



# *The Human Rights Advisory Panel*

Building D, UNMIK HQ Prishtinë/Priština, Kosovo | E-mail: hrap-unmik@un.org | Tel: +381 (0)38 504-604, ext. 5182

## **OPINION**

**Date of adoption: 18 March 2016**

**Case No. 342/09**

**S.M.**

**against**

**UNMIK**

The Human Rights Advisory Panel, on 18 March 2016,  
with the following members taking part:

Marek Nowicki, Presiding Member  
Christine Chinkin  
Françoise Tulkens

Assisted by  
Andrey Antonov, Executive Officer

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

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

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

1. The complaint was introduced on 21 April 2009 and registered on 4 December 2009.

2. On 15 December 2010 and 29 December 2010, the Panel requested further information from the complainant. On 3 February 2011, the Panel received the complainant's response.
3. On 18 July 2011, the complaint was communicated to the Special Representative of the Secretary-General (SRSG)<sup>1</sup>, for UNMIK's comments on the admissibility of the complaint. On 31 August 2011, the SRSG submitted UNMIK's response.
4. On 18 May 2012, the complaint was re-communicated to the SRSG, requesting UNMIK's additional comments on the admissibility of the complaint. On 28 December 2012, the SRSG submitted UNMIK's response.
5. On 15 February 2013, the Panel declared the complaint admissible.
6. On 18 February 2013, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaint, as well as copies of the investigative files relevant to the case.
7. On 4 December 2015, the SRSG provided UNMIK's comments on the merits of the complaint, together with copies of the investigative files.
8. On 11 January 2016, the Panel requested UNMIK to confirm if the disclosure of files concerning the case could be considered final. On the same day, UNMIK provided its response.

## II. THE FACTS

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

9. The events at issue took place in the territory of Kosovo shortly after the establishment in June 1999 of the United Nations Interim Administration Mission in Kosovo (UNMIK).
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

---

<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>).

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 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 1,653 are listed as still missing by the International Committee of the Red Cross (ICRC) as of May 2015.

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 chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. A specialised Bureau for Detainees and Missing Persons (BDMP), responsible for centralising information received by civilian officers, was established within the Office of the SRSG. On 5 November 2001, UNMIK signed the UNMIK-FRY Common Document reiterating, among other things, its commitment to solving the fate of missing persons from all communities, and recognizing that the exhumation and identification programme is only a part of the activities related to missing persons. 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. All information collected by the BDMP was transferred to the OMPF. 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 supposed to be handed over to EULEX.

#### **B. Circumstances surrounding the assault of Mrs M. and the rape and killing of Ms X.**

21. The complainant is the son of Mrs M. and the brother of Ms X.
22. The complainant states that on 26 June 1999, Mrs M. was assaulted in their family home in Bellopole/Belo Polje village, Pejë/Peć municipality, by numerous Albanian men, including one wearing KLA insignia. The attackers assaulted her, blindfolded her and tied her to a chair, and then within earshot, three of them raped her daughter, Ms X., who had mental and physical disabilities. They then killed her daughter by slitting her throat with a razor.
23. The complainant states that the assault of Mrs M. and the rape and killing of Ms X. were reported to KFOR and to an investigative judge of the District Court of Belgrade on 21 June 2000. The complainant also provides documentation detailing that Ms X. was buried at a cemetery in the Serbian Orthodox Patriarchate in Pejë/Peć.

#### **C. The investigation**

##### *Disclosure of relevant files*

24. On 4 December 2015, UNMIK provided to the Panel documents which were held previously by the UNMIK MPU and WCIU. On 11 January 2016, UNMIK confirmed to the Panel that all files in UNMIK's possession have been disclosed.
25. 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.

*MPU and WCIU files in relation to Mr Z.*

26. The investigative file provided by UNMIK relates to another individual, a certain Mr Z., who was disappeared on the same day and from the same place, Bellopole/Belo Polje village, where the complainant's family members were allegedly attacked. As the documents refer to the rape and killing of Ms X., the Panel notes them as part of the same investigation, in the absence of any evidence to the contrary.

27. The first document in the investigative file is a copy of an undated letter, typed in Serbian and translated into English, from the potential witness Mr D.K., from Belgrade. The letter is time-stamped "Received UN Office Belgrade 4 December 2003". The letter states:

"I kindly ask you to provide a report or any kind of information about the tragedy that happened in the village of Belo Polje, near Pec, where three men were killed and one was injured, and one girl massacred and cut to pieces on 19 June 1999. On that day, Filip Kostic, Radomir Stosic and Stevan Stosic were killed, while [Mr Y.] sustained severe injuries from two bullets to his forehead and hardly escaped death while Albanian terrorists, wearing military uniforms with the KLA insignia, broke into the village and killed the above Serbs who did not bear arms and did not belong to any paramilitary unit. Two days later, they returned to the village and broke into the house of the [complainant's] family where they found old [Mrs M.] and her daughter [Ms X.]. [Mrs M.] was tied to a tree in front of her house and [Ms X.] was raped and then massacred. She was buried in the Pec Patriarchate. We decided to address your Office to clarify the above case in order to identify those against whom charges should be brought. We are available to assist you in clarifying this case."

