



OPINION

Date of adoption: 25 April 2013

Case no. 94/09

Svetlana MARINKOVIĆ

against

UNMIK

The Human Rights Advisory Panel, on 25 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 April 2009 and registered on 30 April 2009.
2. On 9 December 2009, the Panel requested further information from the complainant. On 11 January 2010, the complainant provided her response.

3. On 3 March 2010, the Panel communicated the case to the Special Representative of the Secretary-General (SRSG)¹ for UNMIK's comments on the admissibility of the case. On 25 May 2010, the SRSG provided UNMIK's response.
4. On 9 June 2010, the Panel forwarded UNMIK's response to the complainant for her comments. The complainant's response was received on 29 July 2010.
5. On 13 April 2011, the Panel declared the complaint admissible. On 18 April 2011, the Panel forwarded the decision to the SRSG inviting UNMIK's comments on the merits of the case. On 9 September 2011, the SRSG provided UNMIK's response.
6. On 23 March 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 background²

7. The events at issue took place in the territory of Kosovo during the conflict and after the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), in June 1999.
8. 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.
9. 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

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

² 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) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>).

(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.

10. 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.
11. 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.
12. 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.
13. 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.
14. 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.

15. 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”.
16. 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.
17. 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.
18. 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 disappearance and death of Mr Zvonko Marinković

19. The complainant is the wife of Zvonko Marinković. The complainant states that her husband, an employee of the company “Balkanabet”, had been on a business trip in Belgrade in June of 1998 with another colleague, Mr J.P. While returning home from the trip, on 24 June 1998, they went missing on the road between Shtime/Štimlje and Suharekë/Suva Reka, near a place called Carralevë/Crnoljevo.
20. The complainant states that the disappearance was reported to the OSCE Kosovo Verification Mission, the ICRC, the Red Cross of Serbia and the Serbian Ministry of Internal Affairs. The complainant provides a document of the above-mentioned Ministry dated 31 October 2003, which states that a criminal report against unknown perpetrators had been filed with the District Public Prosecutor’s Office in Prizren alleging the abduction of Zvonko Marinković by KLA members.
21. From the death certificates issued by the UNMIK OMPF, and submitted by the complainant, it appears that the mortal remains of Zvonko Marinković were discovered on 28 May 2003, in Rancë/Rance village in Shtime/Štimlje Municipality. They were identified and handed over to the complainant in December 2004 (see §§ 26-27 below).

C. The investigation

22. In the present case, the Panel received from UNMIK investigative documents previously held by the UNMIK OMPF and by the UNMIK Police. The file as presented relates only to the identification and return of the mortal remains of Zvonko Marinković. No additional investigative material regarding any criminal investigation following the return of Zvonko Marinković’s mortal remains was presented to the Panel by UNMIK.
23. Concerning disclosure of information contained in the files, the Panel recalls that UNMIK has made available investigation files for the Panel’s review under a pledge of confidentiality. 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 steps taken by investigative authorities is provided in the paragraphs to follow.
24. On 27 June 2001, the ICRC opened a tracing request for Zvonko Marinković. Moreover, his name appears in two lists of missing persons communicated by the ICRC to UNMIK on 12 October 2001 and 11 February 2002 respectively, with related ante-mortem data attached as collected by the ICRC.
25. It appears that missing person files concerning both Zvonko Marinković and his colleague J.P. were opened by the UNMIK Police MPU in 2002. On 4 April 2002, the MPU recorded in their database the ante-mortem data of Zvonko Marinković received by the ICRC in Belgrade.
26. On 28 May 2003, the mortal remains of Zvonko Marinković were discovered in the area of Shtime/Štimlje. Between 23 and 31 July 2003, an autopsy was conducted by the OMPF. According to an autopsy report dated 12 October 2004, the cause of death could not be ascertained due to the state of decomposition of the remains. On 22

September 2004, the ICMP established a DNA match between samples from the mortal remains exhumed in May 2003 and samples collected from Zvonko Marinković's wife and sons. On 21 October 2004, based on the results of the DNA analysis and on the comparison of ante-mortem and post-mortem information, the UNMIK OMPF issued a confirmation of identity certificate concerning Zvonko Marinković.

