



# The Human Rights Advisory Panel

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## OPINION

**Date of adoption: 31 July 2013**

**Case No. 278/09**

**Olivera ČUPIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 31 July 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 complaint was introduced on 2 April 2009 and registered on 30 April 2009.
2. On 21 December 2009, the Panel requested additional information from the complainant.
3. On 9 September 2010, the Panel decided to join the complainant's case with case no. 23/09 pursuant to Rule 20 of the Panel's Rules of Procedure. The Panel also decided to communicate the complainant's case to the Special Representative of the Secretary-General

(SRSG)<sup>1</sup> for comments on admissibility, following its decision to join it with case no. 23/09. On 18 March 2011, the SRSG provided UNMIK's response.

4. On 9 June 2011, the Panel declared the joined case admissible.
5. On 14 June 2011, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaint together with all files concerning the criminal investigation. On 23 August 2011, the SRSG provided UNMIK's comments together with the requested files.
6. On 17 June 2013, the Panel requested UNMIK to confirm whether the disclosure of files concerning the case could be considered final.
7. On 18 June 2013, the SRSG provided UNMIK's response.
8. On 31 July 2013, following communication from the complainant in the present case, the Panel decided to disjoin the cases.

## **II. THE FACTS**

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

9. The events at issue took place in the territory of Kosovo after the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), in June 1999.
10. The armed conflict during 1998 and 1999 between the Serbian forces on one side and the Kosovo Liberation Army (KLA) and other Kosovo Albanian armed groups on the other is well documented. Following the failure of international efforts to resolve the conflict, on 23 March 1999, the Secretary General of the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes against the Federal Republic of Yugoslavia (FRY). The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo. On 9 June 1999, the International Security Force (KFOR), the FRY and the Republic of Serbia signed a "Military Technical Agreement" by which they agreed on FRY withdrawal from Kosovo and the presence of an international security force following an appropriate UN Security Council Resolution.
11. On 10 June 1999, the UN Security Council adopted Resolution 1244 (1999). Acting under Chapter VII of the UN Charter, the UN Security Council decided upon the deployment of

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

<sup>2</sup> The references drawn upon by the Panel in setting out this general background include: OSCE, "As Seen, as Told", Vol. 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.unhchr.org](http://www.unhchr.org)) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>).

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 SRSG. UN Security Council Resolution 1244 (1999) mandated UNMIK to “promote and protect human rights” in Kosovo in accordance with internationally recognised human rights standards.

12. Estimates regarding the effect of the conflict on the displacement of the Kosovo Albanian population range from approximately 800,000 to 1.45 million. Following the adoption of Resolution 1244 (1999), the majority of Kosovo Albanians who had fled, or had been forcibly expelled from their houses by the Serbian forces during the conflict, returned to Kosovo.
13. Meanwhile, members of the non-Albanian community – mainly but not exclusively Serbs, Roma and Slavic Muslims – as well as Kosovo Albanians suspected of collaboration with the Serbian authorities, became the target of widespread attacks by Kosovo Albanian armed groups. Current estimates relating to the number of Kosovo Serbs displaced fall within the region of 200,000 to 210,000. Whereas most Kosovo Serbs and other non-Albanians fled to Serbia proper and the neighbouring countries, those remaining behind became victims of systematic killings, abductions, arbitrary detentions, sexual and gender based violence, beatings and harassment.
14. Although figures remain disputed, it is estimated that more than 15,000 deaths or disappearances occurred during and in the immediate aftermath of the Kosovo conflict (1998-2000). More than 3,000 ethnic Albanians, and about 800 Serbs, Roma and members of other minority communities went missing during this period. More than half of the missing persons had been located and their mortal remains identified by the end of 2010, while 1,766 are listed as still missing by the International Committee of the Red Cross (ICRC) as of October 2012.
15. As of July 1999, as part of the efforts to restore law enforcement in Kosovo within the framework of the rule of law, the SRSG urged UN member States to support the deployment within the civilian component of UNMIK of 4,718 international police personnel. UNMIK Police were tasked with advising KFOR on policing matters until they themselves had sufficient numbers to take full responsibility for law enforcement and to work towards the development of a Kosovo police service. By September 1999, approximately 1,100 international police officers had been deployed to UNMIK.
16. By December 2000, the deployment of UNMIK Police was almost complete with 4,400 personnel from 53 different countries, and UNMIK had assumed primacy in law enforcement responsibility in all regions of Kosovo except for Mitrovicë/Mitrovica. According to the

2000 Annual Report of UNMIK Police, 351 kidnappings, 675 murders and 115 rapes had been reported to them in the period between June 1999 and December 2000.