28. The letter also lists the names of five other potential witnesses, including the victim [Mrs M.] and [Mr Y.], who was allegedly injured in the attack. This list also includes Mr D.K., Mrs B.S. and Mrs J.S.

29. The next document in the file is a response letter from an MPU investigator to Mr D.K., dated 12 December 2003. The MPU officer requests to meet Mr D.K. and discuss the case in more detail.

30. The investigative file also contains an interoffice memorandum from the MPU investigator assigned to the case to the MPU Chief of Investigations, dated 1 March 2004 and affixed with the MPU file no. 2003-000109. The memorandum's subject is labelled "Statements from [Mr Y.]" and it details the witness interview of [Mr Y.], who survived the attack where Mr Filip Kostić, Mr Radomir Stosić and Mr Stevan Stosić were killed. The memorandum states that [Mr Y.] informed that "on 19 June 1999 a small group of Serbs were talking to [Mr M.T.] in front of the house of Mr D.K. in Belo Polje....One group of UCK members approached the group of [Mr Filip Kostić, Mr Radomir Stosić and Mr Stevan Stosić and Mr

Y.] and shot them in the heads with a pistol equipped with a silencer... [Mr Y.] was convinced that [Mr M. T.] should know the perpetrators... The witness mentioned that he had been interviewed twice by MUP and once by The Hague Tribunal.” The memorandum concludes “[t]he check in MPU database revealed that there is no registered MP with such names. It seems that relatives knowing that they are killed did not declare them as missing. The case has to be send to CCIU for their consideration...” There is no mention in the memorandum of the assault of Mrs M. and the assault and killing of Ms X.

31. The investigative file also contains a document labelled “War Crimes Unit Anti Mortem Investigation Report”, affixed with the WCIU file no. 0566/INV/05 and cross-referenced to MPU case no. 2003-000109. The Report was started on 15 August 2005 and completed on 3 October 2005; it lists Mr Z. as a missing person and lists Mr L.C., as a witness. Under the heading labelled “Suspects”, the Report states “Nil”. Under the heading labelled “Nature of Information”, the Report states (original grammar preserved) “[t]his case was reported to ICRC Belgrade under number BLG-804568-01, file was open on 24/04/2003.” Under the heading labelled “Background of the Case”, the Report states “[Mr Z.] is a missing person since 20/06/1999. On this date he was last seen in Belo Polje/Bellopolje village, in Pec. [Mr Z.’s] family left Belo Polje on 17 June 1999. Relatives heard from his neighbors that he was last seen in his home on 26 June 1999.” Under the heading labelled “Further Investigation”, the Report states:

“[Mr L.C.] gave the following information... My relatives and I spent the last night in [Mr Z.’s] house before evacuating the village. Most of the villagers left the village earlier. After this evacuation unknown people raped and murdered a girl named [Ms X.] who was also mentally sick. And four or five KLA soldiers in uniform with ‘UCK’ patch came to village and they shoot Radmir STOSIC, Stevan STOSIC, Filip KOSTIC and [Mr Y.] in the middle of the village about on 15-19.07.1999. But [Mr Y.] didn’t die. Montenegrin Archbishop Amfilohije, head of churches in Cetinje-Montenegro, performed the burial ceremony of 17-year-old girl and three men...” Under the heading labelled “Conclusion”, the Report states “There is no information leading to a possible location [of Mr Z.]. The case should remain open inactive within the WCU.”

32. The last document in the investigative file is a printout from a web-site sponsored by the Serbian Orthodox Diocese of Raška and Prizren entitled “Post-War Suffering Serbs Killed in Kosovo and Metohija”. The list includes [Ms X.] and states that she was “a mentally ill woman from Belo Polje, near Pec. She was raped and later slaughtered in Belo Polje, on 27 July 1999 around 16:00 hours. The perpetrators are two ethnic Albanians, [one] of which wore a KLA uniform. Her mother [Mrs M.] witnessed this crime- she was tied up in the next room.”

### **III. THE COMPLAINT**

33. The complainant complains about UNMIK’s alleged failure to properly investigate the killing of Ms X. In this regard, the Panel deems that the complainant invokes a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).

34. The complainant also complains about UNMIK's alleged failure to properly investigate the assault and rape of Ms X. and the assault of Mrs M. In this regard, the Panel deems that the complainant invokes a violation of the procedural limb of Article 3 of the ECHR for Ms X. and Mrs M. and a violation of Ms X.'s right to be free from gender-based violence, guaranteed by the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

#### **IV. THE LAW**

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

###### **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) 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 complainants complain 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 *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 § 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 2001, § 136, ECHR 2001-IV).

