



## OPINION

**Date of adoption: 25 February 2013**

**Case no. 46/08**

**Snežana ZDRAVKOVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 25 February 2013,  
with the following members taking part:

Mr Marek NOWICKI, Presiding Member  
Ms Christine CHINKIN  
Ms Françoise TULKENS

Assisted by  
Mr Andrey ANTONOV, Executive Officer

Having considered the aforementioned complaint, introduced pursuant to Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel,

Having deliberated, including through electronic means, in accordance with Rule 13 § 2 of its Rules of Procedures, makes the following findings and recommendations:

### **I. PROCEEDINGS BEFORE THE PANEL**

1. The complaint was introduced on 13 November 2008 and registered on the same date.
2. On 9 December 2008, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG) <sup>1</sup> for UNMIK's comments on the admissibility and the merits of the case. On 30 December 2008, the SRSG provided UNMIK's first response.

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<sup>1</sup> A list of abbreviations and acronyms contained in the text can be found in the attached Annex.

3. On 26 January 2009, the Panel re-communicated the case to the SRSG for UNMIK's comments on the admissibility and the merits of the complaint, specifically in relation to the alleged violation of Article 3 of the European Convention of Human Rights (ECHR). On 12 February 2009, the SRSG provided UNMIK's response.
4. On 6 February 2009, the Panel requested additional information from the complainant. The Panel received the complainant's response on 6 March 2009.
5. On 17 April 2009, the Panel declared the complaint admissible.
6. On 21 April 2009, the Panel forwarded the decision to the SRSG inviting UNMIK's comments on the merits of the case. On 2 July 2009, the SRSG provided UNMIK's response.
7. On 15 July 2009, the Panel forwarded the SRSG's comments to the complainant. The Panel received the complainant's observations on the SRSG's comments on 31 August 2009.
8. On 30 November 2009, the Panel wrote to the SRSG requesting access to the file of the Office on Missing Persons and Forensics (OMPF) as well as other investigative files concerning the case.
9. On 19 January 2010, the Panel received the SRSG's response that the OMPF file concerning the case would be released to the Panel upon guarantee of confidentiality.
10. On 29 April 2010, the Panel responded positively to UNMIK's request for confidentiality in relation to the available files pursuant to Rule 39*bis* of the Panel's Rules of Procedure.
11. On 15 May 2010, the SRSG forwarded a copy of the OMPF file concerning the case to the Panel.
12. On 13 August 2010, the Panel wrote to the SRSG requesting an update on the efforts to obtain the complete investigative files, including the police file, concerning the case. On 16 September 2010, the SRSG provided his response.
13. On 21 February 2011, the Panel requested information in relation to the complaint from the District Public Prosecutor's Office (DPPO) in Prishtinë/Priština. On 1 March 2011, the DPPO provided its response.
14. On 21 June 2011, the Panel requested the DPPO in Prishtinë/Priština to forward any investigative files they might have related to the complaint. The Panel received a copy of the file held by the Prishtinë/Priština DPPO on 27 August 2011.
15. On 12 September 2011, with the permission of the DPPO, the Panel forwarded the additional documents received to the SRSG, inviting him to submit UNMIK's additional comments, if he so wished. No response was received.

16. On 15 January 2013, the Panel requested UNMIK to confirm if the disclosure of files concerning the case could be considered final. On the same date, UNMIK submitted its response.

## II. THE FACTS

### A. General background<sup>2</sup>

17. The events at issue took place in the territory of Kosovo after the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), in June 1999.
18. The armed conflict during 1998 and 1999 between the Serbian forces on one side and the Kosovo Liberation Army (KLA) and other Kosovo Albanian armed groups on the other is well documented. Following the failure of international efforts to resolve the conflict, on 23 March 1999, the Secretary General of the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes against the Federal Republic of Yugoslavia (FRY). The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo. On 9 June 1999, the International Security Force (KFOR), the FRY and the Republic of Serbia signed a “Military Technical Agreement” by which they agreed on FRY withdrawal from Kosovo and the presence of an international security force following an appropriate UN Security Council resolution.
19. On 10 June 1999, the UN Security Council adopted Resolution 1244 (1999). Acting under Chapter VII of the UN Charter, the UN Security Council decided upon the deployment of international security and civil presences - KFOR and UNMIK respectively - in the territory of Kosovo. Pursuant to Security Council Resolution 1244 (1999), the UN was vested with full legislative and executive powers for the interim administration of Kosovo, including the administration of justice. KFOR was tasked with establishing “a secure environment in which refugees and displaced persons can return home in safety” and temporarily ensuring “public safety and order” until the international civil presence could take over responsibility for this task. UNMIK comprised four main components or pillars led by the United Nations (civil administration), United Nations High Commissioner for Refugees (humanitarian assistance, which was phased out in June 2000), the OSCE (institution building) and the EU (reconstruction and economic development). Each pillar was placed under the authority of the SRSG. UN Security Council Resolution 1244 (1999) mandated UNMIK to “promote and protect human rights” in Kosovo in accordance with internationally recognised human rights standards.

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<sup>2</sup> The references drawn upon by the Panel in setting out this general background include: OSCE, “As Seen, as Told”, Vol. I (October 1998 – June 1999) and Vol. II (14 June – 31 October 1999); quarterly reports of the UN Secretary-General on the United Nations Interim Administration in Kosovo; UNMIK Police Annual Reports (2000, 2001); Humanitarian Law Centre, “Abductions and Disappearances of non-Albanians in Kosovo”(2001); Humanitarian Law Centre, “Kosovo Memory Book” (<http://www.kosovomemorybook.org>); UNMIK Office on Missing Persons and Forensics, “Activity Report 2002-2004”; European Court of Human Rights, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos. 71412/01 and 78166/01, decision of 2 May 2007; International Commission on Missing Persons, “The Situation in Kosovo: a Stock Taking” (2010); data issued by the United Nations High Commissioner for Refugees, (available at [www.unhcr.org](http://www.unhcr.org)) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>).