17. Due to the collapse of the administration of justice in Kosovo, UNMIK established in June 1999 an Emergency Justice System. This was composed of a limited number of local judges and prosecutors and was operational until a regular justice system became operative in January 2000. In February 2000, UNMIK authorised the appointment of international judges and prosecutors, initially in the Mitrovicë/Mitrovica region and later across Kosovo, to strengthen the local justice system and to guarantee its impartiality. As of October 2002, the local justice system comprised 341 local and 24 international judges and prosecutors. In January 2003, the UN Secretary-General reporting to the Security Council on the implementation of Resolution 1244 (1999) defined the police and justice system in Kosovo at that moment as being “well-functioning” and “sustainable”.
18. In July 1999, the UN Secretary-General reported to the Security Council that UNMIK already considered the issue of missing persons as a particularly acute human rights concern in Kosovo. In November 1999, a Missing Persons Unit (MPU) was established within UNMIK Police, mandated to investigate with respect to either the possible location of missing persons and/or gravesites. The MPU, jointly with the Central Criminal Investigation Unit (CCIU) of UNMIK Police, and later a dedicated War Crimes Investigation Unit (WCIU), were responsible for the criminal aspects of missing persons cases in Kosovo. In May 2000, a Victim Recovery and Identification Commission (VRIC) chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. As of June 2002, the newly established Office on Missing Persons and Forensics (OMPf) in the UNMIK Department of Justice (DOJ) became the sole authority mandated to determine the whereabouts of missing persons, identify their mortal remains and return them to the family of the missing. Starting from 2001, based on a Memorandum of Understanding (MoU) between UNMIK and the Sarajevo-based International Commission of Missing Persons (ICMP), supplemented by a further agreement in 2003, the identification of mortal remains was carried out by the ICMP through DNA testing.
19. On 9 December 2008, UNMIK’s responsibility with regard to police and justice in Kosovo ended with the European Union Rule of Law Mission in Kosovo (EULEX) assuming full operational control in the area of the rule of law, following the Statement made by the President of the United Nations Security Council on 26 November 2008 (S/PRST/2008/44), welcoming the continued engagement of the European Union in Kosovo.
20. On the same date, UNMIK and EULEX signed a MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were handed over to EULEX.

## **B. Circumstances surrounding the abduction of Mr BrankoČupić**

21. The complainant is the wife of Mr BrankoČupić.
22. The complainant states that on 24 June 1999 at around 23:15, a group of armed men in black uniforms entered the Čupić's apartment and threatened Mr BrankoČupić and herself, and Mr Čupić's mother, Mrs MilijanaČupić who was asleep in the apartment. The armed men abducted Mr Čupić, informing his wife that he was being taken for interrogation and that he would be returned. An hour later, some of the armed men returned with a slip of paper signed by Mr Čupić imploring his wife to give them all of the gold that she had. Mrs OliveraČupić gave the armed men her gold in the hopes that they would return her husband; he was never seen again.
23. The complainant states that the abduction of Mr Čupić was reported to KFOR the morning following the abduction. She states that the abduction was also reported to the ICRC, the Yugoslav Red Cross and the Red Cross of Podgorica.
24. The name of Mr BrankoČupić appears in a list of missing persons, communicated by the ICRC to UNMIK Police on 12 October 2001, and in the database compiled by the UNMIK OMPF. Likewise, the ICRC opened a tracing request for him on 5 November 2001. The entry in the online list of missing persons maintained by the ICMP<sup>3</sup> with regard to Mr BrankoČupić reads, in relevant parts: "sufficient reference samples collected" and "DNA match not found".

## **C. The Investigation**

### *a) Disclosure of relevant files*

25. On 23 August 2011, UNMIK presented to the Panel the documents which were held previously by the UNMIK Police (MPU, WCIU and CCIU), as well as documents received by EULEX from the Kosovo Special Prosecutor's Office. On 18 June 2013, UNMIK confirmed to the Panel that all files in UNMIK's possession have been disclosed.
26. Concerning disclosure of information contained in the files, the Panel recalls that UNMIK has made available investigative 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 relevant investigative steps taken by investigative authorities is provided in the paragraphs to follow.