27. On 10 December 2004, the UNMIK OMPF handed over Zvonko Marinković's mortal remains, together with death and identification documents, to the complainant at the Merdare administrative boundary crossing point between Serbia proper and Kosovo. Upon the handing over of the mortal remains, the OMPF case on Zvonko Marinković was closed. It appears that the mortal remains of J.P., who had disappeared along with Zvonko Marinković, were also returned to his family on the same date.
28. An "Ante-Mortem Investigation Report" of the UNMIK War Crime Unit/Missing Persons Section dated 7 January 2005 contains information specifically related to the case of J.P. The report includes the information, supposedly provided by J.P.'s wife, that J.P. and Zvonko Marinković disappeared on 24 June 1998 while driving a Zastava 508 truck, with a white cabin and orange tarpaulin and an identified registration number. They had taken up their last load of supplies in the town of Arandjelovac, Serbia proper, and they were last seen in a place called Carralevë/Crnojlevo (Shtime/Štimlje Municipality). The report also states that no witness had been interviewed. As the mortal remains of J.P. had been handed over to the family, the missing person case had been closed.
29. On 9 December 2008, UNMIK's responsibility with regard to police and justice in Kosovo ended (see §§ 17-18 above).

III. THE COMPLAINT

30. The complainant complains about the alleged failure by UNMIK to conduct an effective investigation into the disappearance and death of her husband. In this regard, she invokes a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).

IV. THE LAW

A. The scope of the Panel's review

31. 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 ECHR Article 2. 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.

32. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
33. 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.
34. 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.
35. 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 (§ 33). 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.
36. 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 the procedural obligation under Article 2 of the ECHR

37. 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 the disappearance and death of her husband.

1. The parties' submissions

38. The complainant complains that the investigation into the disappearance and death of her husband has not been adequate. She requests that the perpetrators be found. She also asks to be financially compensated for the "fear, pain and illness suffered" since her husband's death.

39. The SRSG notes in his comments dated 9 September 2011 that in this case UNMIK has been able to obtain from EULEX "a copy of the file compiled by the former Office on Missing Persons and Forensics" and "parts of the UNMIK Police investigation file", which, however, "concerns the disappearance of another person", J.P., who was travelling with Zvonko Marinković on the day of the disappearance. The SRSG also states that "UNMIK still has not been able to obtain the complete investigation file" concerning Zvonko Marinković". However, on 23 March 2013, UNMIK confirmed that the disclosure of information on the case could be considered final.

40. As regards the merits of the complaint, the SRSG accepts that UNMIK had an obligation under Article 2 to investigate the disappearance. The SRSG states that there is no allegation in this case that Zvonko Marinković was ever seen in the custody of UNMIK or any group under its control. However, given the security situation in Kosovo in June 1998, it cannot be disputed that Zvonko Marinković disappeared in "life-threatening circumstances". Therefore, UNMIK's responsibility to conduct an effective investigation into his disappearance and death stems from the procedural obligation to conduct an official investigation "where death occurs in suspicious circumstances not imputable to state agents". The SRSG states that, in these circumstances, the purpose of the investigation is to secure the effective implementation of the domestic laws which protect the right to life, as defined by UNMIK Regulation No. 1999/1 of 25 July 1999 On the Authority of the Interim Administration in Kosovo and by UNMIK Regulation No. 1999/24 of 12 December 1999 On the Law Applicable in Kosovo.

41. The SRSG accepts that the procedural obligation under Article 2 is two-fold including "an obligation to determine through investigation the fate and/or whereabouts of the missing person; and an obligation to conduct an investigation capable of determining whether the death was caused unlawfully and leading to the identification and punishment of those responsible".