20. Estimates regarding the effect of the conflict on the displacement of the Kosovo Albanian population range from approximately 800,000 to 1.45 million. Following the adoption of Resolution 1244 (1999), the majority of Kosovo Albanians who had fled, or had been forcibly expelled from their houses by the Serbian forces during the conflict, returned to Kosovo.
21. Meanwhile, members of the non-Albanian community – mainly but not exclusively Serbs, Roma and Slavic Muslims – as well as Kosovo Albanians suspected of collaboration with the Serbian authorities, became the target of widespread attacks by Kosovo Albanian armed groups. Current estimates relating to the number of Kosovo Serbs displaced fall within the region of 200,000 to 210,000. Whereas most Kosovo Serbs and other non-Albanians fled to Serbia proper and the neighbouring countries, those remaining behind became victims of systematic killings, abductions, arbitrary detentions, sexual and gender based violence, beatings and harassment.
22. Although figures remain disputed, it is estimated that more than 15,000 deaths or disappearances occurred during and in the immediate aftermath of the Kosovo conflict (1998-2000). More than 3,000 ethnic Albanians, and about 800 Serbs, Roma and members of other minority communities went missing during this period. More than half of the missing persons had been located and their mortal remains identified by the end of 2010, while 1,766 are listed as still missing by the International Committee of the Red Cross (ICRC) as of October 2012.
23. As of July 1999, as part of the efforts to restore law enforcement in Kosovo within the framework of the rule of law, the SRSG urged UN member States to support the deployment within the civilian component of UNMIK of 4,718 international police personnel. UNMIK Police were tasked with advising KFOR on policing matters until they themselves had sufficient numbers to take full responsibility for law enforcement and to work towards the development of a Kosovo police service. By September 1999, approximately 1,100 international police officers had been deployed to UNMIK.
24. By December 2000, the deployment of UNMIK Police was almost complete with 4,400 personnel from 53 different countries, and UNMIK had assumed primacy in law enforcement responsibility in all regions of Kosovo except for Mitrovicë/Mitrovica. According to the 2000 Annual Report of UNMIK Police, 351 kidnappings, 675 murders and 115 rapes had been reported to them in the period between June 1999 and December 2000.
25. Due to the collapse of the administration of justice in Kosovo, UNMIK established in June 1999 an Emergency Justice System. This was composed of a limited number of local judges and prosecutors and was operational until a regular justice system became operative in January 2000. In February 2000, UNMIK authorised the appointment of international judges and prosecutors, initially in the Mitrovicë/Mitrovica region and later across Kosovo, to strengthen the local justice system and to guarantee its impartiality. As of October 2002, the local justice system comprised 341 local and 24 international judges and prosecutors. In January 2003, the UN Secretary-General reporting to the Security Council on the implementation of Resolution 1244 (1999) defined the police and justice system in Kosovo at that moment as being “well-functioning” and “sustainable”.

26. In July 1999, the UN Secretary-General reported to the Security Council that UNMIK already considered the issue of missing persons as a particularly acute human rights concern in Kosovo. In November 1999, a Missing Persons Unit (MPU) was established within UNMIK Police, mandated to investigate with respect to either the possible location of missing persons and/or gravesites. The MPU, jointly with the Central Criminal Investigation Unit (CCIU) of UNMIK Police, and later a dedicated War Crimes Investigation Unit (WCIU), were responsible for the criminal aspects of missing persons cases in Kosovo. In May 2000, a Victim Recovery and Identification Commission (VRIC) chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. As of June 2002, the newly established OMPF in the UNMIK Department of Justice (DOJ) became the sole authority mandated to determine the whereabouts of missing persons, identify their mortal remains and return them to the family of the missing. Starting from 2001, based on a Memorandum of Understanding (MoU) between UNMIK and the Sarajevo-based International Commission of Missing Persons (ICMP), supplemented by a further agreement in 2003, the identification of mortal remains was carried out by the ICMP through DNA testing.
27. On 9 December 2008, UNMIK's responsibility with regard to police and justice in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
28. On the same date, UNMIK and EULEX signed a MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were handed over to EULEX.

## **B. Circumstances surrounding the abduction and killing of Mr Tomislav Marković**

29. The complainant is the daughter of Tomislav Marković. The following account of the abduction and killing of Tomislav Marković is based on the complainant's submissions to the Panel.
30. In the early morning of 24 June 2000, Tomislav Marković was returning from Prokuplje, Serbia proper, to his house in Nëntë Jugoviç/Devet Jugovića, Prishtinë/Priština municipality, travelling in his own car, with his now late neighbour, Mrs J.R.
31. At the Merdare administrative boundary crossing point between Serbia proper and Kosovo (also known as Gate no. 3), in the proximity of the KFOR checkpoint, Tomislav Marković joined a group of persons in 5-7 cars, waiting to be escorted by an UNMIK Police vehicle towards their homes in Kosovo. The group of cars formed a

convoy led by a clearly marked UNMIK Police vehicle, with Mr Marković's car apparently being the last one.

32. Shortly after the convoy started moving, two vehicles bearing no registration plates, a white VW van and a red VW Golf, started following it. At some time between 7:00 and 8:00 am, Mr Marković's car was overtaken by one of these two vehicles, and forced to stop near the village of Gllamnik/Glavnik, Podujevë/Podujevo municipality. Tomislav Marković was taken out the car and forced into the van by three men, who then drove him away in an unknown direction. A fourth man took Mrs J.R. back to the Gate no. 3 checkpoint in Tomislav Marković's car. Close to the checkpoint, he threw Mrs J.R. out of the vehicle and drove away.
33. Mrs J.R. walked to the checkpoint and reported the incident. Thereafter, she was taken to Podujevë/Podujevo police station where she gave her statement to the UNMIK Police. After that she was transported to the UNMIK Police station no. 3 in Prishtinë/Priština, where she gave another statement.
34. Tomislav Marković's disappearance was later again reported by his wife, Mrs Planinka Marković, to KFOR, UNMIK and the ICRC.
35. The complainant states that, since her father was abducted, her family was visited by at least five individuals, both Serbs and Albanians, who provided information with regard to his fate or whereabouts. She states that every time they received information related to her father's abduction, they promptly conveyed the information to UNMIK Police. However she claims that she did not receive any feedback.
36. On 8 February 2007, the Commission of Missing Persons of the Republic of Serbia informed the complainant's family that the mortal remains of Tomislav Marković had been discovered in a mass grave.
37. The mortal remains of Tomislav Marković were handed over by the UNMIK MPU to the family on 23 February 2007 at the Gate no. 3. The family also received the following documents: a death certificate issued by the UNMIK OMPF, an identification certificate, a confirmation of identity based on a DNA test, clothes and personal effects supposedly belonging to Tomislav Marković. According to the death certificate issued by the OMPF, an autopsy conducted on 21 February 2007 had ascertained that Tomislav Marković's death had occurred at some time before 17 June 2003 and that it was caused by a gunshot wound to the head. The family also received the death certificate issued by the Prishtinë/Priština Institute of Medicine, sitting in Mitrovicë/Kosovska Mitrovica, which stated that the death had been caused by fracture of skull bones and "brain destruction".
38. The complainant states that the lack of reliable information on the fate of Tomislav Marković caused mental anguish and moral damage to her and her family. Mrs Planinka Marković has suffered from a reactive prolonged depressive state and arterial hypertension and is still being treated. The complainant was diagnosed with high tension anxiety. Her sister has also suffered from stress.