### *b) The investigation concerning the abduction of Mr BrankoČupić*

27. In 1999, the UNMIK MPU opened a missing person file with respect to Mr BrankoČupić's abduction (case file no. 1999-000111). The documents presented to the Panel contain a document labeled "OSCE Task Force For Kosovo Incident Report" which is undated and unsigned but appears to give eyewitness testimony from someone who had been at the scene of Mr BrankoČupić's abduction, which may have been the complainant. The eyewitness gave

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<sup>3</sup> The database is available at: [http://www.ic-mp.org/fdmsweb/index.php?w=mp\\_details\\_popup&l=en](http://www.ic-mp.org/fdmsweb/index.php?w=mp_details_popup&l=en) (accessed on 22 July 2013).

the interviewer some further information as to where Mr BrankoČupić and other allegedly abducted men may be found; however, there is no indication that any follow-up action was carried out in regard to this testimony.

28. According to an email correspondence contained in the investigative files between two UNMIK police officers in August 2004, an UNMIK officer had talked to MrsČupić around this time about another potential witness, Mr M.G.
29. On 10 September 2004, the UNMIK MPU produced an ante-mortem investigative report, which includes the phone number of the Mr Čupić's sister in Montenegro and also contains information about a potential witness Mr M.G., whom the investigator had been trying to interview, but who had died prior to the interview taking place.
30. The CCIU apparently opened an investigation in 2005 (case file no. 2005-00140), but no documents were provided from this time period. On 5 October 2007, the case of Mr BrankoČupić was reviewed by the WCIU Section of UNMIK Police and a case analysis report was prepared. The WCIU report indicates that Mr BrankoČupić was abducted on 24 June 1999. The investigator reviewing the case indicated that "although the incident was seen by the victim's family members, none of this (sic) persons was interviewed." There is no evidence that any follow-up action was carried out by UNMIK Police following the case analysis report.
31. On 20 July 2009, Kosovo Special Prosecutor's Office submitted a request to conduct an investigation against unknown persons for the kidnapping of Mr BrankoČupić.

### **III. THE COMPLAINT**

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

### **IV. THE LAW**

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

34. 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 abduction of her husband.

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

35. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.

36. In determining whether it considers that there has been a violation of Article 2 (procedural limb) of the ECHR, the Panel is mindful of the existing case law, notably that of the European Court of Human Rights. However, the Panel is also aware that the complaints before it differ in some significant ways from those brought before that Court. First, the respondent is not a State but an interim international territorial administration mandated to exercise temporary responsibilities in Kosovo. No suspicion attaches to UNMIK with respect to the substantive obligations under Article 2 of the ECHR. Second, as in a limited number of cases before the European Court, those suspected of being responsible for the alleged killings and/or abductions are in all cases before the Panel non-state actors, mostly but not exclusively connected to the conflict. These are factors for the Panel to take into consideration as it assesses 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.
37. 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.
38. 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.
39. Likewise, the Panel emphasises that, as far as its jurisdiction *rationemateriae* 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 § 37). 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.

40. 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, *Cyprus v. Turkey* [GC] no. 25781/94, judgment of 10 May 2011, § 136, ECHR 2001-IV).

## **2. The Parties’ submissions**

41. The Panel deems that the complainant alleges a violation of Article 2 of the ECHR through the lack of an adequate criminal investigation into the abduction of her husband.
42. The SRSG argues that, in general, when considering whether UNMIK has satisfied its procedural obligations under Article 2 of the ECHR, the Panel must take into consideration the special circumstances in Kosovo at the time. This was especially the case in the initial stage of its deployment, the period during which Mr Branko Čupić’s abduction occurred.
43. The SRSG further observes that when determining applications under Article 2, consideration must be given to not imposing an impossible or disproportionate burden on UNMIK. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court of Human Rights 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.”

44. In the view of the SRSG, UNMIK was faced with a very similar situation in Kosovo as the one in Bosnia in the aftermath of that conflict. 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 it very difficult locating and recovering their mortal remains.
45. 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 the 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, the 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.

46. 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.”

47. 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.