42. The SRSG argues that the investigation into Zvonko Marinković's case complied with the standards of an effective investigation as envisaged by Article 2 of the ECHR, especially when considering the circumstances prevailing in Kosovo in the aftermath of

the conflict. The SRSG further argues that in its case-law on Article 2, the European Court of Human Rights has stated that due consideration shall be given to the difficulties inherent to post-conflict situations, and the problems limiting the ability of investigating authorities in investigating such cases. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court in the case *Palić v. Bosnia and Herzegovina* stating at paragraph 70:

“The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources.”

43. In the view of the SRSG, in the aftermath of the Kosovo conflict, UNMIK was faced with a very similar situation to the one in Bosnia. The SRSG states that thousands of people were displaced or went missing. Many of the persons who went missing were abducted, killed, and buried in unmarked graves inside or outside Kosovo, which made very difficult locating and recovering their mortal remains.
44. In June 2002, UNMIK created the OMPF with the mandate to determine the fate of the missing; however its work was faced with many challenges at the beginning of its operations, due to the work previously done mostly by actors independent from UNMIK. In particular, the SRSG states that the collection of evidence of war crimes began with the arrival of NATO in 1999 with independent teams from several countries operating under the loose coordination of the ICTY. A lack of standard operating procedures or centralisation led to problems with the evidence gathered in this phase. In 2000, ICTY launched a large, centralised forensic operation, based at the Rahovec/Orahovac mortuary, with standard operating procedures for all forensic teams except the British one, which operated independently out of Prishtinë/Priština. The SRSG states that, in the effort to demonstrate that crimes were systematic and widespread, the ICTY teams conducted autopsies on as many bodies as possible, carrying out little or no identification work; moreover, unidentified bodies exhumed in 1999 were reburied in locations still unknown to the OMPF. After the ICTY closed their operation in 2000, the UNMIK Police MPU continued small-scale investigations on missing persons “*ex-officio*, without any broader prosecutorial strategy”. As a consequence, a large amount of unstructured information was collected. The SRSG states that, taking into account the difficulties described above, “the process of dealing effectively with disappearances and other serious violations of international humanitarian law has been understandably incremental” in Kosovo as it is reflected in the *Palić* case referred to above. The SRSG concludes that the work of the OMPF contributed greatly to determining the whereabouts and fate of the missing from the Kosovo conflict; however it was not possible to locate all the missing within the timeframe and resources available at that time.
45. The SRSG further argues that fundamental to conducting effective investigations is a professional, well-trained and well-resourced police force and that such a force did not exist in Kosovo in the aftermath of the conflict. In the policing vacuum following the end of the conflict, UNMIK had to build a new Kosovo Police Service from scratch, a

long and challenging task which, according to the SRSG, is still in progress. The SRSG also states that UNMIK Police faced numerous challenges in exercising law enforcement functions gradually transferred to it by KFOR in 1999-2000. In this regard, he refers to the UNMIK Police Annual Report of 2000 describing the situation as follows:

“UNMIK Police had to deal in the aftermath of war with dead bodies and looted and burnt houses. Ethnic violence flared through illegal evictions, forcible takeovers of properties, the burning of houses and physical violence against communities all over Kosovo. Tempers and tensions were running high amongst all ethnic groups, exacerbated by reports of missing and dead persons. It became imperative for UNMIK to establish order and to quickly construct a framework to register and investigate crimes.

All of this had to be done with limited physical and human resources. Being the first executive mission in the history of the UN, the concept, planning and implementation was being developed on the ground. With 20 different contributory nationalities at the beginning, it was very challenging task for police managers to establish common practices for optimum results in a high-risk environment.”