### C. The investigation

39. In the present case, the Panel received from UNMIK investigation documents previously held by the UNMIK OMPF and UNMIK Police (MPU, Prishtinë/Priština Regional Serious Crimes Investigation Unit (SCIU) and Prishtinë/Priština Regional Murder Squad). The Panel also received from the DPPO of Prishtinë/Priština additional documents previously held by the UNMIK OMPF and UNMIK Police.
40. Concerning disclosure of information contained in the files, the Panel recalls that investigation files have been made available for the Panel's review under a pledge of confidentiality from UNMIK and the DPPO. In this regard, the Panel must clarify that although its assessment of the present case stems from a thorough examination of the available documentation, only limited information contained therein is disclosed. Hence a synopsis of relevant investigation steps taken by investigative authorities is provided in the paragraphs to follow.
41. On 24 June 2000, immediately after her release, Mrs J.R. reported Tomislav Marković's abduction to the KFOR personnel on duty at the Gate no. 3, who then issued an alert ("be on look out") in relation to the incident. Mrs J.R. was then taken to two different UNMIK Police stations, and a police investigative file on the matter was opened on the same day. It appears that this first part of the investigation was carried out by the Podujevë/Podujevo Police station in coordination and under the purview of the Prishtinë/Priština SCIU. In her statement, Mrs J.R. provided the investigators with a physical description of the abductors, of their vehicles and of Tomislav Marković's vehicle. She also provided information concerning potential witnesses to the abduction.
42. From the day of the abduction until 27 June 2000, two different teams of UNMIK Police followed up on the leads provided by Mrs J.R. Specifically, the Police searched the place of abduction and the place where Mrs J.R. was released; located and questioned potential witnesses in the surroundings of the location where the abduction took place; showed Mrs J.R. a vehicle, which had been impounded by the KFOR, for possible identification as that of Tomislav Marković or the perpetrators; located and took statements of witnesses A, B and C, who had travelled in the same convoy. Moreover, based on the information received from witnesses A and B in relation to further potential witnesses, UNMIK Police questioned two more persons. In the same days, the Police visited Tomislav Marković's wife to gather additional information on her husband and to collect his photograph.
43. On 12 July 2000, UNMIK Police interviewed the UNMIK Police officer who had escorted the convoy. He clarified that the escort was not an official one but provided solely on humanitarian grounds. The officer stated that additional vehicles joined the convoy without his consent. He did not witness the abduction.
44. On an unspecified date, information was provided for a helicopter search to be conducted aimed at locating Tomislav Marković's vehicle.
45. Between 12 and 31 July 2000, following the discovery of a dead body in the Podujevë/Podujevo area, the Prishtinë/Priština Regional Murder Squad undertook the necessary actions to determine if the body was that of Tomislav Marković. However, the identification was negative.

46. On 14 July 2000, the UNMIK Police from Podujevë/Podujevo verified the details of an impounded car, suspected to be Tomislav Marković's.
47. On 31 August 2000, a file concerning Tomislav Marković was also opened by the MPU of UNMIK Police.
48. As of October 2000, Mr Marković's case was assigned to a new officer within the Prishtinë/Priština Regional SCIU. Following a review of the case, a new round of investigative actions was undertaken. On 31 November 2000, the SCIU shared with the MPU information about identified persons allegedly possessing information on the whereabouts of Tomislav Marković's vehicle.
49. On 30 March 2001, the MPU interviewed Mrs Marković to gather ante-mortem information on her husband.
50. Following leads provided by Mrs Marković, on 26 May 2001, UNMIK MPU located and interviewed one potential witness, allegedly having information on Tomislav Marković's whereabouts. On 27 July 2001, three potential witnesses were questioned.
51. As appears from a report dated 23 December 2004, on 25 October 2002 Mrs Marković informed the MPU that on 19 October 2002 she had received a visit from an unknown person alleging that Tomislav Marković was being kept prisoner in the area of Podujevë/Podujevo. Mrs Marković also reported that similar information had been given to her by a different unknown person one year earlier.
52. On 26 October 2002, the MPU sent a letter to the Director of the Dubrava Prison asking him to verify if any person named Tomislav Marković was, or had been, detained there, or in any other penitentiary institution in Kosovo.
53. On 17 June 2003, as part of the general process of exhumation and identification taking place in Kosovo, several unidentified bodies were exhumed by the OMPF from a mass grave in Prishtinë/Priština.
54. On 11 December 2004, an updated Victim Identification Form was issued by the MPU for Tomislav Marković. It appears that blood samples were collected from his wife, daughters and brother for the purpose of DNA identification, although it is not clear when this happened.
55. Between 16 and 23 December 2004, the investigation into Tomislav Marković's case was reviewed by the UNMIK Police WCIU. In light of the allegations made by Mrs Marković in 2002, WCIU sent a request to the commander of the Podujevë/Podujevo Police station to verify the information provided by Mrs Marković and for any other related information. In the report dated 23 December 2004, the investigators reviewing the case described the difficulties in verifying the allegation that Tomislav Marković was illegally detained, due to the vagueness of the information. The same report states that possible witnesses were not cooperative and that the case shall be left "pending" with the WCIU.
56. The investigative file shows that on a number of occasions, at various stages of the investigation, different UNMIK investigative authorities met with Mrs Marković and

other members of the family, gathering information as well as informing the family on the outcome of specific investigative activities.

57. On 6 November 2006, the ICMP established a DNA match between samples from one of the bodies exhumed on 17 June 2003 (see § 53 above) and samples collected from Tomislav Marković's family members.
58. On 20 February 2007, an autopsy was conducted on the mortal remains suspected to be those of Tomislav Marković. On 21 February 2007, based on the results of the DNA analysis and on the comparison of ante-mortem and post-mortem information, the UNMIK OMPF issued confirmation of identity certificates concerning Tomislav Marković.
59. On 23 February 2007, at the Gate no. 3 UNMIK MPU handed over Tomislav Marković's mortal remains, together with death and identification certificates, to his family. Upon handing over his mortal remains, the MPU closed the missing person case concerning Tomislav Marković.
60. On 9 December 2008, UNMIK's responsibility with regard to police and justice in Kosovo ended (see §§ 27-28 above).
61. On 25 May 2009, the Kosovo Police submitted a criminal report to the Prishtinë/Priština DPPO against unknown perpetrators in relation to the murder of Tomislav Marković. On 28 January 2011, the Prishtinë/Priština DPPO requested the Kosovo Police to conduct further investigation in this case. The investigation is ongoing to date.
62. According to information submitted by the complainant, in 2007 separate criminal proceedings against unknown perpetrators were initiated by Serbian authorities in charge of war crimes investigations, which were later dismissed.

### **III. THE COMPLAINT**

63. The complainant complains about the alleged failure by UNMIK to conduct an effective investigation into the abduction and killing of her father. In this regard, she invokes a violation of the procedural limb of Article 2 of the ECHR. She also complains about the mental pain and suffering allegedly caused to herself and her family by this situation. In this regard, the Panel considers that the complainant relies on Article 3 of the ECHR.
64. Following the Panel's admissibility decision of 29 April 2009, the complainant further alleges that UNMIK, and in particular UNMIK Police, are responsible for the abduction and killing of her father as they failed to provide him with adequate protection. In this regard, the Panel considers that the complainant may be deemed to invoke also a violation of the substantive limb of Article 2 of the ECHR.

