



# ***The Human Rights Advisory Panel***

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## **OPINION**

**Date of adoption: 23 April 2013**

**Case No. 34/09**

**Svetlana JOČIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 23 April 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 Procedure, makes the following findings and recommendations:

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

1. The complaint was introduced on 6 March 2009 and registered on the same date.
2. On 4 May 2009, the Human Rights Advisory Panel requested further information from the complainant. On 31 August 2009 the complainant provided her response.

3. On 30 November 2009, 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 1 June 2010, UNMIK provided its response.
4. On 14 July 2010, the Panel forwarded UNMIK's response to the complainant inviting her to submit further comments if she so wished. The complainant did not avail herself of that opportunity.
5. On 13 April 2011, the Panel declared the complaint admissible. On 18 April 2011, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaint.
6. On 5 August 2011, the SRSG provided UNMIK's comments. On the same date, the Panel was provided with copies of the documents used in preparation of those comments.
7. On 12 October 2011, at the Panel's request, the complainant provided additional comments.
8. On 15 January 2013, at the Panel's request, UNMIK confirmed that the disclosure of files concerning the case could be considered final.

## II. THE FACTS

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

9. 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.
10. 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.

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

<sup>2</sup> The references drawn upon by the Panel in setting out this general background include: OSCE, "As Seen, as Told", Vol. 1 (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>).

11. 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 No. 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 Special Representative of the Secretary-General (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.
12. 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.
13. 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.
14. 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 ICRC as of October 2012.
15. 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.

16. 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.
17. 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”.
18. 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 Office on Missing Persons and Forensics (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.
19. 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.
20. 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 of Mr Dušan Jočić**

21. The complainant is the mother of Dušan Jočić. She states that on 18 June 1999, in Pejë/Peć town, her son and his friends were approached by persons wearing uniforms of the Italian Army who invited them to go with them to a military base, to seek employment with the Italian KFOR. A group of four friends, including Mr Jočić, responded to this invitation. Apparently, at that location, they were detained by members of the Kosovo Liberation Army (KLA).
22. The complainant states that she immediately reported the matter to the Italian KFOR and the ICRC, as well as to “the army”, police and various civic organisations in Serbia proper. However, she is not aware of any action to find her son.
23. She submitted to the Panel an undated criminal report addressed to the International Public Prosecutor’s Office of Pejë/Peć, filed by her husband, which brings charges against unknown persons and provides the names of two witnesses.
24. The ICRC tracing request for Dušan Jočić was opened on 14 July 1999. The tracing request of the Red Cross of Serbia confirms that as of 5 May 2009 he was still registered as a missing person.
25. By the time the complainant submitted her complaint to the Panel, she still did not have any information about the fate of her son.
26. The name of Dušan Jočić appears in a list dated 11 February 2002, presenting the names of missing persons, with regard to whom the relevant ante-mortem data were collected by the ICRC and forwarded to UNMIK. His name is also mentioned in the database compiled by the UNMIK OMPF. The entry in the online list of missing persons maintained by the ICMP<sup>3</sup> in his regard reads, in relevant parts: “sufficient reference samples collected” and “ICMP has provided information on this missing person on 3-21-2007 to authorized institution. To obtain additional information, contact EULEX Kosovo Headquarters.”

## **C. The investigation**

### *1) Disclosure of relevant files*

27. On 5 August 2011, UNMIK presented to the Panel the documents which were previously held by the OMPF and the UNMIK Police MPU and WCIU. However, UNMIK suggested to the Panel that it was possible that further documents existed. On 15 January 2013, UNMIK confirmed to the Panel that it had disclosed all the files in UNMIK’s possession relevant to the case.

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<sup>3</sup> The database is available at: [http://www.ic-mp.org/fdmsweb/index.php?w=mp\\_details\\_popup&l=en](http://www.ic-mp.org/fdmsweb/index.php?w=mp_details_popup&l=en) (accessed on 15 April 2013).

2) *Investigation with regard to the victim, identification and handover of his mortal remains*

