



# *The Human Rights Advisory Panel*

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## **OPINION**

**Date of adoption: 21 August 2013**

**Case Nos 97/09, 332/09, 335/09 & 345/09**

**Ljiljana MILENKOVIĆ, Marica STOJANOVIĆ, Dalibor MILENKOVIĆ and  
Ljubiša MILENKOVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 21 August 2013,  
with the following members taking part:

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

Assisted by

Mr Daniel Trup, Acting Executive Officer

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

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

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

1. The complaint of Mrs Ljiljana Milenković (case no. 97/09) was introduced on 8 April 2009 and registered on 30 April 2009. The complaints of Mrs Marica Stojanović (case no. 332/09), Mr Dalibor Milenković (case no. 335/09) and Mr Ljubiša Milenković (case no. 345/09) were introduced on 13 April 2009 and registered on 4 December 2009.

2. On 9 December 2009, the Human Rights Advisory Panel requested further information from the complainant in case no. 97/09. The complainant responded on 5 January 2010.
3. On 29 April 2010, the Panel communicated case no. 97/09 to the Special Representative of the Secretary-General (SRSG)<sup>1</sup> for UNMIK's comments on the admissibility and the merits of the case.
4. On 3 June 2010, the SRSG provided UNMIK's response.
5. On 9 September 2010, the Panel decided to join case nos 97/09, 332/09, 335/09 and 345/09 pursuant to Rule 20 of the Panel's Rules of Procedure.
6. On 2 November 2010, the Panel re-communicated case no. 97/09 and communicated case nos. 332/09, 335/09 and 345/09 to the SRSG for UNMIK's comments on the admissibility of the cases in light of the decision to join the cases.
7. On 25 February 2011, the SRSG provided UNMIK's response.
8. On 13 April 2011, the Panel declared the case admissible.
9. On 18 April 2011, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaints, together with all files concerning the criminal investigation.
10. On 13 May 2011, the SRSG provided UNMIK's comments on the merits of the case together with the relevant documentation.
11. On 2 August 2013, the Panel requested UNMIK to confirm of the disclosure of files concerning the case could be considered final.
12. On 5 August 2013, the SRSG provided UNMIK's response.

## II. THE FACTS

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

13. 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.

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

<sup>2</sup> The references drawn upon by the Panel in setting out this general background include: OSCE, "As Seen, as Told", Vol. 1 (October 1998 – June 1999) and Vol. II (14 June – 31 October 1999); quarterly reports of the UN Secretary-General on the United Nations Interim Administration in Kosovo; UNMIK Police Annual Reports (2000, 2001); Humanitarian Law Centre, "Abductions and Disappearances of non-Albanians in Kosovo" (2001); Humanitarian Law Centre, "Kosovo Memory Book" (<http://www.kosovomemorybook.org>); UNMIK Office on Missing Persons and Forensics, Activity Report 2002-2004; European Court of Human Rights, *Behrami and Behrami v. France and Saramati v. France, Germany and Norway*, nos. 71412/01 and 78166/01, decision of 2 May 2007; International Commission on Missing Persons, "The Situation in Kosovo: a Stock Taking" (2010); data issued by the United Nations High Commissioner for Refugees, (available at [www.unhcr.org](http://www.unhcr.org)) and by the International Committee of the Red Cross (available at <http://familylinks.icrc.org/kosovo/en>).

14. 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.
15. 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 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.
16. 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.
17. 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.
18. 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.

19. 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.
20. 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.
21. 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”.
22. 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.
23. 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.

24. On the same date, UNMIK and EULEX signed a MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were handed over to EULEX.

### **B. Circumstances surrounding the abduction and disappearance of Mr Momir Milenković**

25. The first complainant (case no. 97/09) is the wife of Mr Momir Milenković. The second complainant (case no. 332/09) is the daughter of Mr Momir Milenković. The third and fourth complainants (case nos 335/09 and 345/09) are the sons of Mr Momir Milenković.

26. According to the first complainant, on 28 June 1999 Mr Momir Milenković went to the village of Pllanjan/Planjane in Prizren Municipality to see a friend, named F. After staying overnight at the home of F., the two travelled together to Mr Momir Milenković's family home in Prizren on 29 June 1999. All of the complainants state that neighbours reported witnessing some unknown persons with KLA insignias on their headbands, removing Mr Momir Milenković and F. from the house, putting them into a car with unidentified number plates and driving them away. The whereabouts of Mr Momir Milenković have remained unknown to date.