48. With regard to this particular case, the SRSG refers first to statements made by Mr Čupić's sister, the complainant in case no. 23/09. The SRSG also refers to the unsigned, undated testimony apparently from an eyewitness (see § 27 above). The SRSG claims that this testimony came from the complainant and that the document was dated July 1999. He argues, "[C]ontrary to the statements made by the complainant Ms Slavica Camović ...that names of several witnesses of the alleged abduction of Mr Čupić were given to the authorities, she did not specify in her complaint to HRAP the individual names nor does she state to which authorities or institutions these names were given. Moreover, in a report of the alleged abduction made to OSCE in July 1999 [see § 27 above], Mr Čupić's wife does not mention the names of any witnesses. The initial reports of the disappearance of the missing person made to UNMIK in 1999 did not specifically name any witnesses or provide material leads for an investigation into the matter."
49. The SRSG highlights that, "Only in 2004, Mr Čupić's wife presented a name of a possible witness to UNMIK's OMPF. Consequently, the matter was reactivated and an investigation was carried out by OMPF from 8 April 2004 until 10 September 2004. This lead, however, turned out to be without success, since the witness could not be located and later it transpired that the potential witness had passed away."
50. With regard to the investigation aimed at identifying and bringing to justice the perpetrators who are responsible for the abduction of Mr Čupić, the SRSG specifically argues that "it is very difficult, based on the information available, to determine the extent and effectiveness of the investigation that was carried out by UNMIK. The SRSG concedes that there is no information in the files that any investigative activity was carried out after September 2004. He notes that "taking into account the circumstances of this particular matter, UNMIK/OMPf did make investigative efforts in accordance with the procedural requirements of Article 2, to determine the whereabouts of Mr Čupić and to bring the perpetrators to justice. Despite the time gap of more than 4 years between the initial reporting of the incident in 1999 and the commencement of investigations in 2004, UNMIK's efforts can be considered effective in the sense of Article 2 ECHR in view of the specific circumstances of Kosovo's post conflict environment."

### **3. The Panel's Assessment**

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

51. The SRSG observes that additional and conclusive information may exist beyond the case file submitted to the Panel concerning the investigation into the case of Mr Branko Čupić.
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, *Celikbilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).

53. The Panel notes that UNMIK was requested on at least three occasions to submit relevant documents in relation to the case. In response to the latest request from the Panel, on 18 June 2013, UNMIK stated that the disclosure of files concerning the case could be considered final.
54. The Panel also notes that the proper maintenance of investigative files concerning crimes such as killings and disappearances, from the opening of the investigations to their handing over, is crucial to the continuation of such investigations and failure to do so could thus raise *per se* issues under Article 2. The Panel likewise notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.
55. 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*

56. First, the Panel considers that the limited content of the investigative files, in particular in the light of the SRSG's argument that, for this reason, it is not possible to ascertain whether there was a failure by UNMIK to conduct an effective investigation into the case of Mr Branko Čupić 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.
57. 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 § 40, at §§ 183-184).
58. 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[GC], *Varnava and Others v Turkey* cited above in § 40 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).

59. 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.
60. 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 Articles 2 (3) (right to an effective remedy) of the (ICCPR) (see United Nations Human Rights Committee (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.
61. 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, 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, § 86, 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).
62. 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 § 40 above, at § 136).
63. 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).

64. 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 above § 40 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 § 63 above, at § 312, and *Isayeva v. Russia*, cited in § 63 above, at § 212).
65. 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 § 61 above, § 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 Mazărev. Romania*, no. 64301/01, judgment of 1 December 2009, § 105).
66. 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 § 64 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 40 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 § 64; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 40 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 in § 64 above, at § 64).

67. 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 *Ahmet Özkan and Others v. Turkey*, cited in § 64 above, at §§ 311-314; *Isayeva v. Russia*, cited in § 63 above, §§ 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, ECHR 2011).

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

68. The Panel is conscious that the abduction of Mr Branko Čupić occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.
69. 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.
70. 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.
71. 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).
72. 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 § 64 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 § 67 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 § 63 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 63 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).

73. 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 § 67 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 § 61 above, at §§ 86-92; ECtHR, *Ergi*, cited above, at §§ 82-85; ECtHR [GC], *Tanrikulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited in § 63 above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).
74. 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 § 60 above, at § 1; HRC, *Abubakar Amirov and Aizan Amirova v. Russian Federation*, communication no. 1447/2006, views of 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).
75. 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 § 17above).