## 2. The Parties’ submissions

41. The complainant in substance alleges a violation concerning the lack of an adequate criminal investigation into the killing of Ms X.
42. In his comments on the merits of the complaint, the SRSG does not dispute that UNMIK had a responsibility to conduct an effective investigation into the killing of Ms X., in line with its general obligation to secure the effective implementation of the domestic laws which protect the right to life, given to it by UN Security Council Resolution 1244 (1999) (see § 11 above) and further defined by UNMIK Regulation No. 1999/1 *On the Authority of the Interim Administration in Kosovo* and subsequently, UNMIK Regulation 1999/24 *On the Law Applicable in Kosovo*, and Article 2 of the ECHR.
43. Accepting that Ms X. was killed unlawfully, the SRSG does not dispute UNMIK’s responsibility to conduct an investigation into his case under Article 2 of the ECHR, procedural part. In this regard, the SRSG stresses that this responsibility stems from the

procedural obligation under Article 2 of the ECHR to conduct an effective investigation where death occurs in suspicious circumstances not imputable to State agents. He 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.

44. The SRSG considers that the obligation is two-fold, including an obligation to determine through investigation the fate and/or whereabouts of the dead person; and an obligation to conduct an investigation capable of determining whether the death was caused unlawfully and leading to the identification and punishment of those responsible for the disappearance and/or death of the missing person.
45. The SRSG notes that in June 1999, “the security situation in post-conflict Kosovo remained tense. KFOR was still in the process of reaching sufficient strength to maintain public safety and law and order; and there were a number of serious criminal incidents targeting Kosovo-Serbs, including abductions and killings.”
46. The SRSG argues that in its case-law on Article 2, the European Court of Human Rights has stated that due consideration shall be given to the difficulties inherent to post-conflict situations and the problems limiting the ability of investigating authorities when conducting investigations in such cases. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court in the case *Palić v. Bosnia and Herzegovina*, stating at paragraph 70:

“The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources [...]”
47. In the view of the SRSG, in the aftermath of the Kosovo conflict, UNMIK was faced with a similar situation as the one in Bosnia. Many of those persons who were unaccounted for were abducted, killed and buried in unmarked graves inside or outside of Kosovo, which made very difficult locating and recovering their mortal remains.
48. 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 with the aftermath of war, with dead bodies and the looted and burned 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 Police 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.”

49. The SRSG states that UNMIK Police WCIU included both international UNMIK Police and local Kosovo Police Service officers and focused on the criminal investigation of cases of missing persons. Their responsibility included locating illicit graves, identifying the perpetrators and collecting evidence relating to crimes.
50. The SRSG states that UNMIK international police officers had to adjust to conducting investigations in a foreign territory and cultures, 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, “[s]uch constraints inhibited the ability of an institution such as UNMIK Police to conduct all investigations in a manner [...] that may be demonstrated, or at least expected, in other States with more established institutions and without the surge in cases of this nature associated with a post-conflict situation.”
51. With regard to this particular case, the SRSG asserts that “[b]ased on the copies of files received from EULEX, it appears that UNMIK only became aware of the matter in December 2003, thus almost 3 and 1/2 years after the incident. It is arguable that, due to the long period of time that had elapsed, witnesses and evidence were inaccessible at the point when UNMIK became aware of the incident. It is noted in this regard that, investigation in an early stage of a crime plays a critical role in a successful investigation.”
52. The SRSG also states that “[n]evertheless, with respect to the investigation aimed at identifying and bringing to justice the perpetrators who are responsible for the death of [Ms X.] it is unclear, based on the files received from EULEX, whether any investigation was conducted. It is similarly unclear whether investigations into her death were part of investigations carried out for another case. As there is a possibility that additional and conclusive information exists, beyond the information contained in the copies of files that UNMIK received from EULEX, UNMIK reserves its right to make further comments on the matter.”

53. The SRSG concludes that with regard to the complaint, there has been no violation of Article 2 of the ECHR.

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

54. The Panel considers that the complainant invokes a violation of the procedural obligation stemming from the right to life, guaranteed by Article 2 of the European Convention on Human Rights (ECHR) in that UNMIK did not conduct an effective investigation into the killing of Ms X.

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

55. At the Panel's request, on 4 December 2015, the SRSG provided copies of the documents related to the investigations subject of the present complaint, which UNMIK was able to recover. On 11 January 2016, UNMIK confirmed to the Panel that no more files have been located, thus the disclosure may be considered complete (see § 8 above).

56. 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, at § 56).

57. Furthermore, the Panel 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 (see HRAP, *Bulatović*, no. 166/09, opinion of 13 November 2014, at § 62).