28. Mortal remains, which were later identified as those of Dušan Jočić, were discovered on 16 July 2002 in Lubeniq/Ljubenić village, Pejë/Peć municipality. An autopsy conducted on 26 November 2004 established that the death was caused by a “gunshot wound to the head.”
29. The ante-mortem data for Dušan Jočić are contained in a missing person’s identification form of the Serbian Ministry of Internal Affairs (MUP), dated 23 March 2003. A handwritten number on the top of that form’s front page reads “2004-000092”. The part of this form related to the donors of DNA samples is blank.
30. It appears from the file that an investigation into the disappearance of Dušan Jočić was opened by the UNMIK Police MPU in 2004.
31. The UNMIK OMPF identification and death certificates, dated 24 July 2007, confirm the mortal remains as those of Dušan Jočić, that they had been located on 16 July 2002 in Lubeniq/Ljubenić village, that he died before 16 July 2002 and that the cause of death was a gunshot to the head. The same information is in the EULEX identification and death certificates, dated 14 December 2010.
32. The EULEX handover certificate, dated 17 December 2010, confirms that the mortal remains of Dušan Jočić, together with relevant post-mortem identification documents and the clothing/artefacts, were handed over to a representative of the Commission for Missing Persons of the Government of the Republic of Serbia on the same date. UNMIK, however, states that the mortal remains were received by the complainant. The case related to the disappearance of Dušan Jočić was closed on the same date.
33. On 12 October 2011, at the Panel’s request, the complainant clarified that she had in fact been contacted by Serbian Government officials, with regard to accepting the mortal remains which had been identified as those of her missing son. However, she did not accept to receive those mortal remains because, first, she does not believe the DNA identification and, second, the belt which was presented to her with the mortal remains was not her son’s.

3) *Investigation with regard to perpetrators*

34. The file presented to the Panel contains a translation of a criminal report, almost identical to the one mentioned in § 23 above, but addressed to the International Public Prosecutor in Prishtinë/Priština. The translation is marked as having been made by an UNMIK DOJ interpreter and is dated 21 February 2005.
35. In accordance with the WCIU Case Report, dated 3 October 2007, the case was entered into the database on 16 August 2005. The “case status” field in the report is blank. The names of two witnesses and a reporting party are mentioned in the report. In a subsequent, undated, WCIU Case Analysis Report addressed to the UNMIK DOJ, it is noted that none of the identified persons was interviewed, thus further action was recommended.

36. No indication of any investigative action with regard to the identification and bringing to justice of those responsible for the disappearance and killing of Dušan Jočić is in the file presented to the Panel.
37. In a report dated 1 July 2011, the Provost Marshal of the KFOR Multinational Brigade West (MNBG-West) Headquarters confirms that the archives of the Italian KFOR contingent of the MNBG-West, including those of the Military Security Section and the Financial Supervisor's Centre, which handles matters of employment of local staff, contain no reference to Dušan Jočić or to anyone with a similar name. The Provost Marshal concludes that it is unlikely that Dušan Jočić had ever contacted Italian KFOR for employment purposes, and that there are no grounds to implicate the Italian KFOR contingent in his disappearance and killing.
38. In the information e-mail to KFOR dated 9 June 2011, an EULEX WCIU investigator notes that Dušan Jočić's name was no longer in the list of missing persons, because his mortal remains had probably been located and handed over to the family, however no information about the identification and handover was in the file.

### **III. THE COMPLAINT**

39. The complainant complains about UNMIK's alleged failure to properly investigate the disappearance and killing of her son. In this regard the Panel deems that she invokes a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
40. The complainant also complains about the mental pain and suffering allegedly caused to herself and her family by this situation. In this regard, the Panel deems that the complainant relies on Article 3 of the ECHR.

### **IV. THE LAW**

#### **A. Alleged violation of the procedural obligation under Article 2 of the ECHR**

41. 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 European Convention on Human Rights (ECHR) in that UNMIK Police did not conduct an effective investigation into her son's disappearance and killing.

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

42. In determining whether it considers that there has been a violation of Article 2 (procedural limb) 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 substantive obligations under Article 2 of the ECHR. 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.

43. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
44. 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.
45. 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.
46. 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 (see § 44). 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.
47. 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, *Varnava and Others v. Turkey*, nos. 16064/90 and others, judgment of 18 September 2009, §§ 147-149; ECtHR, *Cyprus v. Turkey* [GC] no. 25781/94, judgment of 10 May 2001, § 136, ECHR 2001-IV).

