



The Human Rights Advisory Panel

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OPINION

Date of adoption: 6 June 2013

Cases Nos 326/09, 327/09, 328/09, 329/09, and 330/09

X.

against

UNMIK

The Human Rights Advisory Panel, sitting on 6 June 2013,
with the following members present:

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, makes the following findings and recommendations:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaints were introduced on 11 November 2009 and registered on 4 December 2009.

2. On 9 September 2010, the Panel decided to join these cases, pursuant to Rule 20 of the Panel's Rules of Procedure.
3. On 2 November 2010, the Panel communicated the complaints to the Special Representative of the Secretary-General (SRSG)¹, for UNMIK's comments on their admissibility. On 28 February 2011, UNMIK provided its response.
4. On 22 December 2011, the Panel declared the complaints admissible.
5. On 27 December 2011, the Panel informed the SRSG of this decision and invited UNMIK's observations on the merits of the case. On 19 April 2012, the SRSG provided UNMIK's response.
6. On 19 April 2012, UNMIK presented the Panel with the files related to the complaint.
7. On 15 January 2013, UNMIK confirmed that all files in its possession have been disclosed to the Panel.

II. THE FACTS

A. General background²

8. 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.
9. 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.

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

10. 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.
11. 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.
12. 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.
13. 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.
14. 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 (KPS). By September 1999, approximately 1,100 international police officers had been deployed to UNMIK.

15. 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.
16. 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”.
17. 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.
18. 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.
19. 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 killing and abduction and probable killing of the victims

20. The complainant informs the Panel about the killing of four persons: Victim “A” (case no. 326/09), Victim “B” (case no. 327/09), Victim “C” (case no. 328/09), Victim “D” (case no. 329/09), as well as the abduction and probable killing of Victim “E” (case no. 330/09), committed by armed KLA members between 15 and 22 June 1999, in Kosovo.
21. The complainant details that Victim “A”, Victim “B”, Victim “D” and Victim “E” were forcefully taken from the family house on 15 June 1999 by armed KLA members and taken to a hotel. These events were carried out with extreme physical violence, including extreme sexual violence. Victim “A”, Victim “B” and Victim “E” were reportedly killed at the hotel, while Victim “D” managed to escape. Later on the same day, Victim “C” was also captured by KLA members and taken to the same hotel. He was then taken from that location in an unknown direction by armed KLA members, and eventually killed. Victim “D” was killed by armed KLA members on the morning of 22 June 1999, in the back yard of the family house.
22. The complainant further clarifies that the mortal remains of Victim “A”, Victim “B”, Victim “C” and Victim “D” were later found in different locations in Kosovo. The mortal remains of victim “E” have never been found.
23. The complainant claims that he reported everything to the Office of the War Crimes Prosecutor and the Ministry of Internal Affairs of the Republic of Serbia (MUP), as well as to KFOR, UNMIK and the ICRC. He claims that the authorities undertook no action to investigate the circumstances of these killings.
24. The names of Victims “A”, “C”, “D” and “E” appear in the online database maintained by the ICMP³. The name of the Victim “C” is found in the database compiled by the OMPF. The ICRC tracing request with regard to the Victim “E” remains open.

C. The Investigation

1) Disclosure of relevant files

25. On 19 April 2012, UNMIK provided the Panel with “some of the documents” which were held previously by the OMPF, UNMIK Police MPU and WCIU. The presented file consists of the OMPF and UNMIK Police MPU documents with regard to the victims “A”, “B”, “C” and “E”, and the documents from UNMIK Police WCIU with regard to all the victims. On 15 January 2013, UNMIK confirmed to the Panel that all relevant files have been disclosed.

³ The ICMP database is available at: http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en (accessed on 5 June 2013).