27. The first complainant recalls that she reported the abduction and disappearance to UNMIK Police in Shtërpçë/Štrpce around 3 July 1999 and provided photographs of Mr Momir Milenković at that time. She also states that every time there was a change of personnel at UNMIK Police, she would report the abduction and disappearance to the new officers. She also indicates that she reported the abduction and disappearance to the ICRC.

28. On 6 March 2000, the ICRC opened a tracing request for Mr Momir Milenković, which remains open. His name likewise appears in the online database maintained by the ICMP<sup>3</sup>.

29. In 2006 or 2007, the first complainant was informed by F.'s wife that F. had been found dead and that he was buried in the village of Pllanjan/Planjane.

### **C. The investigation**

30. In the present case, the Panel received from UNMIK investigative documents previously held by the UNMIK OMPF and UNMIK Police (MPU and WCIU).

31. Concerning disclosure of information contained in the files, the Panel recalls that investigative files have been made available for the Panel's review under a pledge of

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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 21 August 2013).

confidentiality from UNMIK. 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.

32. The investigative files indicate that on an unspecified date an ante-mortem victim identification form for Mr Momir Milenković was completed by the MPU.
33. The investigative files contain an Ante-Mortem Report, dated 1 December 2004. The report recounts the events surrounding the abduction and disappearance of Mr Momir Milenković and describes UNMIK Police as having undertaken some preliminary investigation. Specifically, the report states that UNMIK Police “tried to contact the next-of-kin of the missing person. After a long try the undersigned managed to talk with the daughter-in-law of the MP”. The report then recounts the events as told by the daughter-in-law. The conclusion of the ante-mortem report highlighted in bold is that “the case requires more investigation”.
34. The investigative files contain a Case Analysis Review report dated 5 September 2008, which categorises the case as a low priority and concludes that the case is still pending.
35. No further investigative activity is recorded in the case files.

## **II THE COMPLAINT**

36. The complainants complain about UNMIK’s alleged failure to properly investigate the abduction and disappearance of Mr Momir Milenković. In this regard, the Panel deems that the complainants invoke a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
37. The complainants also complain about the mental pain and suffering allegedly caused by this situation. In this regard, the Panel deems that the complainants rely on Article 3 of the ECHR.

## **III. THE LAW**

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

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

38. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
39. 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 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.

40. 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.
41. 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 complainants complain about acts that occurred after that date, they fall outside the jurisdiction *ratione personae* of the Panel.
42. 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 § 40). 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.
43. 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 2001, § 136, ECHR 2001-IV).

#### **a. The Parties' Submissions**

44. The complainants in substance allege a violation concerning the lack of an adequate criminal investigation into the abduction and disappearance of Mr Momir Milenković. The complainants also state that they were not informed as to whether an investigation was conducted and what the outcome was.
45. In his comments at the admissibility stage, dated 3 June 2010, the SRSG put forward a number of issues to consider with respect to the merits of the case. First, that the form and extent of the investigation required to achieve the purpose of Article 2 of the ECHR shall depend upon the circumstances of the specific case. In this regard, the SRSG recalls the judgment of 18 May 2000 rendered by the European Court of Human Rights in the case *Velikova v. Bulgaria*, stating at paragraph 80:
- “ [...] the nature and degree of scrutiny which satisfies the minimum threshold of the investigation's effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.”
46. The SRSG is of the view that notwithstanding UNMIK's responsibility for policing, “special circumstances” affecting UNMIK's ability to investigate crimes, in particular in the initial phase of its mission, must also be acknowledged.
47. In particular, it shall be taken into account that during the initial phase of its mission, UNMIK could not rely on a functioning police apparatus or on specialised personnel who were able to investigate into all committed crimes. The SRSG states that the international police force of UNMIK was very slow to deploy. By mid-September 1999 UNMIK had approximately 1,300 international police officers on the ground, while a proper police structure, including a system of criminal investigation units throughout Kosovo, was established only in the following months. In the meantime, the police were required to perform multiple tasks, from investigation of crimes, maintaining law and order, to policing traffic and other tasks.
48. The SRSG states that another circumstance to take into account in assessing the effectiveness of the investigation in the present case is the fact that the abduction and disappearance of Mr Momir Milenković occurred when the crime rate in Kosovo was “at its highest”, that is in June 1999, in the aftermath of the NATO bombing. According to the SRSG, during the years 1999 and 2000 UNMIK received hundreds of reports on disappearances and killings of Kosovo Serbs which were particularly challenging to investigate due to the limited resources as well as to a lack of leads, such as in the present case.
49. As the UN does not have a standing police force of its own and has to rely on contributions of forces from UN member States, UNMIK had no control over the recruitment of international police officers, who often had insufficient experience in investigating crimes