## 2. The Parties' submissions

48. The complainant in substance alleges violations concerning the lack of an adequate criminal investigation into the disappearance and killing of her son. The complainant also states that she was not informed as to whether an investigation was conducted and what the outcome was.
49. In his comments on the merits of the complaint, the SRSG agrees that by virtue of the United Nations Security Council Resolution 1244 (1999), UNMIK was responsible for the security and safety of persons living in Kosovo. UNMIK's policing responsibility entailed that "UNMIK had a mandate to protect people in Kosovo against criminal activities and to conduct effective investigations into crimes". Therefore, the SRSG acknowledges that UNMIK had an obligation to carry out an effective investigation into the disappearance and killing of Dušan Jočić, as required under Article 2 of the ECHR.
50. The SRSG also accepts that Dušan Jočić disappeared in life-threatening circumstances, which are not imputable to any of UNMIK's agents. The SRSG likewise accepts that it was UNMIK's responsibility to conduct an effective investigation into his disappearance and eventual killing, in pursuit of a general goal to secure the effective implementation of the domestic laws which protect the right to life, as defined by UNMIK Regulation No. 1999/1 *On the Authority of the Interim Administration in Kosovo* and subsequently, UNMIK Regulation 1999/24 *On the Law Applicable in Kosovo*, and Article 2 of the ECHR.
51. Having accepted the general responsibility to investigate, the SRSG however refers to the fact that the first mention of the disappearance of Dušan Jočić in the official UNMIK documentation is the Case Report, dated 16 August 2005 (see § 35 above). Therefore, he argues that the disappearance of Dušan Jočić may not have been reported to UNMIK authorities on, or soon after, the day of his disappearance and that therefore UNMIK was not under any obligation to investigate this particular disappearance.
52. The SRSG further states that the Panel should also consider the fact that the disappearance of the complainant's son occurred when the crime rate in Kosovo was "at its highest", that is in June 1999, after the NATO bombing. According to the SRSG, during the years 1999 and 2000 UNMIK received hundreds of reports on disappearances and killings of Kosovo Serbs, which were particularly challenging to investigate due to the limited resources as well as to a lack of leads, as in the present case.
53. As the UN does not have a standing police force of its own and has to rely on contributions of forces from UN member States, UNMIK had no control over the

recruitment of international police officers, who often had insufficient experience in investigating crimes with an inter-ethnic aspect in a post-conflict context. Similarly, the rotation of police officers, who were assigned only for periods of six months to one or two years, hampered the continuity of investigation.

54. For these reasons, the SRSG argues “the standards set by the European Court of Human Rights for an effective investigation cannot be the same for UNMIK as for a State with a functioning, well organized police apparatus in place and with police officers it can recruit, select and train”.
55. The SRSG also submits that “some weight must also be attached to the fact that the mortal remains of Mr. Dušan Jočić were eventually identified and returned to his family”, thus satisfying the procedural requirement under Article 2 related to the obligation to locate and identify the mortal remains of a missing person. In this regard, the SRSG considers that “...UNMIK acted quickly by identifying bod[ies] ... and arranging for the mortal remains ... to be returned to his family.”
56. The SRSG accepts that “based on the paucity of information that was made available” it is not possible to assert “with the requisite amount of certainty whether the investigation aimed at bringing the perpetrators of the killing[s] to justice could be considered effective in the sense of Article 2, ECHR.” Nevertheless, the SRSG concludes that there has not been a violation of Article 2 of the ECHR.

### **3. The Panel’s assessment**

#### *a) Submission of relevant files*

57. The SRSG provided the Panel with copies of all available investigative and other relevant documents on 21 September 2011. However, the SRSG noted that there is a possibility that more documents related to this case may exist (see § 27 above).
58. 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, *Çelikkilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).
59. The Panel also 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 likewise notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.
60. 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*

61. First, the Panel considers that the lack of any investigative files raises issues of the burden of proof. In this regard, the Panel refers to the approach of the European Court on Human Rights as well as of the United Nations Human Rights Committee (HRC) on the matter. The general rule is that it is for the party who asserts a proposition of fact to prove it, but that this is not a rigid rule.
62. Following this general rule, at the admissibility stage an applicant must present facts, which are supportive of the allegations of the State's responsibility, that is, to establish a *prima facie* case against the authorities (see, *mutatis mutandis*, ECtHR, *Artico v. Italy*, no. 6694/74, judgment of 13 May 1980, §§ 29-30, Series A no. 37; ECtHR, *Toğcu v. Turkey*, no. 27601/95, judgment of 31 May 2005, § 95). However, the European Court further holds that "... where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities ... The burden of proof may then be regarded as resting on the authorities to provide a satisfactory and convincing explanation" (see ECtHR [GC], *Varnava and Others v Turkey*, cited above in § 47, at §§ 183-184).
63. The European Court also states that "... it is for the Government either to argue conclusively why the documents in question cannot serve to corroborate the allegations made by the applicants, or to provide a satisfactory and convincing explanation of how the events in question occurred, failing which an issue under Article 2 and/or Article 3 of the Convention will arise" (see ECtHR, *Akkum and Others v. Turkey*, no. 21894/93, judgment of 24 June 2005, § 211, ECHR 2005-II (extracts)). The Court adds that "... [i]f they [the authorities] then fail to disclose crucial documents to enable the Court to establish the facts or otherwise provide a satisfactory and convincing explanation, strong inferences may be drawn" (see ECtHR, *Varnava and Others v Turkey* [GC], cited above in § 47, at § 184; see also, HRC, *Benaniza v Algeria*, Views of 26 July 2010, § 9.4, CCPR/C/99/D/1588/2007; HRC, *Bashasha v. Libyan Arab Jamahiriya*, Views of 20 October 2010, § 7.2, CCPR/C/100/D/1776/2008).
64. The Panel understands that the international jurisprudence has developed in a context where the Government in question may be involved in the substantive allegations, which is not the case with UNMIK. The Panel nevertheless considers that since the documentation was under the exclusive control of UNMIK authorities, at least until the handover to EULEX, the principle that "strong inferences" may be drawn from lack of documentation is applicable.
65. 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 *Velásquez-Rodríguez* (see Inter-American Court of Human Rights (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 Articles 2 (3) (right to an effective remedy) of the International Covenant on Civil and Political Rights (CCPR) (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.