26. Concerning disclosure of information contained in the files, the Panel recalls the request for anonymity made by the complainant. In this regard, the Panel must clarify that although its assessment of the present case stems from a thorough examination of the available documentation, only limited information contained therein is disclosed. Hence a synopsis of relevant investigation steps taken by investigative authorities is provided in the paragraphs to follow.
- 2) *Search for the victims, identification and handover of their mortal remains*
27. In relation to Victim “A”, the file contains an undated Victim Identification Form with the ante-mortem data collected by the ICRC. The mortal remains of this victim were exhumed on 14 September 2004. The autopsy that was conducted on 5 October 2004 established that the death was caused by multiple gunshot wounds to the head, chest and left hand. On 26 September 2005, through a DNA testing, these mortal remains were identified as those of Victim “A”. The Identification Certificate, a Confirmation of Identity and a Death Certificate for this victim were issued by the OMPF on 10 November 2005.
28. An OMPF certificate, dated 24 September 2008, confirms that the victim’s family was notified of the identification on 5 April 2006, that the identified mortal remains of Victim “A” were kept at the OMPF mortuary in Prishtinë/Priština and may be released upon the family’s request. The mortal remains were eventually handed over to the family by EULEX on 12 August 2010.
29. On 23 June 2005, the MPU interviewed a witness who named a person suspected of the the abduction and killing of Victim “E” and of killing of the other four victims (only a summary of the interview is present in the file, not a signed statement). In contrast, an Ante-Mortem Report of the MPU, dated 28 February 2006, reads “none” in the field “suspects”. The same witness names three other persons who were also abducted by the KLA during the same event, tortured and later released; contact details of two of them were also provided. However, the file shows no attempts by UNMIK Police to contact them and record their statements.
30. In relation to Victim “B”, the file contains an Identification Certificate, a DNA Certificate and a Death Certificate, all issued by the OMPF on 31 October 2005. The last document indicates that the mortal remains of this victim were located on 5 November 2003 and autopsied on 13 December 2003; the cause of death was established as a “Gunshot injury of head”. The mortal remains were handed over to the family on 8 December 2005.
31. On 14 July 2005, the MPU interviewed a witness who named some of the suspects in the abduction of Victims “A”, “B”, “D” and “E” as well as another eye-witness. The statement is not signed by the witness. However, the file shows no attempts by UNMIK Police to contact the named witnesses and record their statements.
32. In relation to Victim “C”, the file indicates that the mortal remains were exhumed on 10 August 2000 and autopsied on 23 August 2000. An autopsy report dated 1 September 2000 was issued by the International Criminal Tribunal for former Yugoslavia (ICTY),

which indicates that the death was very likely caused by “gunshot wound perforating the cranium and the brain”. A death certificate dated 7 September 2000 for these then-identified mortal remains was likewise issued by the ICTY.

33. The file also contains a Victim Identification Form with the ante-mortem data collected by the Red Cross on 14 January 2005, an ICMP DNA report of 13 January 2006 confirming the identification of the mortal remains as those of Victim “C”, as well an Identification Certificate, a DNA Certificate and a Death Certificate, all issued by the OMPF on 6 February 2006. The file also contains a certificate similar to the one mentioned in § 28 above; the mortal remains were eventually handed over to the family by EULEX on 12 August 2010.
34. This part of the file also has a copy of the same witness statement referred to in § 31 above. Likewise, although the names of the suspects were given, an Ante-Mortem Report of the MPU, dated 28 June 2005, reads “none” in the relevant field.
35. On 29 July 2005, the MPU sent a memorandum to UNMIK Police Interpol Liaison Office, requesting assistance in locating a witness. No response to it, or a follow up, is found in the file. No other attempts by UNMIK Police to locate the named witnesses and suspects and record their statements are documented.
36. In relation to Victim “E”, the file contains an undated Victim Identification Form with the ante-mortem data collected by the ICRC and an OMPF certificate dated 24 September 2008, confirming that Victim “E” has been registered as a missing person by the MPU since 2 November 2005, and is still missing.
37. This part of the file also contains a copy of the same witness statement referred to in § 29 above. Likewise, despite the fact that a suspect and additional witnesses are named, an Ante-Mortem Report of the MPU dated 27 February 2006 reads “none” in the relevant field. Similarly, no attempts by UNMIK Police to locate the named persons and record their statements are documented.