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

50. Furthermore, the SRSG is of the view that an effective investigation was carried out by UNMIK Police in relation to the abduction and disappearance of Mr Momir Milenković. However, since “the circumstances surrounding the alleged abduction of Mr Momir Milenković remain very vague, [it] made it difficult for UNMIK Police to investigate this particular case”. Indeed the SRSG concludes that “the complainant [Mrs Ljiljana Milenković] was not able to provide any substantive information regarding the disappearance of her husband, including any potential causes, possible perpetrators or witnesses of the alleged abduction”. The SRSG concludes that where “no leads were available to UNMIK Police investigators about the exact circumstances of the abduction and perpetrators...such cases are often considered of a low priority and only to be opened again once further information were available to UNMIK Police”. This approach the SRSG argues was dictated “by the difficult operational choices in terms of priorities and limited policing resources”.
51. In his comments at the merits stage the SRSG does not add any additional comments regarding this case.

**b. The Panel’s assessment**

52. The Panel considers that the complainants invoke a violation of the procedural obligation stemming from the right to life, guaranteed by Article 2 of the European Convention on Human Rights (ECHR) in that UNMIK did not conduct an effective investigation into the abduction and disappearance of Mr Momir Milenković.

*a) Submission of relevant files*

53. The SRSG observes that all available files regarding the investigation have been presented to the Panel.
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 the necessary assistance including, in particular, in the release of documents and information relevant to the complaint. The Panel in this regard refers to the case-law of the European Court of Human Rights that inferences shall be drawn from the conduct of the respondent party during the proceedings, including from its failure “to submit information in their hands without a satisfactory explanation” (see ECtHR, *Çelikkilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).
55. The Panel notes that UNMIK was requested to submit relevant documents in relation to the case. In response to the request from the Panel, on 5 August 2013 UNMIK stated that the disclosure of files concerning the case could be considered final.
56. 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.

57. 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*

58. The complainants state that UNMIK failed to conduct an effective investigation into the abduction and disappearance of Mr Momir Milenković.

59. 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.

60. In order to address the complainant’s allegations, the Panel refers to the well-established case-law of the European Court on Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that “[The] obligation to protect the right to life under Article 2, 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).

61. The European Court has also stated that the procedural obligation to provide some form of effective official investigation exists also when an individual has gone missing in life-threatening circumstances and is not confined to cases where it is apparent that the disappearance was caused by an agent of the State (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 43 above, at § 136).
62. The authorities must act of their own motion once the matter has come to their attention, and they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedure (see ECtHR, *Ahmet Özkan and Others v. Turkey*, no. 21689/93, judgment of 6 April 2004, § 310, see also ECtHR, *Isayeva v. Russia*, no. 57950/00, judgment of 24 February 2005, § 210).
63. Setting out the standards of an effective investigation, the Court has stated that “beside being independent, accessible to the victim’s family, carried out with reasonable promptness and expedition, affording a sufficient element of public scrutiny of the investigation and its results, the investigation must also be effective in the sense that is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible (see ECtHR [GC], *Varnava and Others v. Turkey*, cited § 43 above § 191; see also ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, judgment of 15 February 2011, § 63). This is not an obligation of results but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia eye-witness testimony, forensic evidence and, where appropriate, an autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 62 above, at § 312, and *Isayeva v. Russia*, cited in § 62 above, at § 212).
64. In particular, the investigation’s conclusion must be based on thorough, objective and impartial analysis of all relevant elements. Failing to follow an obvious line of enquiry undermines to a decisive extent the ability to establish the circumstances of the case and the identity of those responsible (see ECtHR, *Kolevi v. Bulgaria*, cited § 60 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 Mazăre v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105).
65. Specifically with regard to persons disappeared and later found dead, the Court has stated that the procedures of exhuming and identifying mortal remains do not exhaust the obligation under Article 2 of the ECHR. The Court holds that “the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for, and it is thus of a continuing nature” (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 63 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 43 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 § 63 above; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 43 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 § 63 above).

66. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others v. Turkey*, cited in § 62 above, at §§ 311-314; *Isayeva v. Russia*, cited § 62 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*

67. The Panel is conscious that the abduction and disappearance of Mr Momir Milenković occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.