66. In order to address the complainant’s allegations, the Panel refers, in particular, 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 ECtHR, *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).
67. 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 § 47 above, at § 136).
68. 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).
69. 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 § 47 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 above, at § 312; and *Isayeva v. Russia*, cited above, at § 212).

70. 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 § 66 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).
71. 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 § 69 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 47 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 in § 47 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).
72. 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*, cited in § 68 above, at §§ 311-314; ECtHR, *Isayeva v. Russia*, cited in § 68 above, at §§ 211-214 and the cases cited therein; ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, judgment of 7 July 2011, no. 55721/07, § 167, ECHR 2011).

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

73. The Panel is conscious that the disappearance and killing of Dušan Jočić occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.
74. On his part, the SRSG does not contest that UNMIK had a duty to investigate the present case under Article 2 of the ECHR. However, according to the SRSG, the unique circumstances pertaining to the Kosovo context and to UNMIK's deployment in the first phase of its mission shall be taken into account when assessing whether this investigation is in compliance with Article 2 of the ECHR. 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.
75. 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.
76. 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).
77. 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 in § 69 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. the United Kingdom*, cited in § 72 above, at § 164; see also ECtHR, *Güleç v. Turkey*, judgment of 27 July 1998, § 81, Reports 1998-IV; ECtHR, *Ergi v. Turkey*, judgment of 28 July 1998, §§ 79 and 82, Reports 1998-IV; ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 68 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 68 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
78. 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 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 § 66 above, at §§ 86-92; ECtHR, *Ergi*, cited 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 above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).

79. 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 § 65 above, at § 1; HRC, *Abubakar Amirov and Aïzan 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).
80. 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 § 17 above).

81. 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, ECtHR, *Brogan and Others v. the United Kingdom*, 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*

82. Turning to the circumstances of the present case, the Panel notes the complainant's statement that her son's disappearance was promptly reported to KFOR and the ICRC (see § 22 above). The Panel considers that from February 2002 UNMIK was informed of Dušan Jočić's disappearance (see § 26 above) and that from February 2005 at the latest, the UNMIK DOJ was fully aware of the circumstances of the complainant's son's alleged abduction (see § 34 above). It is without doubt that after the identification of his mortal remains in 2007, it was apparent that his death was violent (see § 31 above).

83. Examining the particulars of this case, the Panel notes that the file does not indicate any investigative action into the disappearance and, as it later transpired, killing of Dušan Jočić. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 47), 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 § 69 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 § 19 above).

84. The Panel notes that from the moment UNMIK became aware of the matter until 23 April 2005, the only actions undertaken by UNMIK relate to the exhumation of Dušan Jočić's mortal remains, which took place on 16 July 2002. Nonetheless, there is no evidence that any action was undertaken with respect to clarifying the circumstances surrounding his abduction and killing.

85. The Panel also notes that, from the registration of the case in 2004 until the end of the period under review, no action whatsoever aimed at identification of those responsible for the possible abduction and killing of Dušan Jočić undertaken by UNMIK Police is documented in the file. No statement was ever taken from the complainant or witnesses to the abduction. No efforts were made to search for evidence (i.e. a site identification and inspection) or to follow obvious lines of enquiry (i.e. KLA commanders in the area of Pejë/Peć). In 2004, the only step taken by UNMIK Police MPU was the registration of the case.

86. In 2007, UNMIK succeeded in identifying the victim's mortal remains. Although this must be considered in itself an achievement, the Panel recalls that the procedural obligation under Article 2 did not come to an end with the identification of the remains,



especially because of the clear signs of a violent death. Even after receiving two criminal reports from Serbia, one of which was undoubtedly received by the UNMIK DOJ before 21 February 2005 (see § 34 above), no investigative action is reflected in the file.