46. The SRSG states that UNMIK international police officers working on cases of missing persons had to adjust to conducting investigations in a foreign territory and country, with limited support from the still developing Kosovo Police. He further states that these investigators were often faced with situations where individuals holding relevant knowledge on the whereabouts and fate of missing persons did not want to disclose this information. According to the SRSG, all these constraints inhibited the ability of the UNMIK Police to conduct investigations according to the standards that may be expected from States with more established institutions and are not faced with the high number of cases of this nature associated with a post-conflict situation.
47. As regards specifically the case at issue, the SRSG states that it can be assumed that the matter was brought to the attention of UNMIK Police MPU only in 2002. As it occurred in June 1998, one year before the deployment of UNMIK, the disappearance was initially reported to those institutions having a mandate with respect to missing persons at that time, such as the ICRC and the Red Cross of Serbia. The SRSG states that a “Victim Identification Form” was completed by the ICRC in Belgrade in 2002 and “assumedly forwarded to the UNMIK Police MPU later on”. From that moment onwards, the UNMIK Police MPU and UNMIK OMPF were actively involved in locating and identifying the mortal remains of the victim, which resulted in the handover of mortal remains to his family in December 2004.
48. On the criminal aspects of the investigation, the SRSG acknowledges that there is no documentation in this regard. Nevertheless, he refers to the UNMIK Police report of 7 January 2005 concerning the case of J.P. (see § 28 above), who disappeared along with Zvonko Marinković. These documents state that the missing person file was opened by the MPU on 14 July 2002 and describe the status of the case as “closed”. According to the SRSG, “in view of the completely unknown circumstances of the disappearance of Mr Marinković and particularly taking into account that no witness could be identified who could shed light on the incident and/or any possible perpetrators”, UNMIK Police “was not in position to commence an investigation into the instant matter. There were no leads or any information available which could even evidence the circumstances of

the disappearance”. The SRSG concludes that “UNMIK Police made all efforts to investigate the matter; however it was not in a position to make many efforts due to the circumstances of the disappearance and the fact that neither a witness, nor a trace, nor any other information was available”.

49. In light of the above, the SRSG maintains that there is no violation of Article 2 in the present case which could be attributed to UNMIK.

2. The Panel’s assessment

50. 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 husband’s disappearance and death.

a) Submission of relevant files

51. As noted above (see § 39 above), UNMIK was not able to provide to the Panel any files related to the criminal investigation into the disappearance and death of Zvonko Marinković. On 23 March 2013, UNMIK stated that the disclosure of files concerning the case could be considered final.

52. 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).

53. 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 for the lack of any documentation.

54. The Panel has no reason to doubt that UNMIK undertook all efforts in order to obtain the relevant investigation files. However, despite ample time given to UNMIK for that purpose (almost two years), neither files, nor a plausible explanation of the reasons for their complete absence, were presented to the Panel. Therefore, the Panel has no other course of action but to proceed with an examination of the merits of this complaint only on the basis of documents made available by the complainant and the scarce information provided UNMIK, and to draw inferences from this situation (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

55. 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.
56. 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 § 36 above, at §§ 183-184).
57. 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, 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).
58. 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.
59. 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.

60. 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).
61. 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 § 36 above, at § 136).
62. 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).
63. 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 § 36 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 § 62 above, at § 312, and *Isayeva v. Russia*, cited in § 62 above, at § 212).

64. 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 § 60 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).
65. 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 § 63 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 36 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).
66. 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 § 62 above, at §§ 311-314; ECtHR, *Isayeva v. Russia*, cited above in § 62, 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*
67. The Panel is conscious of the fact that Zvonko Marinković disappeared during the Kosovo conflict, in June 1998, approximately one year before UNMIK's deployment in Kosovo. The case was investigated by UNMIK in the aftermath of the armed conflict, when crime, violence and insecurity were rife (see § 8 above).
68. On his part, the SRSB does not contest that UNMIK had a duty to investigate the present case under ECHR Article 2. However, according to the SRSB, 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.

69. 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.
70. 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).
71. 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 § 63 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 § 66 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 § 62 above, at §§ 85-90 and 309-320 and 326-330; ECtHR *Isayeva v. Russia*, cited in § 62 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
72. 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 § 66 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 § 60 above, at §§ 86-92; ECtHR, *Ergi*, cited in § 74 above, at §§ 82-85; ECtHR [GC], *Tanrıkulu 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 § 62 above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).