3) *Investigation with regard to the perpetrators*

38. On 22 August 2005, the MPU handed over the file to the WCIU, for further investigation with regard to the perpetrators. The cover memorandum clearly states that there are witnesses and suspects named in this case. However, no further investigative action by the WCIU is recorded in the file. No attempts to follow up on the request to Interpol referred to in § 35 above are recorded in the file.
39. A case report of the UNMIK Police WCIU, dated 8 October 2007, indicates that the case was registered by that Unit on 12 September 2005. It reflects the same information about the witnesses and suspects.
40. The file also contains a number of documents referred to UNMIK Police by the MUP on 25 June 2005, related to an investigation of an abduction and murder by the KLA of two persons, which took place on 23 August 1998 in the same area and was apparently linked to the killing, as well as abduction and probable killing, of the victims. No action by UNMIK Police with regard to these documents is apparent from the file.

III. THE COMPLAINTS

41. Insofar as the complaints have been declared admissible, the complainant in substance complains about UNMIK's alleged failure to properly investigate the killing of Victims "A", "B", "C" and "D", as well as abduction and probable killing of Victim "E". In this regard, the Panel deemed that the complainant invokes a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
42. The Panel deemed that the complainant also complains about the fear, mental pain and suffering caused to the complainant by the situation surrounding the abduction and probable killing of Victim "E". In this regard, the Panel considers that the complainant relies on Article 3 of the ECHR in its substantive part.

IV. THE LAW

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

43. 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 killing of Victims "A", "B", "C" and "D", as well as into the abduction and probable killing of Victim "E".

1. The scope of the Panel's review

44. In determining whether it considers that there has been a violation of Article 2 (procedural limb) and of Article 3 of the ECHR, the Panel is mindful of the existing case law, notably that of the European Court of Human Rights. However, the Panel is also aware that the complaints before it differ in some significant ways from those brought before that Court. First, the respondent is not a State but an interim international territorial administration mandated to exercise temporary responsibilities in Kosovo. No suspicion attaches to UNMIK with respect to the 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.
45. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
46. 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.

47. 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.
48. 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 § 46). 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.
49. 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 2011, § 136, ECHR 2001-IV).

2. The Parties’ Submissions

50. The complainant in substance complains that there has not been an adequate investigation into the killing, as well as abduction and probable killing, of the victims in this case and no perpetrators have been brought to justice.
51. The SRSG submits that the Panel must take into consideration the special circumstances appertaining in Kosovo, especially in the initial stage of UNMIK's mission (the period during which the victims in this case were killed) and particularly the facts related to the deployment of UNMIK Police (see § 14-15 above). In addition, the work of investigators was seriously affected by lack of support of local institutions and the unwillingness of potential witnesses to come forward with the evidence. These constraints, the SRSG argues, inhibited the ability of UNMIK Police to conduct investigations according to the standards of States with more established institutions and without going through the difficulties associated with a post-conflict situation.
52. The SRSG concludes that in those circumstances the law enforcement organs under UNMIK control undertook all possible action in order to investigate the killing, as well as the abduction and probable killing, of the victims. As a result of those efforts, the mortal remains of all of them, except Victim "E", have been located, identified and returned to the family. Therefore, the SRSG concludes, "in the absence of information to the contrary ... there is no violation of Article 2 [of the] ECHR, which can be attributed to UNMIK."

3. The Panel's Assessment

a) Submission of relevant files

53. At Panel's request, the SRSG provided copies of only the few documents related to this investigation that UNMIK was able to recover, which suggests that the case file could be incomplete. On 15 January 2013, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 25 above). However, UNMIK has not provided explanations as to why the documentation may be deemed to be incomplete and in which parts.
54. 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 it with 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 practice 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 cooperate in the establishment of facts (see ECtHR, *Çelikkilek v. Turkey*, no. 27693/9, judgment of 31 May 2005, § 56).
55. 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 also notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.

56. 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*

57. 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.

58. 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).

59. 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 § 49 above, at § 136).

60. 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).
61. 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 § 49 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).
62. 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 § 58 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).
63. 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 § 61 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 49 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 § 49 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).

64. 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 § 60 above, at §§ 311-314; ECtHR, *Isayeva v. Russia*, cited in § 60 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

65. The Panel is conscious that the killing, as well as the abduction and probable killing, of the victims occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.

66. 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.