58. The Panel has no reason to doubt that UNMIK undertook all efforts in order to obtain the relevant investigative files. However, the Panel notes that UNMIK has not provided any explanation as to why the documentation may be incomplete, nor with respect to which parts.

59. 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, at § 146).

#### *b) General principles concerning the obligation to conduct an effective investigation under Article 2*

60. First, the Panel considers that the limited content of the investigative files, in particular in the light of the SRSG's argument that additional information may exist (see § 52 above), 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.

61. 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" (ECtHR [GC], *Varnava and Others v Turkey*, cited above in § 40, at §§ 183-184).
62. 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" (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" (ECtHR, *Varnava and Others v Turkey* [GC], 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).
63. 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.
64. Second, the Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights *Velásquez-Rodríguez* (see Inter-American Court of Human Rights (IACtHR), *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The Panel also notes that the positive obligation to investigate has been stated by the 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 (UN Document 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.

65. In order to address the complainant’s allegations, the Panel refers to the well-established case-law of the European Court of 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).
66. 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, ECtHR [GC], *Mocanu and Others v. Romania*, nos 10865/09, 45886/07 and 32431/08, judgment of 17 September 2014, § 317).
67. 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, ECtHR [GC], *Mocanu and Others v. Romania*, cited above, § 321).
68. Setting out the standards of an effective investigation, the Court has stated that besides being independent, accessible to the victim’s family, carried out with reasonable promptness and expedition and affording a sufficient element of public scrutiny of the investigation or its results, the investigation must also be effective in the sense that it is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 40 above, at § 191; see also ECtHR, *Palić v. Bosnia and Herzegovina*, no. 4704/04, judgment of 15 February 2011, § 63). This is not an obligation of results but of means. The authorities must take whatever reasonable steps they can to secure the evidence concerning the incident, including, inter alia eye-witness testimony, forensic evidence and, where appropriate, an

autopsy which provides a complete and accurate record of injury and an objective analysis of the clinical findings, including the cause of death. Any deficiency in the investigation which undermines its ability to establish the cause of death or the person or persons responsible will risk falling foul of this standard (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited above, at § 312, and ECtHR, *Isayeva v. Russia*, cited above, at § 212).

69. 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 § 65, at § 201). Nevertheless, the nature and degree of scrutiny which satisfy the minimum threshold of the investigation's effectiveness depend on the circumstances of the particular case. They must be assessed on the basis of all relevant facts and with regard to the practical realities of the investigative work (see ECtHR, *Velcea and Mazăre v. Romania*, no. 64301/01, judgment of 1 December 2009, § 105). At the same time, the authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation (see ECtHR [GC], *El-Masri v. "the former Yugoslav Republic of Macedonia"*, no. 39630/09, judgment of 13 December 2012, § 183; ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 66 above, at § 322).
70. A requirement of promptness and reasonable expedition is implicit in this context. Even where there may be obstacles or difficulties which prevent progress in an investigation in a particular situation, a prompt response by the authorities is vital in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts (see ECtHR, *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, judgment of 14 March 2002, § 72, ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 66 above, at § 323).
71. Specifically with regard to persons disappeared and later found dead, the Court has stated that the procedures of exhuming and identifying mortal remains do not exhaust the obligation under Article 2 of the ECHR. The Court holds that "the procedural obligation arising from a disappearance will generally remain as long as the whereabouts and fate of the person are unaccounted for, and it is thus of a continuing nature" (ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 68 above, § 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 probable killing, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain" (ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited above, at § 145). While the location and the subsequent identification of the mortal remains of the victim may in themselves be significant achievements, the procedural obligation under Article 2 continues to exist (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited above, at § 64).

72. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 67 above, at §§ 311-314; ECtHR, *Isayeva v. Russia*, cited in § 67 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, ECtHR [GC], *Mocanu and Others v. Romania*, cited in § 66 above, at § 324).
73. The Court has also underlined the great importance of an effective investigation in establishing the truth of what transpired thereby satisfying the right to truth not only for the families of victims, but also for other victims of similar crimes, as well as the general public, who have the right to know what occurred (ECtHR, *El-Masri v. "the former Yugoslav Republic of Macedonia"*, cited in § 69 above, at § 191; ECtHR, *Al Nashiri v. Poland*, no. 28761/11, judgment of 24 July 2014, §§ 495-496). United Nations bodies also recognise the importance of the right to truth. In the words of the United Nations Secretary-General, "the right to truth implies knowing the full and complete truth about the violations and the events that transpired, their specific circumstances and who participated in them. In the case of missing persons ... it also implies the right to know the fate and whereabouts of the victim" (see Report of the UN Secretary-General, Missing Persons, UN Document A/67/267, 8 August 2012, § 5; see also HRC, *Schedko and Bondarenko v. Belarus*, Communication no. 886/1999, views of 3 April 2003, § 10.2, CCPR/C/77/D/886/1999; HRC, *Mariam, Philippe, Auguste and Thomas Sankara v. Burkina Faso*, Communication no. 1159/2003, views of 8 March 2006, § 10.2, CCPR/C/86/D/1159/2003; UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009; Preamble and Article 24 (2) of the Convention for the Protection of All People from Enforced Disappearance, cited in § 106 above; see also Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, Mr Ben Emmerson, *Framework Principles for securing the accountability of public officials for gross and systematic human rights violations committed in the context of State counter-terrorist initiatives*, UN Document A/HRC/22/52, 1 March 2013, § 23-26).