76. 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 in § 64 above, *Brecknell v. The United Kingdom*, no. 32457/04, 27 November 2007, § 70).
77. 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*

78. Turning to the particular circumstances of this case, the complainant states that Mr BrankoČupić’s abduction was reported promptly to KFOR and the ICRC. Lacking specific documentation in this regard, the Panel considers that UNMIK became aware of Mr BrankoČupić’s abduction at the latest by July 1999 (see § 48 above).
79. The SRSG states that an effective investigation was carried out in relation to Mr BrankoČupić’s abduction, however, due to minimal information and available leads, no concrete results could be achieved. Concerning the abduction of Mr Čupić, the SRSG in essence states that, from the documentation contained in the investigative file, it is not possible to establish whether some apparent gaps in the investigation are attributable to a failure of the relevant officers to pass on and record the information, or rather to a mere lack of investigation. For this reason, he is not in a position to provide comments as to whether UNMIK conducted an effective investigation in this case.
80. In this regard, 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 Mr BrankoČupić disappeared in life threatening circumstances and that UNMIK had become aware of his abduction at the latest in July 1999 (see § 48 above).
81. Accordingly, applying the principles discussed above (see §§ 56-59), 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 a complete investigative 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.

82. The Panel notes that at least from December 2000 the whole system of criminal investigation in Pejë/Peć region was under the full control of UNMIK (see § 16 above). 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 § 20 above); and third, that the investigative files could be traced and retrieved, should a need arise at any later stage.
83. The Panel infers from the limited content of the 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.
84. 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.
85. The Panel notes that there were obvious shortcomings in the conduct of the investigation from its inception, having in mind that the initial stage of the investigation is of the utmost importance. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 40), 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 § 64 above, at § 70). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 19 above).
86. With regard to Mr Branko Čupić, the Panel notes that a missing person file was opened by the UNMIK MPU in 1999; however it appears that from that time until at least April 2004, no apparent investigative activity took place. In particular, it appears to the Panel that UNMIK police never took a formal statement from the complainant, as eye-witness to the abduction, or from other potential witnesses, despite the SRSG’s assumption that the unsigned, undated testimony was from the complainant (see § 27 above). This cannot be confirmed from the files in the Panel’s possession. According to an email between UNMIK Police officers in August 2004, an officer had spoken to Mrs Cupić concerning a potential witness around that time. Thereafter, on 10 September 2004, the UNMIK MPU produced an ante-mortem investigation report, stating that they could not interview the alleged eyewitness, as he had passed away (see § 29 above). However, there is no clear understanding presented in the file as to whether UNMIK Police could have located this eyewitness earlier.

87. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that these basic investigative steps and follow-ups had not been carried out, such as formally interviewing the complainant, and locating and interviewing other possible witnesses to the abduction. After that critical date, the failure to conduct the necessary investigative actions persisted, thus, in accordance with the continuing obligation to investigate (see § 66 above), bringing the assessment of the whole investigation within the period of the Panel's jurisdiction.
88. In addition, the Panel considers that, as those responsible for the crime had not been identified, UNMIK was obliged 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 Mr Branko Čupić regarding any possible new leads of enquiry. While the Panel notes that, on 5 October 2007, the case of Mr Branko Čupić was reviewed by the WCIU of UNMIK Police and a case analysis report was prepared, there is no evidence that any follow-up action was carried out by UNMIK Police following the case analysis report.
89. 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.
90. 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 Mr Branko Čupić's abduction and bring the 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 § 64 above), as required by Article 2.
91. As concerns the requirement of public scrutiny, the Panel recalls that Article 2 also requires that in all cases the victim's next-of-kin must be involved in the investigation to the extent necessary to safeguard his or her legitimate interests (see ECtHR [GC], *TahsinAcar v. Turkey*, no. 26307/95, judgment of 8 April 2004, § 226, ECHR 2004-III; ECtHR, *Tanış v. Turkey*, no. 65899/01, judgment of 2 August 2005, § 204, ECHR 2005-VIII).
92. In this regard, the complainant claims that she never received any information or statement about the steps taken by the investigators. The Panel notes that is unclear whether a formal statement was ever taken from the complainant and no information was given to her concerning the status of the investigation. The Panel understands the complainant's view that the extent of the information received was unsatisfactory. The Panel therefore considers that the investigations were not accessible to the complainant's family as required by Article 2.
93. In light of the deficiencies and shortcomings as described above, the Panel concludes that UNMIK failed to carry out an adequate and effective investigation into the abduction of the complainant's husband. There has been accordingly a violation of Article 2 of the ECHR under its procedural limb.