### **IV. THE LAW**

#### **A. The scope of the Panel's review**

65. In determining whether it considers that there has been a violation of Article 2 and of Article 3 of the ECHR, the Panel is mindful of the existing case law, notably that of the European Court of Human Rights. However, the Panel is also aware that the complaints before it differ in some significant ways from those brought before that Court. First, the respondent is not a State but an interim international territorial administration mandated to exercise temporary responsibilities in Kosovo. No suspicion attaches to UNMIK with respect to the obligation under ECHR Article 2 requiring authorities to refrain from the unlawful deprivation of life. Second, as in a limited number of cases before the European Court, those suspected of being responsible for the alleged killings and/or abductions are in all cases before the Panel non-state actors, mostly but not exclusively connected to the conflict. These are factors for the Panel to take into consideration as it assesses for the first time the procedural positive obligations of an intergovernmental organisation with respect to acts committed by third parties in a territory over which it has temporary legislative, executive and judicial control.
66. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
67. The Panel notes that with the adoption of the UNMIK Regulation No. 1999/1 on 25 July 1999 UNMIK undertook an obligation to observe internationally recognised human rights standards in exercising its functions. This undertaking was detailed in UNMIK Regulation No. 1999/24 of 12 December 1999, by which UNMIK assumed obligations under the following human rights instruments: the Universal Declaration of Human Rights, the European Convention on Human Rights and Protocols thereto, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination, the Convention on the Elimination of All Forms of Discrimination Against Women, the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, the Convention on the Rights of the Child.
68. The Panel also notes that Section 1.2 of UNMIK Regulation No. 2006/12 of 23 March 2006 on the Establishment of the Human Rights Advisory Panel provides that the Panel “shall examine complaints from any person or group of individuals claiming to be the victim of a violation by UNMIK of (their) human rights”. It follows that only acts or omissions attributable to UNMIK fall within the jurisdiction *ratione personae* of the Panel. In this respect, it should be noted, as stated above, that as of 9 December 2008, UNMIK no longer exercises executive authority over the Kosovo judiciary and law enforcement machinery. Therefore UNMIK bears no responsibility for any violation of human rights allegedly committed by those bodies. Insofar as the complainant complains about acts that occurred after that date, they fall outside the jurisdiction *ratione personae* of the Panel.
69. Likewise, the Panel emphasises that, as far as its jurisdiction *ratione materiae* is concerned, as follows from Section 1.2 of UNMIK Regulation No. 2006/12, it can only examine complaints relating to an alleged violation of human rights. This means that it can only review acts or omissions complained of for their compatibility with the international human rights instruments referred to above (§ 67). In the particular case of killings and disappearances in life-threatening circumstances, it is not the Panel’s

role to replace the competent authorities in the investigation of the case. Its task is limited to examining the effectiveness of the criminal investigation into such killings and disappearances, in the light of the procedural obligations flowing from Article 2 of the ECHR.

70. The Panel further notes that Section 2 of UNMIK Regulation No. 2006/12 provides that the Panel shall have jurisdiction over complaints relating to alleged violations of human rights “that had occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date where these facts give rise to a continuing violation of human rights”. It follows that events that took place before 23 April 2005 generally fall outside the jurisdiction *ratione temporis* of the Panel. However, to the extent that such events gave rise to a continuing situation, the Panel has jurisdiction to examine complaints relating to that situation (see European Court of Human Rights (ECtHR) Grand Chamber [GC], *Varnava and Others v. Turkey*, nos. 16064/90 and others, judgment of 18 September 2009, §§ 147-149; ECtHR [GC], *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2011, § 136).

## **B. Alleged violation of Article 2 of the ECHR**

71. The complainant claims that UNMIK did not fulfil its duty to protect her father’s life and that UNMIK Police did not conduct an effective investigation into his abduction and killing.
72. The Panel considers that the complainant invokes a violation of both the substantive and procedural obligations stemming from Article 2 of the ECHR.

### **1. The substantive obligation under Article 2**

#### **a) Admissibility**

##### *The parties’ submissions*

73. The complainant states that at the time when her father was abducted, UNMIK Police and KFOR were the only institutions responsible for maintaining peace and security in Kosovo. She states that her father was travelling within a convoy escorted by UNMIK Police and that the latter did not do anything to impede his abduction. The complainant states that UNMIK is ultimately responsible for not safeguarding her father’s life.
74. The SRSG contests the factual allegation that Tomislav Marković was travelling in convoy under the escort of KFOR and/or UNMIK Police. The SRSG states that it clearly transpires from the witnesses’ accounts that only two cars were to be escorted by UNMIK Police and that Tomislav Marković decided to join the “unauthorized” convoy on his own initiative. According to the SRSG, this part of the complaint is therefore unfounded.

##### *The Panel’s assessment*

75. The Panel notes that the complaint concerning the alleged violation of the substantive limb of Article 2 was submitted as an additional complaint after the Panel had already declared the complaint admissible on 29 April 2009. For this reason, the Panel will

assess the admissibility of this part of the complaint against the admissibility criteria set out in Sections 1, 2 and 3 of UNMIK Regulation No. 2006/12.

76. The Panel recalls that according to Section 2 of the Regulation, it shall have jurisdiction over complaints relating to alleged violations of human rights that have occurred not earlier than 23 April 2005 or arising from facts which occurred prior to this date when these facts give rise to a continuing violation of human rights.
77. The Panel notes that Tomislav Marković disappeared on 24 June 2000. According to the investigators, his death occurred on an unspecified date between the day of his abduction and 23 June 2003, which is well before the critical date of 23 April 2005. The Panel further considers the death of Tomislav Marković as an instantaneous event which does not create a continuing situation (see ECtHR, *Çakir and Others v. Cyprus*, no. 7864/06, decision of 29 April 2010, see also ECtHR, *Aloyan and Nadryan v. Russia*, no. 11680/03, decision of 11 October 2011). Accordingly, having acknowledged the events which regrettably led to Tomislav Marković's abduction, the Panel has to conclude that the applicant's complaint regarding the substantive limb of Article 2 falls outside of the Panel's jurisdiction *ratione temporis*.
78. The Panel therefore declares this part of the complaint inadmissible.

## **2. The procedural obligation under Article 2**

### **a) Admissibility**

79. In his comments on the admissibility of the complaint, the SRSG argued that an investigation into Tomislav Marković's case is still open. Therefore the complaint shall be declared inadmissible pursuant to Section 3.1 of UNMIK Regulation No. 2006/12, which states that the Panel may only deal with a matter after it determines that all other available avenues for review of the alleged violations have been pursued.
80. In its admissibility decision of 29 April 2009, the Panel found that the SRSG's objection concerning the alleged non-exhaustion of remedies should be joined to the merits of the complaint. Moreover, and in light of its later case-law, the Panel notes that the SRSG has not indicated any specific legal remedy available to the complainant with regard to the effectiveness of the investigation itself. For its part, the Panel does not see any such remedy. The fact that the matter is currently under investigation has no bearing on the object of the complaint: the effectiveness of the investigation itself (see Human Rights Advisory Panel (HRAP), *D.P.*, case no. 04/09, decision of 6 August 2010).
81. The objection of the SRSG is therefore dismissed and this part of the complaint is declared admissible.

### **b) Merits**

#### ***The parties' submissions***

82. The complainant complains that the investigation into Tomislav Marković's abduction and killing has not been adequate.