68. On his part, the SRSB does not contest that UNMIK had a duty to investigate the present case under ECHR Article 2. However, according to the SRSB, the unique circumstances pertaining to the Kosovo context 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 SRSB argues that it is not possible to apply to UNMIK the same standards applicable to a State in a normal situation.

69. The Panel considers that this raises 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.

70. As regards the applicability of Article 2 to UNMIK, the Panel recalls that with the adoption of the UNMIK Regulation No. 1999/1 on 25 July 1999 UNMIK undertook an obligation to observe internationally recognised human rights standards in exercising its functions. This undertaking was detailed in UNMIK Regulation No. 1999/24 of 12 December 1999, by which UNMIK assumed obligations under certain international human rights instruments, including the ECHR. In this respect, the Panel has already found that it is true that UNMIK’s interim character and related difficulties must be duly taken into account with regard to a number of situations, but under no circumstances could these elements be taken as a justification for diminishing standards of respect for human rights, which were duly incorporated into UNMIK’s mandate (see HRAP, *Milogorić and Others*, nos. 38/08 and others, opinion of 24 March 2011, § 44; *Berisha and Others*, nos. 27/08 and others, opinion of 23 February 2011, § 25; *Lalić and Others*, nos. 09/08 and others, opinion of 9 June 2012, § 22).

71. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court on Human Rights has established the applicability of

Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see, among other examples, ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 63 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011). The Court has further held 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 § 66 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 § 62 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 62 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).

72. The Court has acknowledged that “where the death [and disappearances] to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed” (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited above, at §164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that “the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 60 above, at §§ 86-92; ECtHR, *Ergi v Turkey*, cited above, at §§ 82-85; ECtHR [GC], *Tanrıkulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, § 101-110, ECHR 1999-IV; ECtHR, *Hashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v. Russia*, cited in § 62 above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).
73. Similarly, the HRC has held that the right to life, including its procedural guarantees, shall be considered as the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (see, HRC, General Comment No. 6, cited in § 59 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).
74. The Panel appreciates the difficulties encountered by UNMIK during the first phase of its deployment. The Panel notes that the appropriate importance attached to the issue of missing persons in Kosovo meant that UNMIK had to take into account both the humanitarian and criminal dimensions of the situation. In particular, the Panel considers that the importance attached to the criminal investigations and the difficulties in Kosovo that limited the abilities of investigating authorities to conduct such investigations, as described by the SRSG, made it crucial that UNMIK establish from the outset an environment conducive to the performance of meaningful investigations. This would involve putting in place a system that would include such elements as the allocation of overall responsibility for the supervision and monitoring of progress in investigations, provision for the regular review of the status of investigations, and a process for the proper handover of cases between different officers or

units of UNMIK Police. Such a system should also take account of the protection needs of victims and witnesses (see, *mutatis mutandis*, ECtHR, *R.R. and Others v. Hungary*, no. 19400/11, judgment of 4 December 2012, §§ 28-32), as well as to consider the special vulnerability of displaced persons in post-conflict situations (see ECtHR [GC], *Sargsyan v. Azerbaijan*, no. 40167/06, decision of 14 December 2011, § 145; and ECtHR [GC], *Chiragov and Others v. Armenia*, no. 13216/05, decision of 14 December 2011, § 146). While understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel deems that this process was completed in 2003 when the police and justice system in Kosovo was described as being “well-functioning” and “sustainable” by the UN Secretary-General (see § 21 above).

75. 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 SRSJ that the nature and degree of scrutiny to determine whether the effectiveness of the investigation satisfies the minimum threshold depends on the circumstances of the particular case. For these reasons, the Panel considers that it will establish with regard to each case if all reasonable steps were taken to conduct an effective investigation as prescribed by Article 2, having regard to the realities of the investigative work in Kosovo.

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

76. The complainants state that Mr Momir Milenković’s abduction and disappearance was reported promptly to the ICRC and UNMIK. The Panel notes that the investigative files indicate that UNMIK became aware of the abduction and disappearance some time before December 2004 (see § 33 above).

77. Examining the particulars of this case, the Panel notes that there were obvious shortcomings in the conduct of the investigation from its commencement. However, in light of the considerations developed above concerning its limited temporal jurisdiction, 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 (see § 43 above). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 23 above).