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

94. The Panel considers that the complainant invokes, in substance, a violation of the right to be free from inhumane or degrading treatment, guaranteed by Article 3 of the ECHR.
- 1. The scope of the Panel's review**
95. The Panel will consider the allegations under Article 3 of the ECHR, applying the same scope of review as was set out with regard to Article 2 (see §§ 35-40 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, cited in § 40 above, at § 156, *ECHR*, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, cited in § 73 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 64 above, at § 74; ECtHR, *AlpatuIsrailova 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, *Gelayev v. Russia*, no. 20216/07, cited in § 11 above, at §§ 147-148).

## 2. The Parties' submissions

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

### 3. The Panel's assessment

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

101. Like Article 2, Article 3 of the ECHR enshrines one of the mostfundamental values in democratic societies (ECtHR, *TalatTepe 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.
102. Setting out the general principles applicable to situations where violations of the obligation under Article 3 of the ECHR are alleged, the Panel notes that the phenomenon of disappearance constitutes a complex form of human rights violation that must be understood and confronted in an integral fashion (see IACtHR, *Velasquez Rodriguez v. Honduras*, cited in § 60 above, at § 150).
103. The Panel observes that the obligation under Article 3 of the ECHR differs from the procedural obligation on the authorities under Article 2. Whereas the latter requires the authorities to take specific legal action capable of leading to identification and punishment of those responsible, the former is more general and humanitarian and relates to their reaction to the plight of the relatives of those who have disappeared or died.
104. The HRC has also recognised disappearances as a serious violation of human rights. In its decision of 21 July 1983, in the case *Quinteros v. Uruguay*, it stated that disappearances constitute serious violations of the rights of the disappeared person's relatives, who suffer from deep anguish which persists for as long as the uncertainty concerning the fate of their loved one continues, often for many years (see HRC, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), § 14). Moreover, in its decision of 15 July 1994 in the case *Mojica v. Dominican Republic*, the HRC has deemed that "the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7 [of the Covenant]", also prohibiting torture, inhumane or degrading treatment and punishment (see HRC, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), § 5.7).
105. With respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR, the Panel refers to the case law of the European Court of Human Rights and to its own case law. The European Court accepts that this may be the case, depending on the existence of "special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation". The Court further holds that "relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries" (see ECtHR, *Baysayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 159; ECtHR, *Er and Others v. Turkey*, cited in § 96 above, at § 94).