83. The complainant claims that for about seven years, from the date of Tomislav Marković's abduction to the identification of his mortal remains in February 2007, she and her family did not know anything about his fate and whereabouts.
84. The complainant states that the abduction was promptly reported to relevant institutions and that her family cooperated at all times with the authorities. However, they were not sufficiently informed on the status of the investigation. The complainant states that on several occasions she made enquiries with UNMIK Police without receiving satisfactory answers. She states also that her mother used to go on a weekly basis to the UNMIK Police in Graçanicë/Gračanica, where she would receive the same answer from investigators that they "are working on the case". Further, according to the complainant, they did not receive any feedback from investigators on whether the leads provided to them by Mrs Marković were followed and what was the outcome. Finally, the complainant claims that she did not receive timely information as to where and when her father's mortal remains were found and by whom. She also claims that the findings of the autopsy were contradictory.
85. The SRSG notes in his comments dated 12 July 2009 that, following the handover to EULEX in December 2008, all investigative files held by UNMIK were handed over to EULEX (see §§ 27-28 above). Since then UNMIK is dependent on EULEX to provide information "on a given case".
86. The SRSG states that in this case UNMIK has been able to obtain from EULEX copies of "some relevant documents which were held by the former Office on Missing Persons and Forensics" but they were not able to retrieve from EULEX additional material pertaining to the police investigation on the matter. The SRSG states that "the information UNMIK relies upon may be incomplete". In this regard, the Panel recalls that additional investigative documents were provided by the Prishtinë/Priština DPPO on 23 August 2011.
87. As regards the merits of the complaint, the SRSG states at the outset that the present case does not involve security forces operating in Kosovo under the authority of UNMIK and that the perpetrators appeared to be "private individuals acting on their own accord at a time and place where the security of Serb individuals was precarious and in the immediate context of a post-conflict situation".
88. The SRSG argues that the investigation into Tomislav Marković's case complied with the standards of an effective investigation as envisaged by Article 2 of the ECHR, especially when considering the "exceptional circumstances" prevailing in Kosovo at that time. In this regard, the SRSG states that the investigation was initiated immediately after the abduction and that it was conducted expeditiously. An UNMIK Police patrol car was dispatched to the scene of crime, statements were obtained from all witnesses, both from the convoy and from the place of abduction, a police broadcast was sent to all police stations in Kosovo to stop cars and vans fitting the description of those of the abductors and Tomislav Marković, individuals and vehicles were stopped on the road and questioned. The SRSG states that UNMIK Police diligently followed up on all leads provided to them and that at least ten different investigative activities were carried out by UNMIK Police between 24 June 2000 and 14 July 2000 in order to locate Tomislav Marković and identify the perpetrators. Thereafter, several investigative actions were undertaken to follow up on further leads, such as on the information that Tomislav Marković was detained in Podujevë/Podujevo.

89. The SRSG also states that in 2007 UNMIK OMPF was able to identify one of the bodies that had been discovered in a mass grave in Prishtinë/Priština in 2003 as that of Tomislav Marković. Thereafter a thorough autopsy was conducted which established the cause and probable time of his death. The SRSG acknowledges that there was a delay in the identification of the mortal remains, from the exhumation of the body in 2003 until the final identification in 2007. However, according to the SRSG, this delay was due to the difficulties appertaining to excavating mass graves where the number of the dead is large, requiring the careful separation and reassembly of mortal remains and items of identification, as well as to “the need to complete full autopsies for each individual to be identified”.
90. In this regard, the SRSG refers to the case law of the European Court of Human Rights and in particular to the case of *Bazorkina v. Russia*, in which, according to the SRSG, the Court accepted in principle that some delays in an investigation could be explained by the “exceptional circumstances”, such as those prevailing in Chechnya although, in the specific case, the Court had held that the delays in the investigation “clearly exceeded any acceptable limitations on efficiency that could be tolerated in dealing with such a serious crime”. The SRSG concludes that:
- “in the instant case, UNMIK police did in fact take all the necessary, urgent investigative measures at the earliest stages of the incident and pursued with diligence and independence all enquiries while operating in exceptional circumstances as those present in the north of Kosovo at the time”.
91. In response to the complainant’s allegations that she was not adequately informed on the status of the investigation, the SRSG states that by the complainant’s own admission, Mrs Marković was in weekly contact with the police when she would have been kept informed of all the latest developments in the case. The SRSG also states that all leads provided by Tomislav Marković’s family were followed by UNMIK Police and there was constant communication between them and the family. However, unfortunately, those leads did not result in finding Tomislav Marković. The SRSG further states that the procedures of identification and handing over of Tomislav Marković’s mortal remains were carried out with the cooperation of his family.
92. For these reasons, according to the SRSG, any complaint concerning the alleged violation of Article 2, procedural limb, is unfounded.

***The Panel’s assessment***

93. The Panel considers that the complainant invokes a violation of the procedural obligation stemming from the right to life, guaranteed by Article 2 of the ECHR in that UNMIK Police did not conduct an effective investigation into her father’s abduction and killing.
- a) *Submission of relevant files*
94. The SRSG observes that the case file submitted to the Panel concerning the investigation into the case of Tomislav Marković could be incomplete.

95. The Panel notes that Section 15 of UNMIK Regulation No. 2006/12 states that the Panel may request the submission from UNMIK of any documents and that the SRSG shall cooperate with the Panel and provide the necessary assistance including, in particular, in the release of documents and information relevant to the complaint. The Panel in this regard refers to the case-law of the European Court of Human Rights that inferences shall be drawn from the conduct of the respondent party during the proceedings, including from its failure “to submit information in their hands without a satisfactory explanation” (see ECtHR, *Çelikkbilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).
96. The Panel notes that UNMIK was requested on at least three occasions to submit relevant documents in relation to the case. In response to the latest request from the Panel, on 15 January 2013, UNMIK stated that the disclosure of files concerning the case could be considered final.
97. The Panel notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigation to their handing over, is crucial to the continuation of such investigations and could thus raise *per se* issues under Article 2. The Panel also notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which part.
98. The Panel itself is not in the position to verify the completeness of the investigative files received. The Panel will therefore assess the merits of the complaint on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of 15 March 2011, § 146).
- b) *General principles concerning the obligation to conduct an effective investigation under Article 2*
99. Second, the Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights (IACtHR) *Velásquez-Rodríguez* (see IACtHR, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been stated by the United Nations Human Rights Committee (HRC) as stemming from Article 6 (right to life), Article 7 (prohibition of cruel and inhuman treatment) and Article 9 (right to liberty and security of person), read in conjunction with Article 2(3) (right to an effective remedy) of the ICCPR (see HRC, General Comment No. 6, 30 April 1982, § 4; HRC, General Comment No. 31, 26 May 2004, §§ 8 and 18, CCPR/C/21/Rev.1/Add. 13; see also, among others, HRC, *Mohamed El Awani, v. Libyan Arab Jamahiriya*, communication no. 1295/2004, views of 11 July 2007, CCPR/C/90/D/1295/2004). The obligation to investigate disappearances and killings is also asserted in the UN Declaration on the Protection of all Persons from Enforced Disappearances (A/Res/47/133, 18 December 1992), and further detailed in UN guidelines such as the UN Manual on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions (1991) and the “Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres” (1995). The importance of the obligation is confirmed by the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, which entered into force on 23 December 2010.