78. The Panel notes that it remains unclear at what precise date the investigation into Mr Momir Milenković’s abduction and disappearance began. Although a report was made to UNMIK, little, if any, investigative activity is apparent from the investigative files. No attempt appears to have been made to record formally any witness statements from the complainants or from any of the neighbours who, according to the first complainant, had witnessed the abduction. No follow up activity was taken regarding the statement given by the daughter-in-law, which may have provided additional lines of enquiry.

79. It is also noted that, following the relatives of F. confirming that his mortal remains had been located and buried, no attempts appear to have been made to link his death with the

investigation into Mr Momir Milenković's abduction as the two men were taken at the same time from the same location.

80. Finally, no attempt appears to have been made to trace the vehicle that was used in the abduction or the possible direction the vehicle and occupants may have gone.
81. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that there is no evidence that basic investigative steps had been carried out, such as attempting to identify and interview possible witnesses who may have seen Mr Momir Milenković's abduction and help establish what had happened to him. After that critical date the failure to conduct the necessary investigative actions persisted, thus, in accordance with the continuing obligation to investigate (see § 65 above), bringing the assessment of the whole investigation within the period of the Panel's jurisdiction.
82. In addition, the Panel considers that, as those responsible for the crime had not been located, UNMIK was obligated to use the means at its disposal to regularly review the progress of the investigation to ensure that nothing had been overlooked and any new evidence had been considered, as well as to inform the relatives of Mr Momir Milenković regarding any possible new leads of enquiry. However, there is no indication that any such review was ever undertaken.
83. Finally, the Panel notes the SRSG's statement that it was not possible to locate those missing such as Mr Momir Milenković within the timeframe and resources available often lead to such cases being accorded a low priority. The Panel agrees that in a situation of a massive influx of potential criminal reports where there is limited police investigative capacity on the ground, prioritisation is one of the ways of maintaining a level of efficiency, addressing only the most serious cases with obvious leads. However, the Panel considers that such categorisation of an investigation should take place only after the minimum possible investigative actions have been undertaken and obtainable information has been collected and analysed. Prioritisation should not be made where there is a lack of information on the circumstances of a death or disappearance, especially one occurring in an obviously life-threatening environment and suspicious circumstance. Indeed, this prioritisation, in the circumstances of the SRSG's reference to police rotations every (see § 49 above) Kosovo, underscores the need to ensure that all cases are thoroughly investigated and that information regarding the case are properly passed on to subsequent investigators.
84. On the contrary, the lack of any immediate 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.
85. The Panel therefore considers that, having regard to all the circumstances of the particular case, not all reasonable steps were taken by UNMIK to identify the perpetrators and to bring them 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 above), as required by Article 2.

86. 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], *Tahsin Acar v. Turkey*, no. 26307/95, judgment of 8 April 2004, § 226, ECHR 2004-III; ECtHR, *Taniş v. Turkey*, no. 65899/01, judgment of 2 August 2005, § 204, ECHR 2005-VIII).
87. The Panel notes from the investigative file the absence of any recorded meeting between UNMIK and the complainants to inform them about the status of the investigation or on any further steps that may be taken in the case. This was despite the fact the first complainant stated that she readily reported the case to each new team of UNMIK Police officers who were supposed to have responsibility for the investigation of such cases. The Panel therefore considers that the investigation was not accessible to the complainants' family as required by Article 2.
88. In light of the deficiencies and shortcomings described above, the Panel concludes that UNMIK failed to carry out an adequate and effective investigation into the abduction and disappearance of Mr Momir Milenković. 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**

89. The Panel considers that the complainants invoke, 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**

90. 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 §§ 38-43 above).
91. The Panel recalls that the European Court of Human Rights has found on many occasions that a situation of enforced disappearance gives rise to a violation of Article 3 in respect of close relatives of the victim. It emphasises that, concerning Article 3, "the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention" (see, e.g., ECtHR (Grand Chamber), *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, ECHR, 1999-IV; ECtHR (Grand Chamber), *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, ECHR, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, cited in § 72 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 6762 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).
92. 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

93. The complainants allege that the lack of information and certainty surrounding the abduction and disappearance of Mr Momir Milenković, particularly because of UNMIK's failure to properly investigate his abduction and disappearance, caused mental suffering to them and their family.
94. At the admissibility stage, the SRSG does not proffer any additional arguments regarding any violation of Article 3 of the ECHR save to remind the Panel that such a violation "does not lay in the fact of the disappearance, but rather concerns the reactions of the authorities and their attitudes toward the disappearance when it is brought to their attention".
95. The SRSG does not make any further submissions at the merits stage.