87. The Panel also considers that, contrary to the SRSG's position, it was not due to the diligence of the MPU or WCIU, that Dušan Jočić's mortal remains were found and identified. The fact that they were excavated in 2002 but then it was five years before they were identified in 2007, suggests that they were discovered during an action, not targeting this particular case (e.g. an excavation of a suspected mass grave). Otherwise, the identification would not have taken that long. The Panel also considers the fact that ante-mortem data on this missing person was collected by the Serbian MUP, and not by the UNMIK Police. In addition, no explanation was offered to the Panel as to why the handover of the identified mortal remains took place only after three years.
88. 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 of the ECHR. 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 a delay to be unreasonable. The Panel also believes 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 the perpetrators to justice (see approach adopted by the Panel in HRAP, *Zdravković*, no. 46/08, §§ 123-124).
89. The Panel notes that considering the situation in Kosovo at that time, it may be that the criminal report of the complainant's husband (see § 23 above) never in fact reached the International Public Prosecutor's Office of Pejë/Peć. The Panel however recalls that from February 2002 UNMIK was informed of Dušan Jočić's disappearance and that the UNMIK DOJ was fully aware of the case from February 2005 at the latest (see § 82 above).
90. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that basic investigative steps, such as interviewing the complainant and witnesses to the above-described incident when the complainant's son and others were invited to go to KFOR, had not yet been carried out. In addition, the Panel considers that, as it became clear that the death was violent and 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 to ensure that no new facts had come to light, as well as to inform the relatives Dušan Jočić regarding any possible new leads of enquiry. The Panel notes that the case was reviewed at least once, some time between 3 October 2007 and 9 December 2008 (see § 35 above). However, regardless of the fact that deficiencies were identified, no action to rectify them was undertaken.
91. The Panel therefore considers that, having regard to all the circumstances of the particular case, not all reasonable steps to identify the perpetrators and to bring them to justice were

taken by UNMIK. In this sense the Panel considers that the investigation was not adequate and did not comply with the requirements of promptness, expedition and effectiveness (see § 69 above), as required by Article 2.

92. As concerns the requirement of public scrutiny, the Panel recalls that Article 2 also requires the victim's next-of-kin to be involved in the investigation to the extent necessary to safeguard his or her legitimate interests. In this regard, the complainant states that she received no feedback whatsoever from UNMIK on the investigation concerning her son's abduction. As the Panel has already noted, no statement was ever taken from the complainant and no information was given to her concerning the status of the investigation. The Panel therefore considers that the investigation was not accessible to the complainant's family as required by Article 2.
93. In light of the deficiencies and shortcomings as described above, the Panel concludes that UNMIK failed to carry out an adequate and effective investigation into the abduction and killing of the complainant's son. There has been accordingly a violation of Article 2 of the ECHR.

## **B. Alleged violation of Article 3 of the ECHR**

94. The Panel considers that the complainant invokes, in substance, a violation of the right to be free from inhumane or degrading treatment, guaranteed by Article 3 of the ECHR.

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

95. The Panel will consider the allegations under Article 3 of the ECHR, applying the same scope of review as was set out with regard to Article 2 (see §§ 42-47 above).
96. The Panel recalls that the European Court of Human Rights has found on many occasions that a situation of enforced disappearance gives rise to a violation of Article 3 in respect of close relatives of the victim. It emphasises that, concerning Article 3, "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 (Grand Chamber), *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR (Grand Chamber), *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*, cited in § 78 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 69 above, at § 74; ECtHR, *Alpatu Israilova v. Russia*, no. 15438/05, judgment of 14 March 2013, § 69; see also HRAP, *Zdravković*, no. 46/08, decision of 17 April 2009, § 41). "It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities' conduct" (see, among others, ECtHR, *Er and Others v. Turkey*, no. 23016/04, judgment of 31 July 2012, § 94).
97. Lastly, where mental suffering caused by the authorities' reactions to the disappearance is at stake, the alleged violation is contrary to the substantive element of Article 3 of the ECHR, not its procedural element, as is the case with regard to Article 2 (ECtHR, *Gelayevy v. Russia*, no. 20216/07, judgment of 15 July 2010, §§ 147-148).

## 2. The Parties' submissions

98. The complainant alleges that the lack of information and certainty surrounding the disappearance of her son, particularly because of UNMIK's failure to properly investigate his disappearance, caused mental suffering to herself and her husband, whose untimely death was to a large extent due to this suffering.
99. The SRSG, rejects this allegation, stressing that there were neither assertions made by the complainant of any bad faith on the part of UNMIK personnel involved with the matter, nor evidence of any disregard for the seriousness of the matter, or the emotions of the complainant and her family emanating from the disappearance and death of her son.
100. The SRSG adds that the understandable and apparent mental anguish and suffering of the complainant cannot be attributed to UNMIK, but rather results from the disappearance and death of her son. The SRSG concludes that the complainant's suffering lacks a character distinct from the emotional distress which may be regarded as inevitably caused to the relatives of a victim of a serious human rights violation.