106. The Panel takes note that, when assessing the emotional suffering of the victims, the European Court also considers the following circumstances: the length of the disappearance itself and of the period with no information on the fate of the missing person and on the investigation undertaken by the authorities; the delay in initiation of criminal investigation into the disappearance; the absence of any “meaningful” action by the authorities, despite the fact that the complainants approached them to report the disappearance of their relative and to share with them the information they had; lack of any plausible explanation or information as to the fate of their missing relatives despite personal or written inquiries with official bodies (see, among others, ECtHR, *Er and Others v. Turkey*, cited in § 96 above, at § 96; ECtHR, *Osmanoğlu v. Turkey*, no. 48804/99, judgment of 24 January 2008, § 97). Another factor leading to a finding of violation of Article 3 of the ECHR is the continuous nature of the psychological suffering of relatives of a victim of a disappearance (ECtHR, *Salakhov and Islyamova v. Ukraine*, no. 28005/08, judgment of 14 March 2013, § 201).
107. The HRC has also considered the issue and recognised family members of disappeared or missing persons as victims of a violation of Article 7 of the Covenant: parents (*Boucherf v. Algeria*, Communication No. 1196/2003, views of 30 March 2006, § 9.7, CCPR/C/86/D/1196/2003), children (*Zarzi v. Algeria*, Communication No. 1780/2008, views of 22 March 2011, § 7.6, CCPR/C/101/D/1780/2008), siblings (*El Abani v. Libyan Arab Jamahiriya*, Communication No. 1640/2007, views of 26 July 2010, § 7.5, CCPR/C/99/D/1640/2007), spouses (*Bousroual v. Algeria*, Communication No. 992/2001, views of 30 March 2006, § 9.8, CCPR/C/86/D/992/2001), aunts and uncles (*Benaziza v. Algeria*, cited in § 58 above, at § 10), grandchildren (*ibid.*) and even cousins (*Bashasha v. Libyan Arab Jamahiriya*, cited in § 58 above, at § 7.5). It justifies this broad understanding of victim status by the suffering and distress that is caused to family members by the disappearance of an individual, which is often exacerbated by the authorities’ insufficient efforts to investigate the disappearance in order to establish the fate of the victim and to bring perpetrators to justice (*Aboussedra v. Libyan Arab Jamahiriya*, Communication No. 1751/2008, views of 25 October 2010, § 7.5, CCPR/C/100/D/1751/2008). In the *Amirov v. Russian Federation* the Committee observed that “[w]ithout wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary. In the present case, the Committee notes the horrific conditions in which the author came to find his wife's mutilated remains (...), followed by the dilatory, sporadic measures undertaken to investigate the circumstances that have lead to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated” (*Amirov v. Russian Federation* Communication No. 1447/2006, views of 2 April 2009, § 11.7, CCPR/C/95/D/1447/2006).
108. The Panel also takes into account that the European Court of Human Rights has determined that its analysis of the authorities’ reaction is “not confined to any specific manifestation of the authorities’ attitudes, isolated incidents or procedural acts; on the contrary, the Court gives a global and continuous assessment of the way in which the authorities of the respondent State responded to the applicants’ enquiries” (see ECtHR, *Janowiec and Others v. Russia*, nos. 55508/07 and 29520/09, judgment of 16 April 2012, § 152).

109. In this respect, it is the position of the European Court that findings under the procedural limb of Article 2 would also be of direct relevance in considering the existence of a violation of Article 3 (see ECtHR, *Basayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 109; ECtHR, *Gelayev v. Russia*, no. 20216/07, judgment of 15 July 2010, § 147; ECtHR, *Bazorkina v. Russia*, cited in § 73 above, at § 140).

110. The Panel observes that the European Court has already found violations of Article 3 of the ECHR in relation to disappearances in which the State itself was found to be responsible for the abduction (see ECtHR, *Luluyev and Others v. Russia*, no. 69480/01, judgment of 9 November 2006, §§ 117-118; ECtHR, *Kukayev v. Russia*, no. 29361/02, judgment of 15 November 2007, §§ 107-110). However, in contrast, in the case under the Panel's consideration, in no way is UNMIK implicated in the actual disappearance and UNMIK cannot be held responsible for the applicant's mental distress caused by the commission of the crime itself.

111. The Panel is mindful that in the absence of a finding of State responsibility for the disappearance, the European Court has ruled that it is not persuaded that the authorities' conduct, albeit negligent to the extent that it has breached Article 2 in its procedural aspect, could have in itself caused the applicant mental distress in excess of the minimum level of severity, which is necessary in order to consider treatment as falling within the scope of Article 3 (see, among others, ECtHR, *Tovsultanova v. Russia*, no. 26974/06, judgment of 17 June 2010, § 104; ECtHR, *Shafiyeva v. Russia*, no. 49379/09, judgment of 3 May 2012, § 103).

112. Finally, with regard to the issue of burden of proof, the Panel refers to what it has said under Article 2 (see above, §§ 56-59).

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

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

114. With regard to the applicability of the above standards to the Kosovo context, the Panel first refers to its view on the same issue with regard to Article 2, developed above (see §§ 68-77).

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

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

117. For these reasons, the Panel considers that it has to establish with regard to each case whether the attitude and reactions of UNMIK authorities to the disappearance itself and to the complainants' quest for information with regard to the fate of their relatives and the

criminal investigation, would amount to a violation of the obligation under Article 3, having regard to the realities in Kosovo at the relevant time.