## 3. The Panel's assessment

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

96. Like Article 2, Article 3 of the ECHR enshrines one of the most fundamental values in democratic societies (ECtHR, *Talat Tepe v. Turkey*, no. 31247/96, 21 December 2004, § 47; ECtHR (Grand Chamber), *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 424). As confirmed by the absolute nature conferred on it by Article 15 § 2 of the ECHR, the prohibition of torture and inhuman and degrading treatment still applies even in most difficult circumstances.
97. 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 § 59 above, at § 150)
98. 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.
99. 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).

100. 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, *Ergi and Others v. Turkey*, cited in § 71 above, at § 94).
101. 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 complainant 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, *Ergi and Others v. Turkey*, cited in § 71 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).
102. 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 (*Benaniza v. Algeria*, views of 26 July 2010, § 9.4, CCPR/C/99/D/1588/2007) (*Bashasha v. Libyan Arab Jamahiriya*, views of 20 October 2010, § 7.2, 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 No. 1447/2006, views of 2 April 2009, § 11.7, CCPR/C/95/D/1447/2006).

103. 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).

104. In this respect, it is the position of the European Court that findings under the procedural limb of Article 2 would also be of direct relevance in considering the existence of a violation of Article 3 (see ECtHR, *Basayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 109; ECtHR, *Gelayevy v. Russia*, no. 20216/07, judgment of 15 July 2010, § 147; ECtHR, *Bazorkina v. Russia*, cited in § 72 above, at § 140).

105. 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.

106. 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).

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

107. 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 §§ 67 – 75 above).

108. 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 § 21 above).

109. 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.

110. 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*

111. 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.

112. Turning to the circumstances of the present case, the Panel notes that the complainants are the wife, daughter and sons of the victim. Accordingly, the Panel has no doubt that they indeed suffered serious emotional distress following the abduction and disappearance of Mr Momir Milenković.

113. The Panel observes that on no occasion did UNMIK authorities contact the complainants. Indeed, in his comments the SRSG seems to indicate that the lack of activity in this case is partly the result of the lack of any substantive information given by one of the complainants, Ljiljana Milenković (see § 50 above). This despite the fact that the complainant regularly reported to UNMIK Police the abduction and disappearance. The Panel reiterates that from the standpoint of Article 3 it may examine UNMIK’s reactions and attitudes to the complainants in its entirety.

114. Drawing inferences from UNMIK’s failure to submit a complete investigative file (§ 53 above) or to provide another plausible explanation for the absence of sustained a regular contact with the complainants, or information about the criminal investigation into the abduction and disappearance of Mr Momir Milenković, the Panel considers that this situation, which continued into the period of the Panel’s temporal jurisdiction and caused grave uncertainty about his fate and the status of the investigation.

115. In view of the above, the Panel concludes that the complainants suffered severe distress and anguish for a prolonged and continuing period of time on account of the way the authorities of UNMIK have dealt with their complaints and as a result of her inability to find out what happened to Mr Momir Milenković. In this respect, it is obvious that, in any situation, the pain of a family who has to live in uncertainty about the fate of a close member of the family must be unbearable.

116. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the complainants’ distress and mental suffering in violation of Article 3 of the ECHR.

## V. CONCLUDING COMMENTS AND RECOMMENDATIONS

117. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
118. 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 a further serious violation of the rights of the victim and his next-of-kin, in particular the right to have the truth of the matter determined.
119. 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.
120. 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 § 23), 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.
121. 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 complainants 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 (Grand Chamber), *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR (Grand Chamber), *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 109), must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the requirements of an effective investigation as envisaged by Article 2, that the circumstances surrounding the abduction and disappearance of Mr Momir Milenković will be established and that perpetrators will be brought to justice. The complainants 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 and disappearance of Mr Momir Milenković, as well as the distress and mental suffering subsequently incurred, and makes a public apology to the complainants and their family in this regard;
- Takes appropriate steps towards payment of adequate compensation to the complainants 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 complainants as a consequence of UNMIK's behaviour.

**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 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 AND DISAPPEARANCE OF MR**

**MOMIR MILENKOVIĆ 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 DISAPPEARANCE OF MR MOMIR MILENKOVIĆ, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANTS;**
- c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION OF THE COMPLAINANTS 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 COMPLAINANTS AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Daniel Trup  
Acting 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  
**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