## 3. The Panel's assessment

### a) *General principles concerning the obligation under Article 3*

101. Like Article 2, Article 3 of the ECHR enshrines one of the most fundamental values in democratic societies (ECtHR, *Talat Tepe v. Turkey*, no. 31247/96, 21 December 2004, § 47; ECtHR (Grand Chamber), *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, ECHR, 2004-VII, § 424). As confirmed by the absolute nature conferred on it by Article 15 § 2 of the ECHR, the prohibition of torture and inhuman and degrading treatment still applies even in most difficult circumstances.
102. Setting out the general principles applicable to situations where violations of the obligation under Article 3 of the ECHR are alleged, the Panel notes that the phenomenon of disappearance constitutes a complex form of human rights violation that must be understood and confronted in an integral fashion (see IACtHR, *Velasquez Rodriguez v. Honduras*, cited in § 65 above, at § 150).
103. The Panel observes that the obligation under Article 3 of the ECHR differs from the procedural obligation on the authorities under Article 2. Whereas the latter requires the authorities to take specific legal action capable of leading to identification and punishment of those responsible, the former is more general and humanitarian and relates to their reaction to the plight of the relatives of those who have disappeared or died.
104. The HRC has also recognised disappearances as a serious violation of human rights. In its decision of 21 July 1983, in the case *Quinteros v. Uruguay*, it stated that disappearances constitute serious violations of the rights of the disappeared person's relatives, who suffer from deep anguish which persists for as long as the uncertainty concerning the fate of their loved one continues, often for many years (see HRC, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), § 14). Moreover, in its decision of 15 July 1994 in the case *Mojica v. Dominican Republic*, the HRC has deemed that "the disappearance of persons is inseparably linked to treatment that

amounts to a violation of article 7 [of the Covenant]”, also prohibiting torture, inhumane or degrading treatment and punishment (see HRC, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), § 5.7).

105. 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 Panel refers to the case law of the European Court of Human Rights and to its own case law. 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” (see ECtHR, *Baysayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 159; ECtHR, *Er and Others v. Turkey*, cited in § 96 above, at § 94).
106. The Panel takes note that, when assessing the emotional suffering of the victims, the European Court also considers the following circumstances: the length of the disappearance itself and of the period with no information on the fate of the missing person and on the investigation undertaken by the authorities; the delay in initiation of criminal investigation into the disappearance; the absence of any “meaningful” action by the authorities, despite the fact that the complainants approached them to report the disappearance of their relative and to share with them the information they had; lack of any plausible explanation or information as to the fate of their missing relatives despite personal or written inquiries with official bodies (see, among others, ECtHR, *Er and Others v. Turkey*, cited in § 96 above, at § 96; ECtHR, *Osmanoğlu v. Turkey*, no. 48804/99, judgment of 24 January 2008, § 97). Another factor leading to a finding of violation of Article 3 of the ECHR is the continuous nature of the psychological suffering of relatives of a victim of a disappearance (ECtHR, *Salakhov and Islyamova v. Ukraine*, no. 28005/08, judgment of 14 March 2013, § 201).
107. The HRC has also considered the issue and recognised family members of disappeared or missing persons as victims of a violation of Article 7 of the Covenant: parents (*Boucherf v. Algeria*, Communication No. 1196/2003, views of 30 March 2006, § 9.7, CCPR/C/86/D/1196/2003), children (*Zarzi v. Algeria*, Communication No. 1780/2008, views of 22 March 2011, § 7.6, CCPR/C/101/D/1780/2008), siblings (*El Abani v. Libyan Arab Jamahiriya*, Communication No. 1640/2007, views of 26 July 2010, § 7.5, CCPR/C/99/D/1640/2007), spouses (*Bousroual v. Algeria*, Communication No. 992/2001, views of 30 March 2006, § 9.8, CCPR/C/86/D/992/2001), aunts and uncles (*Benaziza v. Algeria*, cited in § 63 above, at § 10), grandchildren (*ibid.*) and even cousins (*Bashasha v. Libyan Arab Jamahiriya*, cited in § 63 above, at § 7.5). It justifies this broad understanding of victim status by the suffering and distress that is caused to family members by the disappearance of an individual, which is often exacerbated by the authorities’ insufficient efforts to investigate the disappearance in order to establish the fate of the victim and to bring perpetrators to justice (*Aboussedra v. Libyan Arab Jamahiriya*, Communication No. 1751/2008, views of 25 October 2010, § 7.5,

CCPR/C/100/D/1751/2008). In the *Amirov v. Russian Federation* the Committee observed that “[w]ithout wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary. In the present case, the Committee notes the horrific conditions in which the author came to find his wife's mutilated remains (...), followed by the dilatory, sporadic measures undertaken to investigate the circumstances that have lead to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated” (*Amirov v. Russian Federation* Communication No. 1447/2006, views of 2 April 2009, § 11.7, CCPR/C/95/D/1447/2006).