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

74. The Panel is conscious that Ms X. was killed shortly after the deployment of UNMIK in Kosovo, when crime, violence and insecurity were rife.
75. 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.

76. 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.
77. 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).
78. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court of 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 § 68 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011). The Court has further held that that the procedural obligation under Article 2 continues to apply in "difficult security conditions, including in a context of armed conflict" (see ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited in § 72 above, at § 164; see also ECtHR, *Gülleç 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 § 67 above, at §§ 85-90, 309-320 and 326-330; ECtHR, *Isayeva v. Russia*, cited in § 67 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
79. The Court has acknowledged that "where the death to be investigated under Article 2 occurs 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 § 65 above, at §§ 86-92; ECtHR, *Ergi v Turkey*, cited above, at §§ 82-85; ECtHR [GC], *Tanrikulu v. Turkey*, no. 23763/94, judgment of 8 July 1999, §§ 101-110, ECHR 1999-IV; ECtHR, *Khashiyev and Akayeva v. Russia*, nos. 57942/00 and 57945/00, judgment of 24 February 2005, §§ 156-166; ECtHR, *Isayeva v.*

*Russia*, cited above, at §§ 215-224; ECtHR, *Musayev and Others v. Russia*, nos. 57941/00 and others, judgment of 26 July 2007, §§ 158-165).

80. 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 Aïzan 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).
81. The Panel appreciates the difficulties encountered by UNMIK during the first phase of its deployment. The Panel notes that the appropriate importance attached to the issue of missing persons in Kosovo meant that UNMIK had to take into account both the humanitarian and criminal dimensions of the situation. In particular, the Panel considers that the importance attached to the criminal investigations and the difficulties in Kosovo that limited the abilities of investigating authorities to conduct such investigations, as described by the SRSG, made it crucial that UNMIK establish from the outset an environment conducive to the performance of meaningful investigations. This would involve putting in place a system that would include such elements as the allocation of overall responsibility for the supervision and monitoring of progress in investigations, provision for the regular review of the status of investigations, and a process for the proper handover of cases between different officers or units of UNMIK Police. Such a system should also take account of the protection needs of victims and witnesses (see, *mutatis mutandis*, ECtHR, *R.R. and Others v. Hungary*, no. 19400/11, judgment of 4 December 2012, §§ 28-32), as well as to consider the special vulnerability of displaced persons in post-conflict situations (see ECtHR [GC], *Sargsyan v. Azerbaijan*, no. 40167/06, decision of 14 December 2011, § 145; and ECtHR [GC], *Chiragov and Others v. Armenia*, no. 13216/05, decision of 14 December 2011, § 146). While understanding that the deployment and the organisation of the police and justice apparatus occurred gradually, the Panel deems that this process was completed in 2003 when the police and justice system in Kosovo was described as being "well-functioning" and "sustainable" by the UN Secretary-General (see § 17 above).
82. 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.

83. Lastly, 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 § 68 above, at § 70; ECtHR, *Brecknell v. The United Kingdom*, no. 32457/04, judgment of 27 November 2007, § 62).

84. The Panel puts on record that it has already analysed the effectiveness under Article 2 of numerous investigations conducted by UNMIK with respect to killings, abductions and disappearances related to the conflict in Kosovo. The Panel has identified common shortcomings in these investigations such as delays in the registration of the cases and lengthy periods of inactivity from the outset and in the period within the Panel's jurisdiction; failure to take basic investigative steps and follow obvious lines of enquiry; lack of coordination among different units of UNMIK Police; lack of regular and meaningful reviews of cases; lack of prosecutorial oversight and failure to provide family members with minimum necessary information on the status of the investigation (compare with ECtHR, *Aslakhanova and Others v. Russia*, cited in § 71 above, at § 123). The Panel also records systemic failures such as a deficient system of setting investigative priorities and lack of proper handover. In the great majority of these cases the Panel has found that the investigations were not effective in the meaning of Article 2 and that UNMIK's failures, which persisted throughout the period of the Panel's jurisdiction, could not be justified in the light of difficulties encountered by UNMIK at the beginning of its mission.