73. 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).
74. 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).
75. In response to the SRSG’s objection that Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, either in the context of policing activities or that of priorities and resources, the Panel takes into account that the European Court has established that what amounts to an impossible

and/or disproportionate burden must be measured by the very particular facts and contexts (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited § 63 above, *Brecknell v. The United Kingdom*, no. 32457/04, 27 November 2007, § 70).

76. 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*, 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 the requirements of Article 2 in the present case

77. Turning to the circumstances of the present case, the Panel first addresses the issue of the burden of proof. At the admissibility stage, the Panel was satisfied that the complainant's allegations were not groundless, thus it accepted the existence of a *prima facie* case: that Zvonko Marinković disappeared in life threatening circumstances and that, at the latest on 21 October 2001, UNMIK became aware of the matter (see § 24 above).

78. Accordingly, applying the principles discussed above (see §§ 52-54), the Panel considers that the burden of proof has shifted to the respondent, so that it is for UNMIK to present the Panel with evidence of an adequate investigation as a defence against the allegations put forward by the complainant and accepted by the Panel as admissible. UNMIK has not discharged its obligation in this regard, as it has neither presented any further investigative file regarding the criminal case into the disappearance and death of Zvonko Marinković besides that which is contained in UNMIK OMPF file, nor has it in a "satisfactory and convincing" way explained its failure to do so. Accordingly, the Panel will draw inferences from this situation.

79. The Panel notes that according to the 2000 Annual Report of UNMIK Police, at least from mid-September 1999 the whole system of criminal investigation in Prishtinë/Priština region was under the full control of UNMIK. Therefore, it was UNMIK's responsibility to ensure, first, that the investigation is conducted expeditiously and efficiently; second, that all relevant investigative material is properly handed over to the authority taking over responsibility for investigation (EULEX, see § 18 above); and third, that the investigative files could be traced and retrieved, should a need arise at any later stage.

80. The Panel infers from the absence of any investigative file that one of the following situations occurred: no investigation was carried out; UNMIK deliberately opted not to present the file to the Panel, despite its obligation to cooperate with the Panel and to provide it with the necessary assistance, including the release of documents relevant to the complaints under Section 15 of UNMIK Regulation No. 2006/12 (cited in § 52 above); the file was not properly handed over to EULEX; or UNMIK failed to retrieve the file from the current custodian.

81. The Panel has already noted above that it has no reason to doubt UNMIK's good faith in seeking to provide the investigative file for the Panel's review. However, the Panel considers that whichever of these potential explanations is applicable, it indicates a failure, which is directly attributable to UNMIK, either when it was exercising its executive functions, or in its current capacity.
82. 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 Zvonko Marinković. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 36), 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 § 63 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 §§ 17-18 above).
83. The Panel notes that, according to the documentation provided, the only investigative actions carried out by UNMIK from when they became aware of Zvonko Marinković's disappearance until 23 April 2005, relate to the location, identification and handing over of his mortal remains to the family. Although this must be considered in itself an important achievement, the Panel recalls that the procedural obligation under Article 2 did not come to an end with the discovery of the body, especially as the circumstances of the case suggested a violent death. Nonetheless, there is no evidence that any action was undertaken with respect to clarifying the circumstances surrounding the disappearance and death of Zvonko Marinković and to identify the perpetrators.
84. In particular, there is no indication that UNMIK Police undertook, in this respect, any basic investigative steps such as: interviewing the complainant, searching for potential witnesses at the location where the victim was last seen; searching for the truck he was driving on the day of the disappearance.
85. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that those basic investigative steps had not been carried out. After that critical date the failure to conduct the necessary investigative actions persisted, thus, in accordance with the continuing obligation to investigate (see § 36 above), bringing the assessment of the whole investigation within the period of the Panel's jurisdiction.
86. In addition, the Panel considers that, 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 to ensure that nothing had been overlooked and any new evidence had been considered, as well as to inform the relatives of Dušan Bogićević regarding any possible new leads of enquiry. However, there is no indication that any such review was ever undertaken.
87. The apparent lack of any adequate reaction from UNMIK Police may have suggested to perpetrators that the authorities were either not able, or not willing to investigate such criminal acts. Such an attitude of the authorities towards the gravest crimes in any society, and especially in post-conflict circumstances, inevitably creates a culture of impunity among the criminals and can only lead to a worsening of the situation. The

problems which UNMIK had encountered at the beginning of its mission, which were discussed above, do not justify such inaction, either at the outset or subsequently.