108. The Panel also takes into account that the European Court of Human Rights has determined that its analysis of the authorities’ reaction is “not confined to any specific manifestation of the authorities’ attitudes, isolated incidents or procedural acts; on the contrary, the Court gives a global and continuous assessment of the way in which the authorities of the respondent State responded to the applicants’ enquiries” (see ECtHR, *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, judgment of 16 April 2012, § 152).
109. In this respect, it is the position of the European Court that findings under the procedural limb of Article 2 would also be of direct relevance in considering the existence of a violation of Article 3 (see ECtHR, *Basayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 109; ECtHR, *Gelayevy v. Russia*, no. 20216/07, judgment of 15 July 2010, § 147; ECtHR, *Bazorkina v. Russia*, cited in § 78 above, at § 140).
110. The Panel observes that the European Court has already found violations of Article 3 of the ECHR in relation to disappearances in which the State itself was found to be responsible for the abduction (see ECtHR, *Luluyev and Others v. Russia*, no. 69480/01, judgment of 9 November 2006, §§ 117-118; ECtHR, *Kukayev v. Russia*, no. 29361/02, judgment of 15 November 2007, §§ 107-110). However, in contrast, in the case under the Panel’s consideration, in no way is UNMIK implicated in the actual disappearance and UNMIK cannot be held responsible for the applicant’s mental distress caused by the commission of the crime itself.
111. The Panel is mindful that in the absence of a finding of State responsibility for the disappearance, the European Court has ruled that it is not persuaded that the authorities’ conduct, albeit negligent to the extent that it has breached Article 2 in its procedural aspect, could have in itself caused the applicant mental distress in excess of the minimum level of severity, which is necessary in order to consider treatment as falling within the scope of Article 3 (see, among others, ECtHR, *Tovsultanova v. Russia*, no. 26974/06, judgment of 17 June 2010, § 104; ECtHR, *Shafiyeva v. Russia*, no. 49379/09, judgment of 3 May 2012, § 103).
112. Finally, with regard to the issue of burden of proof, the Panel refers to what it has said under Article 2 (see above, §§ 61-64).

113. Taking note of that position, the Panel considers that in this situation it may draw strong inferences from the available established facts relevant to the complaint before it.

*b) Applicability of Article 3 to the Kosovo context*

114. With regard to the applicability of the above standards to the Kosovo context, the Panel first refers to its view on the same issue with regard to Article 2, developed above (see §§ 73-81).

115. The Panel reiterates that a normally functioning law enforcement system should take into account the protection needs of victims and witnesses, as well as to consider the special vulnerability of displaced persons in post-conflict situations. The Panel has already considered the fact that by 2003 the police and justice system in Kosovo was described by the UN Secretary-General as being “well-functioning” and “sustainable” (see § 17 above).

116. The Panel again notes that it will not review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application to the complaint before it, considering the particular circumstances of the case.

117. For these reasons, the Panel considers that it has to establish with regard to each case whether the attitude and reactions of UNMIK authorities to the disappearance itself and to the complainants’ quest for information with regard to the fate of their relatives and the criminal investigation, would amount to a violation of the obligation under Article 3, having regard to the realities in Kosovo at the relevant time.

*c) Compliance with Article 3 in the present case*

118. Against this background, the Panel discerns a number of factors in the present case which, taken together, raise the question of violation of Article 3 of the ECHR.

119. The Panel notes the proximity of the family ties between the complainant and Dušan Jočić, as the complainant is his mother. Accordingly, the Panel has no doubt that she indeed suffered serious emotional distress since his disappearance, which took place in June 1999. She immediately communicated the disappearance to the authorities and gave them all the information available to her (see §§ 22 and 23 above).

120. The Panel also notes that the complainant and her husband had undertaken their own actions to search for their son. They applied to various bodies with enquiries but despite their attempts, they have never received any explanation or information as to what became of their son following his disappearance, until the time the complainant was contacted with regard to the handover of his mortal remains.

121. The Panel further takes note of the unexplained delay of around eight years between the location of Dušan Jočić’s mortal remains and the time when the complainant was informed of their positive identification. The Panel notes that the ante-mortem data present in the investigative file was collected by the Serbian police (see § 29 above);

however, the file does not indicate when and by and from whom the DNA samples which enabled the identification were collected.