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

85. Turning to the particulars of this case, the Panel first addresses the issue of the burden of proof. At the admissibility stage, the Panel was satisfied that the complainant's allegations were not groundless, thus it accepted the existence of a *prima facie* case: that Ms X. was killed and that UNMIK had become aware of her death at the latest sometime by December 2003, as the UN Office in Belgrade had received information of the situation by then (see § 26 above).

86. Accordingly, applying the principles discussed above (see §§ 60-63), 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 defense 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.

87. 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 § 56 above); the file was not

properly handed over to EULEX; or UNMIK failed to retrieve the file from the current custodian.

88. 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.
89. 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. The Panel also notes that the SRSJ in essence opines that, from the dearth of investigative information available regarding the investigation into the killing of Ms X., it is not possible to establish whether some apparent gaps in the investigation are attributable to a failure of the relevant offices 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.
90. The purpose of this investigation was to discover the truth about the circumstances of Ms X.'s killing and to find the perpetrators and bring them before a competent court established by law. To fulfil these purposes, those conducting the investigation were required to seek, collect and preserve all necessary evidence leading to identification of the perpetrator(s).
91. 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 (see § 40 above), the Panel recalls that it is competent *ratione temporis* to evaluate the compliance of the investigation with Article 2 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 71 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).
92. The Panel recalls that in order to be effective, the investigative actions must be conducted promptly and expeditiously, with the authorities taking all reasonable steps and following obvious lines of enquiry to secure the evidence concerning the incident, including, *inter alia* eye-witness testimony, forensic evidence etc. The investigation must also ensure a sufficient element of public scrutiny and be reasonably accessible to the victim's family. The investigation's conclusion must be based on thorough, objective and impartial analysis of all relevant elements. In addition, the investigation should be periodically reviewed, in order to ensure that all available information is considered. As the obligation to investigate is not an obligation of results but of means, in assessing the investigation's effectiveness, the circumstances of the particular case and the practical realities of the investigative work must be taken into consideration (see §§ 68 - 69 above).
93. The Panel notes in this regard that according to the 2000 Annual Report of UNMIK Police, the complete executive policing powers in the Pejë/Peć region, including criminal investigations, were under the full control of UNMIK Police from June 2000. 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 assuming responsibility for the investigation (EULEX); and *third*, that the investigative files could be traced and retrieved, should a need for that arise at any later stage.

94. With regard to the procedural obligations under Article 2 of the ECHR, that is, discovering the whereabouts or determining the fate of Ms X., identifying the perpetrator(s) of her rape and killing and bringing them to justice, the Panel notes that the SRSG states that the UNMIK MPU became aware of her killing in 2003, presumably because the it opened its missing persons file under case file no. 2003-000109 on another person, Mr Z., who went missing around the same time as Ms X. was killed, and this included details of her rape and killing (see § 26 above). The Panel notes that the investigative file shows that the MPU evidently opened its case in relation to Mr Z. in 2003.
95. The Panel notes that by 2003, UNMIK Police already possessed some information, including a basic description of the rape and killing of Ms X. (see § 26 above). Furthermore, the Panel notes that by 2003, UNMIK Police also possessed the name and address of five possible witnesses, namely the complainant's mother, Mrs M., and Mr Y., both of whom were alleged victims of the same violent attack and had survived, as well as Mr D.K., Mrs B.S. and Mrs J.S., (see §§ 26-28 above). However, there is no indication in the file that the UNMIK Police contacted, or made any effort to contact them until the MPU investigators conducted a witness interview of Mr Y. around 1 March 2004 (see § 30 above).
96. Furthermore, the Panel notes that although the investigative files show that an MPU investigator took a witness statement from Mr Y. around 1 March 2004, it does not appear that even then any other basic investigative steps were taken by the UNMIK Police, such as visiting the family home of Ms X. in Bellopole/Belo Polje village, Pejë/Peć municipality, to try and better understand the circumstances of her rape and killing, or identifying and interviewing individuals who had been residing at or located in that area, including the complainant, Mrs M., Mr D.K., Mrs B.S., Mrs J.S. and Mr M.T. Likewise, there is no evidence that UNMIK Police attempted to interview any of the priests who were residing at the Serbian Orthodox Patriarchate in Pejë/Peć at that time, even though UNMIK Police had received information that Ms X. was buried there (see § 26 above). The Panel notes that the documents do not show that the UNMIK investigators had collected any further information about Ms X.'s rape and killing than what UNMIK Police already knew about the case in 2003; except for interviewing Mr Y. (see § 30 above), it does not appear that the WCIU had accomplished much, if anything, during its investigation since that time.
97. The Panel likewise recalls the SRSG's argument that "it appears that UNMIK only became aware of the matter in December 2003, thus almost 3 and ½ years after the incident. It is arguable that, due to the long period of time that had elapsed, witnesses and evidence were unavailable at the point when UNMIK became aware of the incident. It is noted in this regard that, investigation in an early stage of a crime plays a critical role in a successful investigation" (see § 52 above). The Panel is conscious that the three and a half year delay may have rendered the investigative enquiry more difficult, but nevertheless this cannot justify UNMIK's total inaction, taking into consideration the extreme gravity of the events.