88. The SRSG's statement with respect to the specific challenges faced by UNMIK regarding the large number of missing persons leads to an implicit argument that such cases were not considered a priority. The Panel agrees that in a situation of a massive influx of potential criminal reports where there is limited police investigative capacity on the ground, prioritisation is one of the ways of maintaining a level of efficiency, when only the most serious cases with obvious leads are addressed. In this respect, the Panel considers the pre-eminence of the right to life in international instruments on the protection of human rights (see, for instance, ECtHR, *Streletz, Kessler and Krenz v. Germany* [GC], nos 34044/96, 35532/97 and 44801/98, judgment of 22 March 2001, § 85, ECHR 2001-II). In any event, such categorisation of an investigation should take place only after the minimum possible investigative actions have been undertaken and obtainable information has been collected and analysed. In this case, prioritisation should not have been made when no information on the circumstances of the death had been gathered, especially as it had occurred in an obviously life-threatening environment and suspicious circumstances.
89. The Panel therefore considers that, having regard to all the circumstances of the particular case, no steps appear to have been taken by UNMIK to clarify the circumstances of Zvonko Marinković's disappearance and death and to bring any perpetrators to justice. 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 § 63 above), as required by Article 2.
90. 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 claims that she was never informed about the steps taken by the investigators. The Panel notes that UNMIK communicated with the complainant and other family members only when gathering ante-mortem data concerning Zvonko Marinković and with respect to recovery, handover and burial of his mortal remains. As the Panel has already noted, no statement was ever taken from the complainant or from other family members and no information was given to them concerning the status of the investigation.
91. The Panel understands the complainant's view that the extent of the information received was unsatisfactory. The Panel is also aware that in all cases, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interest (see ECtHR [GC], *Tahsin Acar v Turkey*, no. 26307/95, judgment of 8 April 2004, § 226, ECHR 2004-III; ECtHR, *Taniş v Turkey*, no. 65899/01, judgment of 2 August 2005, § 204, ECHR 2005-VIII). The Panel therefore considers that the investigation was not accessible to the complainant's family as required by Article 2.
92. 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 disappearance and death of the complainant's husband. There has been accordingly a violation of Article 2 of the ECHR under its procedural limb.

V. CONCLUDING COMMENTS AND RECOMMENDATIONS

93. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
94. The Panel notes that enforced disappearances and arbitrary killings constitute serious violations of human rights which the competent authorities are under an obligation to investigate and to bring perpetrators to justice under all circumstances. The Panel also notes that pursuant to United Nations Security Council Resolution 1244 (1999) UNMIK from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute the disappearance and death of Zvonko Marinković, and that its failure to do so constitutes a further serious violation of the human rights of the victim and his next-of-kin, in particular the right to have the truth of the matter determined.
95. 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.
96. 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 § 17 above) 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.
97. 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 [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, § 333, ECHR 2004-VII; ECtHR, *Al-Saadoon and Mufdhi v. the United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171, ECHR 2010 (extracts); ECtHR [GC], *Catan and Others v. Republic of Moldova and Russia*, nos. 43370/04 and others, 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 death of Zvonko Marinković 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 death of Zvonko Marinković and makes a public apology to the complainant and her family in this regard;
- Takes appropriate steps towards payment of adequate compensation of the complainant for the moral damage suffered due to UNMIK's failure to conduct an effective investigation as stated above.

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. 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 DEATH OF THE COMPLAINANT'S HUSBAND IS 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 DEATH OF THE COMPLAINANT'S HUSBAND AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT;**
- c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION OF THE COMPLAINANT FOR MORAL DAMAGE;**
- 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
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