100. In order to address the complainant's allegations, the Panel refers to the well-established case-law of the European Court on Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that "[The] obligation to protect the right to life under Article 2 of the Convention, read in conjunction with the State's general duty under Article 1 of the Convention to "secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention", requires by implication that there should be some form of effective official investigation when individuals have been killed (see, *mutatis mutandis*, ECtHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 161, Series A no. 324; and *Kaya v. Turkey*, judgment of 19 February 1998, § 105, Reports 1998-I; see also ECtHR, *Jasinskis v. Latvia*, no. 45744/08, judgment of 21 December 2010, § 71). The duty to conduct such an investigation arises in all cases of killing and other suspicious death, whether the perpetrators were private persons or State agents or are unknown (see ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, judgment of 5 November 2009, § 191).
101. The European Court has also stated that the procedural obligation to provide some form of effective official investigation exists also when an individual has gone missing in life-threatening circumstances and is not confined to cases where it is apparent that the disappearance was caused by an agent of the State (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 70 above, at § 136).
102. The authorities must act of their own motion once the matter has come to their attention, and they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedure (see ECtHR, *Ahmet Özkan and Others v. Turkey*, no. 21689/93, judgment of 6 April 2004, § 310, see also ECtHR, *Isayeva v. Russia*, no. 57950/00, judgment of 24 February 2005, § 210).
103. Setting out the standards of an effective investigation, the Court has stated that "beside being independent, accessible to the victim's family, carried out with reasonable promptness and expedition, affording a sufficient element of public scrutiny of the investigation and its results, the investigation must also be effective in the sense that is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible" (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 70 above, at § 191; see also ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, judgment of 15 February 2011, § 63). This is not an obligation of results but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the 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 or persons responsible will risk falling foul of this standard (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 102 above, at § 312, and *Isayeva v. Russia*, cited in § 102 above, at § 212).
104. In particular, the investigation's conclusion must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the ability to establish the circumstances of the case and the identity of those responsible (see ECtHR, *Kolevi v. Bulgaria*, cited in § 100 above, at § 201). Nevertheless, the nature and degree of scrutiny which satisfy the

minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of the investigative work (see ECtHR, *Velcea and Mazăre v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105).

105. Specifically with regard to persons disappeared and later found dead, the Court has stated that the procedures of exhuming and identifying mortal remains do not exhaust the obligation under Article 2 of the ECHR. The Court holds that “the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for, and it is thus of a continuing nature” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 103 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 70 above, at § 148, *Aslakhanova and Others v. Russia*, nos. 2944/06 and others, judgment of 18 December 2012, § 122). However, the Court also stresses that this procedural obligation “does not come to an end even on discovery of the body .... This only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited above, at § 145). While the location and the subsequent identification of the mortal remains of the victim may in themselves be significant achievements, the procedural obligation under Article 2 continues to exist (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, at § 64).

106. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 102 above, at §§ 311-314; ECtHR, *Isayeva v. Russia*, cited above in § 102, at §§ 211-214 and the cases cited therein.)” ECtHR [GC], *Al-Skeini and Others v. United Kingdom*, no. 55721/07, judgment of 7 July 2011, § 167).

c) *Applicability of Article 2 to the Kosovo context*

107. The Panel notes that the abduction and killing of Tomislav Marković occurred in the aftermath of the armed conflict, approximately one year after the deployment of UNMIK in Kosovo, when crime, violence and insecurity were still rife.

108. On his part, the SRSG does not contest that UNMIK had a duty to investigate the present case under ECHR Article 2. However, according to the SRSG, the “unique circumstances” pertaining to the Kosovo context, shall be taken into account when assessing whether this investigation is in compliance with Article 2 of the ECHR. In other cases pending before the Panel concerning alleged violation of the procedural obligation under Article 2, the SRSG has further elaborated that the “unique circumstances” of the Kosovo context include also the peculiar challenges of UNMIK's deployment in the first phase of its mission, which shall also be duly considered when assessing the effectiveness of the investigation under Article 2 (see HRAP, S.C., case no. 02/09, opinion of 6 December 2012, §§ 64-69). In substance, the

SRSG argues that it is not possible to apply to UNMIK the same standards applicable to a State in a normal situation.

109. The Panel considers that the SRSG's arguments raise two main questions: first, whether the standards of Article 2 continue to apply in situation of conflict or generalised violence and, secondly, whether such standards shall be considered fully applicable to UNMIK, in particular during the first phase of its mission.
110. As regards the applicability of Article 2 to UNMIK, the Panel recalls that with the adoption of the UNMIK Regulation No. 1999/1 on 25 July 1999 UNMIK undertook an obligation to observe internationally recognised human rights standards in exercising its functions. This undertaking was detailed in UNMIK Regulation No. 1999/24 of 12 December 1999, by which UNMIK assumed obligations under certain international human rights instruments, including the ECHR. In this respect, the Panel has already found that it is true that UNMIK's interim character and related difficulties must be duly taken into account with regard to a number of situations, but under no circumstances could these elements be taken as a justification for diminishing standards of respect for human rights, which were duly incorporated into UNMIK's mandate (see HRAP, *Milogorić and Others*, nos. 38/08 and others, opinion of 24 March 2011, § 44; *Berisha and Others*, nos. 27/08 and others, opinion of 23 February 2011, § 25; *Lalić and Others*, nos. 09/08 and others, opinion of 9 June 2012, § 22).
111. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court on Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see, among other examples, ECtHR, *Palić v. Bosnia and Herzegovina*, cited § 81 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011). The Court has further held that that the procedural obligation under Article 2 continues to apply in "difficult security conditions, including in a context of armed conflict" (see ECtHR [GC], *Al-Skeini and Others v. United Kingdom*, cited in § 106 above, at § 164; see also ECtHR, *Güleç v. Turkey*, no. 21593/93, judgment of 27 July 1998, § 81, Reports of Judgments and Decisions 1998 IV; ECtHR, *Ergi v. Turkey*, no. 23818/94, judgment of 28 July 1998, §§ 79 and 82, Reports 1998 IV; ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 102 above, at §§ 85-90 and 309-320 and 326-330; ECtHR *Isayeva v. Russia*, cited in § 102 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
112. The Court has acknowledged that "where the death [and disappearances] to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed" (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited in § 106 above, at §164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that "the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 101 above, at §§ 86-92; ECtHR, *Ergi*, cited in § 111 above, at §§ 82-85; ECtHR [GC], *Tanrikulu v. Turkey*, no.

23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited in § 102 above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).