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

118. Against this background, the Panel discerns a number of factors in the present case which, taken together, raise the question of violation of Article 3 of the ECHR.
119. The Panel notes the proximity of the family ties between the complainant and Mr Branko Čupić, as she is his wife. Accordingly, the Panel has no doubt that she indeed suffered serious emotional distress since his disappearance, which took place in June 1999. She immediately communicated the disappearance to the authorities and gave them all the information available to her (see §23 above).
120. The Panel also notes that the complainant has undertaken her own actions to search for her husband. She applied to various bodies with enquiries but despite her attempts, she has never received any explanation or information as to what became of her husband following his disappearance.
121. The Panel notes that, with the exception of a limited and ultimately unsuccessful contact in 2004 attempting to locate another eyewitness (see § 29 above), the complainant has never been contacted by either the UNMIK Police or prosecutors, that her statements were never recorded and that she was never informed of the progress of the investigation. The Panel reiterates that from the standpoint of Article 3 it may examine UNMIK's reactions and attitudes to the complainant in its entirety. As was shown with respect to Article 2, the file as presented provides no details of any formal communication between UNMIK investigative authorities and the complainant from the time of the filing of the initial report of the disappearance, except for the single contact in 2004.
122. Drawing inferences from UNMIK's failure to submit the complete investigative file or to provide another plausible explanation for the almost complete absence of contact with the complainant, or information about the criminal investigation into the disappearance of Mr Branko Čupić, 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 husband and the status of the investigation.
123. In view of the above, the Panel concludes that the complainant suffered severe distress for a prolonged and continuing period of time on account of the way the authorities of UNMIK have dealt with her complaint and as a result, have left her with the inability to find out what happened to her husband. In this respect, it is obvious that, in any situation, the pain of a wife who has to live in uncertainty about the fate of her disappeared husband must be unbearable.
124. 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

125. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
126. The Panel notes that enforced disappearances and arbitrary executions constitute serious violations of human rights which shall be investigated and prosecuted under any circumstances. The Panel also notes that UNMIK as the territorial administration of Kosovo from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute those responsible for killings, abductions or disappearances in life-threatening circumstances. Its failure to do so constitutes further serious violations of the rights of the victims and their next-of-kin, in particular the right to have the truth of the matter determined.
127. 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.
128. It would normally be for UNMIK to take the appropriate measures in order to put an end to the violation noted and to redress as far as possible the effects thereof. However, as the Panel noted above (see § 19), UNMIK's responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law. UNMIK therefore is no longer in a position to take measures that will have a direct impact on the investigations that are still pending before EULEX or local authorities. Likewise, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo, this fact limiting its ability to provide full and effective reparation of the violation committed, as required by established principles of international human rights law.
129. 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], *Ilașcu and Others v. Moldova and Russia*, cited in § 101 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 abduction of Mr Branko Čupić 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 abduction of Mr Branko Čupić, as well as the distress and mental suffering subsequently incurred, and makes a public apology to the complainant and her family in this regard;
- Takes appropriate steps towards payment of adequate compensation to the complainant for the moral damage suffered due to UNMIK’s failure to conduct an effective investigation, as well as for distress and mental suffering incurred by the complainant as a consequence of UNMIK’s behavior.

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

- In line with the UN General Assembly Resolution on “Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law” (A/Res/60/147, 21 March 2006), takes appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and non-governmental organisations, for the realisation of a full and comprehensive reparation programme, including restitution compensation, rehabilitation, satisfaction and guarantees of non-repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict;
- Takes appropriate steps before competent bodies of the United Nations, including the UN Secretary-General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the United Nations, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring;

**FOR THESE REASONS,**

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN A VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 2. FINDS THAT THERE HAS BEEN A VIOLATION OF THE SUBSTANTIVE OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 3. RECOMMENDS THAT UNMIK:**
  - a. URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE ABDUCTION 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 ABDUCTION AND PROBABLE KILLING OF THE COMPLAINANT'S HUSBAND, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT AND HER FAMILY;**
- c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION OF THE COMPLAINANT FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 AND ARTICLE 3 OF THE ECHR.**
- d. TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**
- e. TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
- f. TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey ANTONOV  
Executive Officer

Marek NOWICKI  
Presiding Member

## **ABBREVIATIONS AND ACRONYMS**

**CCIU** - Central Criminal Investigation Unit

**CCPR** – International Covenant on Civil and Political Rights

**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 Nation Human Rights Committee

**IACtHR**– Inter-American Court of Human 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

**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