98. It is particularly important to note that the complainant's contact details, in Serbia proper, were available to UNMIK Police from December 2003. In this respect, the Panel recalls the general need to take into account the special vulnerability of displaced persons in post-conflict situations (see § 81 above). Thus, in the Panel's view, it was for UNMIK to reach out to the complainant, and not for him to come back to Kosovo, from where he had left for security reasons, to try to find out what had happened to his relative or to the investigation.
99. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that after that critical date the failure to conduct the necessary investigative actions, including those at the initial stage, persisted. Accordingly, inadequacies existing up until that date were not addressed. Thus, in accordance with the continuing obligation to investigate (see § 71 above), the assessment of the whole investigation is brought within the period of the Panel's jurisdiction.
100. In addition, the Panel considers that, as the perpetrators of 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 complainant's relatives regarding any possible new leads of enquiry.
101. The Panel notes that the file contains a document labelled "War Crime Unit Anti Mortem Investigation Report", affixed with the WCIU file no. 0566/INV/05 and cross-referenced to MPU case no. 2003-000109, started on 15 August 2005 and completed on 3 October 2005, which indicates that the WCIU performed a review of the case. It appears that sometime during this review, WCIU officers completed a witness interview with Mr L.C., the brother of another victim, Mr Z., who had also gone missing. The Report identifies other possible witnesses, including a priest who allegedly performed a burial ceremony for some of the victims (see § 31 above). However, the Panel notes that the investigative file contains no record of any formal interviews with him, or with any of the other potential witnesses conducted by any of the WCIU investigating officers or even any attempts to contact them. In fact, the information in this Report only re-states the same basic information that had been known to UNMIK Police since the registration of the case.
102. Similarly, the Panel notes with concern that there is no evidence in the file that any distinct enquiries were ever made into the rape and killing of Ms X. The SRSG admits the same when he states "with respect to the investigation aimed at identifying and bringing to justice the perpetrators who are responsible for the death of [Ms X.], it is unclear, based on the files received from EULEX, whether any investigation was conducted. It is similarly unclear whether investigations into her death were part of investigations carried out for another case (see § 52 above)." In any event, the Panel notes that there is no evidence in the file of any further investigative activity or other meaningful action undertaken by UNMIK Police during the period within the Panel's temporal jurisdiction.
103. The apparent lack of any adequate reaction from UNMIK Police, and of any action at later stages, may have suggested to the 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 lead to a worsening of the situation. The problems that UNMIK had encountered at the beginning of its mission, which were discussed above, do not justify such inaction, either at the outset or subsequently.

104. The Panel notes with concern that UNMIK WCIU completed its review of the case on 3 October 2005 and left the case “open inactive” due to a lack of sufficient information (see § 31 above). The Panel also reiterates in this regard its position expressed in many other cases in relation to the adequacy of the investigations into the abductions, disappearances, killings and suspicious deaths and to the categorisation of cases into “active” and “inactive”. In those cases the Panel has underlined that any “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” (see e.g. HRAP, *B.A.*, no. 52/09, opinion of 14 February 2013, § 82).
105. As the Panel has previously observed, UNMIK Police and DOJ had implemented a policy conserving its limited investigative resources and concentrating only on the investigations “with a strong likelihood of suspect identification” (see HRAP, *Bulatović*, no. 275/09, opinion of 22 April 2015, § 149). As the Panel also noted, this approach was in contrast to the description of the situation on the ground presented by the UN Secretary-General to the UN Security Council at around the same time and indicated a serious systemic failure (see *ibid.*). In the Panel’s view, the effect of this policy had serious impact on this particular investigation and, possibly, many others of the similar nature.
106. Likewise, the file indicates no involvement of a public prosecutor in this investigation during the period under UNMIK’s administration. As the Panel has mentioned previously, a proper prosecutorial review of the investigative file might have resulted in additional recommendations, so that the case would not have remained inactive for years to come (see HRAP, *Stojković*, no. 87/09, opinion of 14 December 2013, § 160). Thus, in the Panel’s view, the review of the investigative files was far from being adequate.
107. The Panel is also aware that the duty to investigate is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, such an investigation must be undertaken in a serious manner and not be a mere formality. The Panel considers that, having regard to all the circumstances of the particular case, no steps were taken by UNMIK towards identifying the perpetrators and bringing 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 § 70 above), as required by Article 2 of the ECHR.
108. As concerns the requirement of public scrutiny, the Panel recalls that Article 2 also requires the victims’ next-of-kin to be involved in the investigation to the extent necessary to safeguard his or her legitimate interests. The investigative file does not contain evidence of any contact attempted between UNMIK investigators and the complainant or his family. In this respect, the Panel also recalls the general need to take into account the special vulnerability of displaced persons in post-conflict situations (see § 81 above). Thus, in the

Panel's view, it was for UNMIK to reach out to them, and not for them to come back to Kosovo, from where they had left for security reasons, to try to find out what had happened to their relatives or to aid in the investigation (see HRAP, *Buljević*, no. 146/09, opinion of 13 December 2013, § 100).