67. 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, second, whether such standards shall be considered fully applicable to UNMIK, in particular during the first phase of its mission.

68. 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, *Milgorić and Others*, nos. 38/08, 58/08, 61/08, 63/08, 69/08, 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).

69. 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 § 61 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 § 64 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 § 60 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 60 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
70. 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 § 58 above, at §§ 86-92; ECtHR, *Ergi v. Turkey*, 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).
71. 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 § 57 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).
72. 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 § 16 above).

73. 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 the requirements of Article 2 in the present case*

74. Turning to the circumstances of this case, the Panel notes that there were obvious shortcomings in the conduct of the investigation from its inception. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 49 above), 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 § 81 above § 70). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see §§ 18-19 above).

75. With regard to the first element of the procedural obligation, the Panel observes that the mortal remains of Victims “A”, “B” and “C” were exhumed, identified and returned to the family:

- in case of Victim “A”, the exhumation took place on 14 September 2004, the mortal remains were autopsied shortly thereafter and identified through DNA testing on 26 September 2005, the family was notified on 5 April 2006 and the remains returned by EULEX to the family, upon their request, on 12 August 2010;

- in case of Victim “B”, the exhumation took place on 5 November 2003, the mortal remains were autopsied on 13 December 2003 and identified through DNA testing shortly before 31 October 2005; the remains were returned to the family, upon their request, on 8 December 2010;
 - in case of Victim “C”, the mortal remains were exhumed by the ICTY on 10 August 2000 and autopsied on 23 August 2000. The ante-mortem data and DNA samples were collected by the Red Cross on 14 January 2005. The mortal remains were identified through DNA testing on 26 September 2005 and were eventually returned by EULEX to the family, upon their request, on 12 August 2010.
76. The Panel considers that the situation of no UNMIK Police MPU file presented with regard to Victim “D” is probably caused by the fact that the body was found immediately after death and was buried in a known location. Thus no issue of a missing person arose and consequently no investigation was carried out. Having accepted this possibility, the Panel notes that it should have had no bearing on pursuing an investigation into the circumstances of the actual killing of this victim, identification of the perpetrators and bringing them to justice.
77. With regard to the file related to the search for Victim “E”, the file contains only the ante-mortem data collected on an unknown date by the ICRC, which was subsequently handed over to UNMIK Police, and a certificate confirming that this person is still missing (see § 36 above).
78. In addition, the MPU investigators located and interviewed witnesses with regard to the killing of all the victims, whose testimony presented clear leads for the further investigation (see §§ 29-31 above).
79. The Panel now turns to the investigation carried out by UNMIK Police with the aim of identification of perpetrators and bringing them to justice, that is the second element of the procedural obligation under Article 2 of the ECHR.
80. The Panel notes that after receiving the case from the MPU in August 2005, no action by the WCIU, except for registering the case in their database and assigning a case number to it, is reflected in the file. This is despite the fact that the cover note of the MPU investigator (referred to in § 38 above) is clear regarding the obvious leads which *ad minimum* had to be followed up. A “case report” of the UNMIK WCIU, dated 8 October 2007, shows that the information was well received and understood by the WCIU, as the information on the witnesses and suspects is reflected there as well. Likewise, it appears that the WCIU made no attempts to follow up on the request to Interpol previously submitted by the MPU (referred to in § 35 above).
81. As regards the requirements of promptness and expedition, the Panel is mindful that in any investigation, and in particular in a murder investigation, the initial stage is of utmost importance, and it shall serve the two main purposes: identify the direction of the investigation and to ensure preservation and collection of evidence for future possible court proceedings.