122. The Panel notes that the complainant has never been contacted by either the UNMIK Police or prosecutors, that her statement was never recorded and that she was never informed of the progress of the investigation. The Panel reiterates that from the standpoint of Article 3 it may examine UNMIK's reactions and attitudes to the complainant in its entirety. As was shown with respect to Article 2, the file as presented provides no details of any communication between UNMIK investigative authorities and the complainant from the time of the filing of the initial report of the disappearance (see §§ 83, 85, 87 and 89 above).
123. Drawing inferences from UNMIK's failure to submit the investigative documents (§ 57 above) or to provide another plausible explanation for the complete absence of contact with the complainant, or information about the criminal investigation into the disappearance and killing of Dušan Jočić, the Panel considers that this situation, which continued into the period of the Panel's temporal jurisdiction, caused grave uncertainty about the fate of the complainant's son and the status of the investigation.
124. In view of the above, the Panel concludes that the complainant suffered severe distress and for a prolonged and continuing period of time on account of the way the authorities of UNMIK have dealt with her complaint and as a result of her inability to find out what happened to her son. In this respect, it is obvious that, in any situation, the pain of a mother who has to live in uncertainty about the fate of her disappeared son must be unbearable.
125. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the complainant's distress and mental suffering in violation of Article 3 of the ECHR.

## **V. RECOMMENDATIONS**

126. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
127. The Panel notes that enforced disappearances and arbitrary executions constitute serious violations of human rights which shall be investigated and prosecuted under any circumstances. The Panel also notes that UNMIK as the territorial administration of Kosovo from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute those responsible for the disappearance and killing of Dušan Jočić, and that its failure to do so constitutes a further serious violation of the rights of the victims and his next-of-kin, in particular the right to have the truth of the matter determined.
128. The Panel notes the SRSG's own concerns that the inadequate resources, especially at the outset of UNMIK's mission, made compliance with UNMIK's human rights obligations difficult to achieve.

129. It would normally be for UNMIK to take the appropriate measures in order to put an end to the violation noted and to redress as far as possible the effects thereof. However, as the Panel noted above (see § 19), UNMIK's responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law. UNMIK therefore is no longer in a position to take measures that will have a direct impact on the investigations that are still pending before EULEX or local authorities. Likewise, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo, this fact limiting its ability to provide full and effective reparation of the violation committed, as required by established principles of international human rights law.
130. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible.

**With respect to the complainant and the case the Panel considers it appropriate that UNMIK:**

- In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR (Grand Chamber), *Ilașcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR (Grand Chamber), *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 109), must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the requirements of an effective investigation as envisaged by Article 2, that the circumstances surrounding the disappearance and killing of Dušan Jočić will be established and that perpetrators will be brought to justice. The complainant and/or other next-of-kin shall be informed of such proceedings and relevant documents shall be disclosed to them, as necessary;
- Publicly acknowledges, within a reasonable time, responsibility with respect to UNMIK's failure to adequately investigate the disappearance and killing of Dušan Jočić, as well as the distress and mental suffering subsequently incurred, and makes a public apology to the complainant and her family in this regard;
- Takes appropriate steps towards payment of adequate compensation to the complainant for the moral damage suffered due to UNMIK's failure to conduct an effective investigation, as well as for distress and mental suffering incurred by the complainant as a consequence of UNMIK's behavior.

**The Panel also considers it appropriate that UNMIK:**

- In line with the UN General Assembly Resolution on "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian



Law” (A/Res/60/147, 21 March 2006), takes appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and non-governmental organisations, for the realisation of a full and comprehensive reparation programme, including restitution compensation, rehabilitation, satisfaction and guarantees of non-repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict;

- Takes appropriate steps before competent bodies of the United Nations, including the UN Secretary-General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the United Nations, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring;

**FOR THESE REASONS,**

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN A VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 2. FINDS THAT THERE HAS BEEN A VIOLATION OF THE SUBSTANTIVE OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 3. RECOMMENDS THAT UNMIK:**
  - a. URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE DISAPPEARANCE AND KILLING OF THE COMPLAINANT’S SON CONTINUED IN COMPLIANCE WITH ARTICLE 2 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;**
  - b. PUBLICLY ACKNOWLEDGES RESPONSIBILITY FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE DISAPPEARANCE AND KILLING OF THE COMPLAINANT’S SON, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT AND HER FAMILY;**
  - c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION OF THE COMPLAINANT FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 AND ARTICLE 3 OF THE ECHR.**

- d. TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**
- e. TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
- f. TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

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
- 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
- KFOR** - International Security Force (commonly known as Kosovo Force)
- KLA** - Kosovo Liberation Army
- MoU** - Memorandum of Understanding
- MPU** - Missing Persons Unit
- MUP** - Serbian Ministry of Internal Affairs (Serbian: *Министарство унутрашних послова*)
- NATO** - North Atlantic Treaty Organization
- OMPF** - Office on Missing Persons and Forensics
- OSCE** - Organization for Security and Cooperation in Europe
- RIU** - Regional Investigation Unit
- SRS** - 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