113. Similarly, the HRC has held that the right to life, including its procedural guarantees, shall be considered as the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (see, HRC, General Comment No. 6, cited in § 99 above, at § 1; HRC, *Abubakar Amirov and Aizan Amirova v. Russian Federation*, 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006). Further, the HRC has stated the applicability of Article 2 (3), 6 and 7 of the ICCPR with specific reference to UNMIK's obligation to conduct proper investigations on disappearances and abductions in Kosovo (see HRC, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), 14 August 2006, §§ 12-13, CCPR/C/UNK/CO/1).
114. The Panel appreciates the difficulties encountered by UNMIK during the first phase of its deployment. The Panel notes that the appropriate importance attached to the issue of missing persons in Kosovo meant that UNMIK had to take into account both the humanitarian and criminal dimensions of the situation. In particular, the Panel considers that the importance attached to the criminal investigations and the difficulties in Kosovo that limited the abilities of investigating authorities to conduct such investigations, as described by the SRSG, made it crucial that UNMIK establish from the outset an environment conducive to the performance of meaningful investigations. This would involve putting in place a system that would include such elements as the allocation of overall responsibility for the supervision and monitoring of progress in investigations, provision for the regular review of the status of investigations, and a process for the proper handover of cases between different officers or units of UNMIK Police. Such a system should also take account of the protection needs of victims and witnesses (see, *mutatis mutandis*, ECtHR, *R.R. and Others v. Hungary*, no. 19400/11, judgment of 4 December 2012, §§ 28-32), as well as to consider the special vulnerability of displaced persons in post-conflict situations (see ECtHR [GC], *Sargsyan v. Azerbaijan*, no. 40167/06, decision of 14 December 2011, § 145; and ECtHR [GC], *Chiragov and Others v. Armenia*, no. 13216/05, decision of 14 December 2011, § 146). While understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel deems that this process was completed in 2003 when the police and justice system in Kosovo was described as being "well-functioning" and "sustainable" by the UN Secretary-General (see § 25 above).
115. The Panel further notes that its task is not to review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application to the particular circumstances of a situation subject of a complaint before it (see ECHR, *Brogan and Others v. the United Kingdom*, nos. 11209/84, 11234/84, 11266/84, 11386/85, judgment of 29 November 1988, § 53, Series A no. 145 B). The Panel thus agrees with the SRSG that the nature and degree of scrutiny to determine whether the effectiveness of the investigation satisfies the minimum threshold depends on the circumstances of the particular case. For these reasons, the Panel considers that it will establish with regard to each case if all

reasonable steps were taken to conduct an effective investigation as prescribed by Article 2, having regard to the realities of the investigative work in Kosovo.

d) *Compliance with Article 2 in the present case*

116. The complainant complains that the actions carried out by UNMIK to locate her father and identify the perpetrators were inadequate and that she was not properly informed about the status of investigation. The complainant also claims that there was an unreasonable delay between the discovery of her father's mortal remains and their identification and that UNMIK did not conduct a thorough autopsy.
117. The SRSG states that an effective investigation was carried out in relation to the abduction and killing of Tomislav Marković; however, the leads followed did not result in identifying the perpetrators and bringing them to justice. The SRSG also states that as a result of the investigation, Tomislav Marković's mortal remains were eventually located and identified, and that the cause of death was ascertained through autopsy.
118. The Panel notes that the investigation into Tomislav Marković's case was initiated on the same date of his abduction, 24 June 2000, and is still ongoing. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 70), the Panel recalls that it is competent *ratione temporis* to evaluate the compliance of the investigation with Article 2 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 103 above, at § 70). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 20 above).
119. The Panel notes that the investigation into Tomislav Marković's abduction was commenced promptly and that all crucial investigative steps were undertaken by the authorities in the immediate aftermath of the incident. Within three days of the abduction UNMIK Police inspected the crime scene and surroundings, interviewed all witnesses (eye-witnesses, family members, potential witnesses at the place of abduction and at the border gate) and, together with KFOR, actively initiated a search for Tomislav Marković and the perpetrators. However, no results were achieved, in part due to a lack of cooperation from witnesses. Further investigative activity was undertaken in July and August 2000; and in October 2000, a search for Tomislav Marković's vehicle was initiated. As of August 2000, a missing person file was opened and ante-mortem information was taken from family members for identification purposes.
120. Additional investigative activity was made by UNMIK Police in 2001, after the complainant had indicated new potential witnesses to the investigators, and again in 2002, after the complainant had conveyed the information that Tomislav Marković was being illegally detained. Again, no results were achieved.
121. In June 2003, an unspecified number of unidentified bodies were exhumed from a mass grave in Prishtinë/Priština, and in December 2004 Tomislav Marković's case was reviewed by the WCIU of UNMIK Police. On this occasion, the investigators tried to investigate further the information that Tomislav Marković was illegally detained somewhere in Podujevë/Podujevo, but without any success.

122. Coming to the period under the jurisdiction of the Panel, starting on 23 April 2005, the Panel considers that there had been no significant omissions or oversights thus far in the investigation, which had been undertaken sufficiently promptly and was adequate. The traceable witnesses had been interviewed and the available evidence collected. UNMIK's general efforts in locating and excavating burial locations in Kosovo had led to the discovery of Tomislav Marković's mortal remains in a mass grave, although they were still unidentified at this time. The Panel does not overlook the fact that the identification of Tomislav Marković and subsequent autopsy occurred only in February 2007, almost four years after the discovery of his mortal remains. The Panel deems that this delay in carrying out the identification procedures could of itself call into question whether the investigation satisfied the requirements of promptness under Article 2. However, the Panel is aware that the processes of exhuming and identifying mortal remains in the context of post-conflict Kosovo was particularly time-consuming, as a considerable number of cases concerning missing persons were simultaneously being handled by UNMIK during this period. For such procedures, and in particular for the DNA-based identification, adopted in Kosovo as of 2003, UNMIK had to rely on the technical cooperation of external institutions, primarily the ICMP. For this reason, the Panel does not consider such delay to be unreasonable. The Panel also notes that, given the circumstances of the case, the delay in the identification cannot be considered to have further prejudiced the investigation and its ability to bring perpetrators to justice.
123. As regards the complainant's allegations that the results of the autopsy were not accurate or consistent, the Panel did not find evidence of any serious failings in the autopsy performed on Tomislav Marković. According to the documents reviewed by the Panel, both autopsy reports provided to the complainant and issued by the Prishtinë/Priština Institute of Medicine and by the UNMIK OMPF respectively (see § 37) are consistent in their findings that Tomislav Marković was killed by a gunshot wound to the head.
124. The Panel also recalls that, although the discovery and identification of the Tomislav Marković's mortal remains must be considered in itself an achievement, the procedural obligation under Article 2 did not come to an end with the discovery of the mortal remains, especially as they showed evidence of violent death. The Panel has already stated that, as far as those responsible for the crime had not been located, UNMIK was obligated to use the means at its disposal to regularly review the progress of the investigation and to ensure that no new facts had come to light, as well as to inform the victim's relatives regarding any possible new leads of enquiry (see HRAP, S.C., cited in § 108 above, at § 98). The Panel notes that there is no indication that Tomislav Marković's case was further reviewed after his mortal remains were identified and the cause of death established. However, having in mind that all crucial investigation steps had previously been taken and that all available leads had been sufficiently pursued thus far by the investigators, the Panel deems that, the fact that the case was not further reviewed cannot constitute of itself a violation of Article 2.
125. Finally, as regards the accessibility of the investigation to the family and to public scrutiny, the complainant claims that she was not adequately informed about the steps taken by the investigators. On the other hand, the SRSG argues that as per the complainant's own admission, her mother and family were in regular contact with UNMIK investigators. Upon review of the investigation files, the Panel notes that

UNMIK Police from 2000 onwards met on several occasions with the Marković family to gather information or in order to follow-up on the investigation. It appears from the documents examined by the Panel that on those occasions the investigators were also tasked to inform the family of the status of the investigation. The Panel also recalls that the European Court of Human Rights has held that “this aspect of the procedural obligation does not require applicants to have access to police files, or copies of all documents during an ongoing enquiry, or for them to be consulted or informed at every step (see ECtHR, *McKerr v. the United Kingdom*, no. 28883/95, judgment of 4 May 2011, § 121; ECtHR, *Green v. the United Kingdom*, no. 28079/04, decision of 19 May 2005; ECtHR, *Hackett v. the United Kingdom*, no. 34698/04, decision of 10 May 2005; ECtHR, *Brecknell v. the United Kingdom*, judgment of 27 November 2007, § 77). The Panel understands the complainant’s view that the scope of the information received was limited or not entirely satisfactory. However, it appears to the Panel that the limited information provided to the complainant and her family was due to the lack of concrete results, substantial progress or change in status of the investigation. For these reasons, the Panel deems that in the present case the applicant cannot be considered to have been excluded from the investigation process to such a degree as would infringe the minimum standard of Article 2.