82. It appears from the file that the investigation into both elements of the obligation under the Article 2 of the ECHR did not commence before 2005, which is almost six years after the alleged crimes were committed.
83. The first documented actions in this direction were interviews of the witnesses in June and July of 2005. Even though those took place almost six years after the killings, substantive evidence was obtained. However, this crucial evidence was left standing alone, neither corroborated nor refuted by anything else, because of the absence of any adequate further investigation. The investigative file shows no attempts by UNMIK Police either to identify the named witnesses, for the purposes of collecting more evidence (they have only been contacted for the collection of DNA samples), or of locating and interviewing the suspects. The WCIU did not even attempt to locate the alleged crime scene and examine it, at least formally, to better understand the circumstances of the crime under investigation. This is a basic step in cases with insufficient evidence.
84. The Panel also takes into account that in order to be adequate, the investigation into such grave crimes, besides the obvious minimum actions mentioned above, should have included at least identifying and interviewing individuals residing at or located in the area of the crime, especially those who were present in the village on that day and may have witnessed something, persons who knew the victims; persons who knew or had knowledge of the suspects when the leads to suspects were made, as well as persons who might have knowledge of possible motives.
85. The Panel takes into account that an investigative file should have included records of interviews of all potential witnesses to the crime as well as the victims' family. In all cases, such interviews should take place as soon as possible and should be recorded and retained in the case file⁴. The failure to formally interview persons who were believed to have been involved in the abduction again would seem to undermine the effectiveness of the investigation.
86. With respect to this investigation, the Panel observes that no signed records of the interviews with only two witnesses are present in the file. It is obvious that if this case was ever to reach a court, such statements would not be accepted as admissible evidence. The Panel must therefore conclude that with respect to pursuing these lines of enquiry, serious deficiencies existed with respect to the effectiveness of the investigation.
87. The purpose of the investigation under the second element of the procedural obligation under Article 2 of the ECHR was to discover the truth about the events leading to the killing of the victims. To fulfil this purpose, those conducting the investigation were required to recover and preserve evidentiary material related to the abduction, in order to aid in any potential prosecution of those responsible in the future; to identify possible witnesses and obtain statements from them concerning the killing; to identify, interview and, if necessary, apprehend the person(s) involved in the killing, all in pursuit of the

⁴ See: United Nations Manual On The Effective Prevention And Investigation Of Extra-Legal, Arbitrary And Summary Executions, adopted on 24 May 1989 by the Economic and Social Council, Resolution 1989/65.

ultimate goal to bring the suspected perpetrator(s) before a competent court. Even if those individually responsible for the crime have not been identified, 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. However, in this case, no evidence of this file being reviewed is present.

88. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that the delays in commencing and completing the investigation fall largely within the period of the Panel's temporal jurisdiction. After that critical date the failure to conduct the necessary investigative actions persisted, thus, in accordance with the continuing obligation to investigate (see § 63 above), bringing the assessment of the whole investigation within the period of the Panel's jurisdiction. The Panel is aware that the duty to investigate should also not be breached because the investigation does not produce a satisfactory result. Nevertheless, such an investigation must be undertaken in a serious manner and not be a mere formality.
89. Finally, as regards the accessibility of the investigation to the family, the Panel notes that it is not contested that the complainant was never informed of the status of the investigation.
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 (see ECtHR, *Tahsin Acar v Turkey*, no. 26307/95, judgment of 8 April 2004, § 226; *Taniş v Turkey*, no. 65899/01, judgment of 2 August 2005, § 204). In this regard, the complainant received no feedback whatsoever from UNMIK on the investigation concerning the killing, as well as the abduction and probable killing, of the victims. As the Panel has already noted, no statement was ever taken from the complainant as well.
91. The Panel takes due note of the fact that immediately after the abduction and killing of the victims, the complainant moved out of Kosovo, making contacts difficult for UNMIK Police. However, the Panel, first, notes that the file presented to it does not reflect any attempts by UNMIK Police to contact, or look for, the complainant. At the same time, some persons who might have had knowledge of the complainant's whereabouts are named in the file. Second, the Panel's request for the complainant's address was promptly responded to, which suggests that the same action may have easily been undertaken by UNMIK Police.
92. The Panel therefore considers that the investigation was not accessible to the complainant as required by Article 2.
93. For the aforementioned reasons, therefore, the Panel concludes that UNMIK violated its obligations to conduct an effective investigation pursuant to 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,

with regard to the situation surrounding the abduction and probable killing of Victim “E”.

