibility for this case.

The HoM is invited to inform the Panel of the measures she has undertaken in connection with the present decision by 19 November 2016.

For the Panel,

John J. RYAN
Senior Legal Officer



Magda MIERZEWSKA
Presiding Member