126. The Panel regrets that the investigation has not to date been able to identify the perpetrators of Tomislav Marković’s abduction and killing and bring them to justice. Nevertheless, the Panel concludes that in the present case there has been no violation of Article 2, procedural limb, of the ECHR.

### **C. Alleged violation of Article 3**

127. The complainant states that the lack of information and uncertainty surrounding the disappearance and killing of her father caused mental suffering to herself and her family. The complainant invokes Article 3 of the ECHR prohibiting inhuman and degrading treatment.

128. In its admissibility decision of 17 April 2009, the Panel rejected the SRSB’s objections that the complaint was not submitted on time and that it was manifestly ill-founded. It also decided that the issue of exhaustion of available remedies should be joined to the examination of the merits of the complaint.

129. Nevertheless, the Panel has to reassess the admissibility of this part of the complaint, in light of subsequent developments in the Panel’s case-law concerning the admissibility of complaints under Article 3 of the ECHR.

130. In particular, the Panel refers to the case-law of the European Court of Human Rights and to its own case-law with respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR. The European Court accepts that this may be the case, depending on the existence of “special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation”. The Court further holds that “relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the

authorities responded to those enquiries”. It also emphasizes “that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention” (see, e.g., ECtHR [GC], *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR [GC], *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, *ECHR*, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, no. 69481/01, cited in § 112 above, at § 139; see also HRAP, *Radovanović*, decision of 16 September 2011, § 41).

131. The Panel has held that a complainant may invoke a violation of Article 3 of the ECHR even if there is no explicit reference to specific acts of the authorities involved in the investigation, since also the passivity of the authorities and the absence of information given to the complainant may be indicative of inhuman treatment of the complainant by the authorities (see HRAP, *Mladenović*, no. 99/09, decision of 11 August 2011, § 22).
132. However, the Panel recalls the case-law of the European Court of Human Rights stating that, where the disappeared person is later found dead, the applicability of Article 3 of the ECHR is in general limited to the distinct period during which the member of the family sustained uncertainty, anguish and distress appertaining to the specific phenomenon of disappearances (see, e.g., ECtHR, *Luluyev and Others v. Russia*, no. 69480/01, judgment of 9 November 2006, §§ 114-115, *ECHR*, 2006-XIII; see also ECtHR, *Gongadze v. Ukraine*, no. 34056/02, judgment of 8 November 2005, § 185, *ECHR*, 2005-XI).
133. In this respect, the question arises whether the complaint has been filed in time. Section 3.1 of UNMIK Regulation No. 2006/12 states that the Panel “may only deal with a matter ... within a period of six months from the date on which the final decision was taken”. As a rule, the six-month period runs from the date of the final decision in the process of exhaustion of domestic remedies. Where it is clear from the outset however that no effective remedy is available to the complainant, the period runs from the date of the acts or measures complained of, or from the date of knowledge of that act or its effect on or prejudice to the complainant (ECtHR [GC], *Varnava and Others v. Turkey*, cited in 70 above, at § 157). Where the complaint relates to a continuing situation, which has come to an end, the six-month time limit starts to run from the date on which the situation has come to an end.
134. The Panel notes that the mortal remains of Tomislav Marković were returned to the complainant on 23 February 2007. It is at that moment that the period during which an issue could arise under Article 3 of the ECHR, came to an end. For the purpose of Section 3.1 of UNMIK Regulation No. 2006/12, the six-month time limit therefore started to run from that date.
135. The complaint was filed with the Panel on 13 November 2008 that is after the expiration of the above-referred six-month period.
136. The Panel therefore must conclude that this part of the complaint falls outside the time-limit set by Section 3.1 of UNMIK Regulation No. 2006/12 and thus will not be examined in its merits (HRAP, *Radovanović*, cited in § 130 above, at §§ 20-23).

**FOR THESE REASONS,**

The Panel, unanimously,

- 1. DECLARES THE COMPLAINT CONCERNING THE ALLEGED VIOLATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, SUBSTANTIVE OBLIGATION, INADMISSIBLE *RATIONE TEMPORIS*;**
- 2. REJECTS THE OBJECTION TO THE ADMISSIBILITY OF THE COMPLAINT CONCERNING THE ALLEGED VIOLATION OF ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, PROCEDURAL OBLIGATION;**
- 3. FINDS THAT THERE HAS BEEN NO VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 4. DECLARES THE COMPLAINT UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS INADMISSIBLE DUE TO THE SIX-MONTH RULE.**

Andrey ANTONOV  
Executive Officer

Marek NOWICKI  
Presiding Member

## ABBREVIATIONS AND ACRONYMS

**CCIU** - Central Criminal Investigation Unit  
**DOJ** - Department of Justice  
**DPPO** - District Public Prosecutor's Office  
**ECHR** - European Convention on Human Rights  
**ECtHR** - European Court of Human Rights  
**EU** - European Union  
**EULEX** - European Union Rule of Law Mission in Kosovo  
**FRY** - Federal Republic of Yugoslavia  
**GC** - Grand Chamber of the European Court of Human Rights  
**HRAP** - Human Rights Advisory Panel  
**HRC** - United Nations Human Rights Committee  
**IACtHR** - Inter-American Court of Human Rights  
**ICCPR** - International Covenant on Civil and Political Rights  
**ICMP** - International Commission of Missing Persons  
**ICRC** - International Committee of the Red Cross  
**ICTY** - International Criminal Tribunal for former Yugoslavia  
**KFOR** - International Security Force (commonly known as Kosovo Force)  
**KLA** - Kosovo Liberation Army  
**MoU** - Memorandum of Understanding  
**MPU** - Missing Persons Unit  
**NATO** - North Atlantic Treaty Organization  
**OMPF** - Office on Missing Persons and Forensics  
**OSCE** - Organization for Security and Cooperation in Europe  
**RIU** - Regional Investigation Unit  
**SCIU** - Serious Crimes Investigation Unit  
**SRSG** - Special Representative of the Secretary-General  
**UN** - United Nations  
**UNHCR** - United Nations High Commissioner for Refugees  
**UNMIK** - United Nations Interim Administration Mission in Kosovo  
**VRIC** - Victim Recovery and Identification Commission  
**WCIU** - War Crimes Investigation Unit