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 [GC], *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, *ECHR*, 1999-IV; ECtHR [GC], *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, *ECHR*, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, cited in § 70 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 61 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 is deemed to allege that the lack of information and certainty surrounding the abduction of Victim “E”, particularly because of UNMIK’s failure to properly investigate it, caused mental suffering to the complainant.
99. In the comments on the merits of this case, the SRSR refutes any violation of Article 3 of the ECHR on the reasons that there is no express allegation that UNMIK inaction with regard to locating the mortal remains of Victim “E” caused mental pain and anguish to the complainant. The said suffering was caused by the killing and disappearance of the victim, which cannot be attributed to UNMIK.

3. The Panel’s assessment

a) General principles concerning the obligation under Article 3

100. 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 [GC], *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.

101. 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 § 57 above, at § 150).
102. 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.
103. 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, *Quinteros v. Uruguay*, 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, *Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), § 5.7).
104. 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).
105. 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).

106. 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*, Views of 26 July 2010, § 10, CCPR/C/99/D/1588/2007), grandchildren (*ibid.*) and even cousins (*Bashasha v. Libyan Arab Jamahiriya*, Views of 20 October 2010, § 7.5, CCPR/C/100/D/1776/2008). 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, cited in § 71 above, at § 11.7).
107. 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).

108. 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, cited in § 97 above, at § 147; ECtHR, *Bazorkina v. Russia*, cited in § 70 above, at § 140).
109. 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.
110. 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).
111. 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

112. 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 §§ 65-73).
113. 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 § 16 above).
114. 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.
115. 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

116. 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.

117. The Panel notes the proximity of the family ties between the complainant and Victim "E". Accordingly, the Panel has no doubt that the complainant indeed suffered serious emotional distress since June 1999, when the abduction of the Victim "E" took place.

118. The Panel reiterates that from the standpoint of Article 3 it may examine UNMIK's reactions and attitudes toward the complainant in its entirety. Despite the fact that the cases related to the killing and abduction and probable killing of the victims have been registered by UNMIK and that there were named witnesses who could have helped the investigators in locating the complainant, no contacts between the latter and UNMIK or other authorities in Kosovo with regard to these criminal investigations took place. No explanation or information as to what became of Victim "E" following the abduction was ever given to the complainant. The Panel notes that the complainant has never been officially invited by either the UNMIK Police or prosecutors to give a statement and that the complainant was never informed of the progress of the investigation.

119. Drawing inferences from UNMIK's failure to submit the complete investigative file (see §§ 25, 53 - 56 above) or to provide another plausible explanation for the lack of investigative actions with regard to the abduction and probable killing of Victim "E", 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.

120. In view of the above, the Panel concludes that the complainant suffered severe distress and anguish for a prolonged and continuing period of time on account of the way the authorities of UNMIK have handled the criminal investigation and as a result of the complainant's inability to find out what happened to the Victim "E". In this respect, it is obvious that, in any situation, the complainant still has to live in uncertainty about his fate, which must be unbearable.

121. 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. CONCLUDING COMMENTS AND RECOMMENDATIONS

122. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.

123. 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 killing of Victims “A”, “B”, “C” and “D”, as well as the abduction and probable killing of Victim “E”, and that its failure to do so constitutes a further serious violation of the human rights of the victims and their next-of-kin, in particular the right to have the truth of the matter determined.
124. The Panel notes the SRSB’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.
125. 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 § 18), 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.
126. 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 complaint and the case the Panel considers 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, cited in § 100 above, at § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR [GC], *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 killing of Victims “A”, “B”, “C” and “D”, as well as abduction and probable killing of Victim “E”, 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 killing of Victims "A", "B", "C", "D" and abduction and probable killing of Victim "E", as well as the distress and mental suffering incurred with respect to Victim "E", and makes a public apology to the complainant 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 stated above.

The Panel also considers 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 NO VIOLATION OF THE ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS, IN RELATION TO THE DISAPPEARANCE AND PROBABLE KILLING OF VICTIM "E";

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 KILLING OF VICTIMS “A”, “B”, “C”, “D” AND ABDUCTION AND PROBABLE KILLING OF VICTIM “E”, 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 KILLING OF VICTIMS “A”, “B”, “C”, “D” AND THE ABDUCTION AND PROBABLE KILLING OF VICTIM “E”, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED WITH RESPECT TO VICTIM “E”, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT;**
- c. **TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION TO 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
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