109. The Panel therefore considers that the investigation was not open to any public scrutiny, as required by Article 2 of the ECHR (see, *a contrario*, ECtHR [GC], *Mustafa Tunç and Fecire Tunç v. Turkey*, no. 24014/05, judgment of 14 April 2015, §§ 210 - 216).
110. In light of the shortcomings and deficiencies in the investigation described above, the Panel considers that the case of Ms X., as well as other cases of killings, abductions and disappearances previously examined, well exemplify a pattern of perfunctory and unproductive investigations conducted by the UNMIK Police into killings and disappearances in Kosovo (see § 84 above; compare with HRC, *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, cited in § 80 above, at § 11.4, and ECtHR, *Aslakhanova and Others v. Russia*, cited in § 71 above, at § 123; HRAP, *Bulatović*, cited in § 57 above, at §§ 85 and 101).
111. Therefore, the Panel concludes that UNMIK failed to carry out an effective investigation into the killing of Ms X. There has accordingly been a violation of Article 2, procedural limb, of the ECHR.

## **B. Alleged violation of Article 3 of the ECHR, Article 7 of the ICCPR and the CEDAW**

112. The Panel considers that the complainant invokes a violation of the procedural limb of Article 3 of the ECHR and Article 7 of the ICCPR arising out of UNMIK's failure to properly investigate the assault and rape of Ms X. and the assault of Mrs M., as well as a violation of Ms X.'s right to be free from gender-based violence, guaranteed by the CEDAW.

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

113. The Panel will consider the allegations under Article 3 of the ECHR and the CEDAW, applying the same scope of review as was set out with regard to Article 2 (see §§ 35 - 39 above). Additionally, the Panel notes that regarding the burden of proof (see §§ 60- 63 above), the same principle that "strong inferences" may be drawn from lack of documentation is applicable.

### **2. The Parties' submissions**

114. The complainant alleges, in substance, that UNMIK's failure to properly investigate the assault and rape of Ms X. and the assault of Mrs M. was a violation of the procedural limb of their right to be free from torture and inhuman or degrading treatment, guaranteed by Article 3 of the ECHR, and Article 7 of the ICCPR, as well as a violation of Ms X.'s right to be free from gender-based violence, guaranteed by the CEDAW.

115. Commenting on this part of the complaint, the SRSG rejects the allegations and reiterates the arguments he already made concerning the “extremely challenging post conflict conditions in Kosovo that UNMIK was required to operate in.” He notes that “UNMIK was required to focus its efforts in establishing a professional, well-trained and well-resourced police force, since such a force did not exist in Kosovo in 1999. Given this environment, UNMIK was unable to dedicate the same investigative resources to cases that could be expected in states with clear functioning institutions.”
116. The SRSG further argues that “[a]s an aside, UNMIK notes that in raising the obligation to investigate serious human rights violation in Article 3 of the ECHR, HRAP has discussed commentary on other human rights instruments, such as the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). While UNMIK accepts that Article 3 of the ECHR provides an obligation on state authorities to investigate serious human rights violations, UNMIK is not of the view that this obligation under Article 3 arises from other human rights instruments, such as the ICCPR and CEDAW.”
117. The SRSG therefore argues that there has been no violation of Article 3 of the ECHR.

### **3. The Panel’s assessment**

118. The Panel first considers the SRSG’s argument that “UNMIK is not of the view that this obligation under Article 3 arises from other human rights instruments, such as the ICCPR and CEDAW.” The Panel notes that UNMIK Regulation 2006/12 provides that the Panel shall examine complaints of alleged violations of the human rights obligations set forth in the ICCPR, the International Covenant on Economic, Social and Cultural Rights, the International Convention on the Elimination of All Forms of Racial Discrimination and the CEDAW, among others (see § 37 above). Accordingly, the Panel is competent to directly apply such human rights instruments. The Panel is in no way, however, applying such instruments so as to suggest that the procedural obligation of Article 3 of the ECHR arises from those instruments.

#### *General principles concerning the procedural obligation to investigate torture and ill-treatment*

119. The Panel notes that it is widely accepted that there is an obligation to investigate acts of torture and ill-treatment whether the acts were committed by the state or by non-state actors. The Panel also notes that in such cases, the European Court has consistently found that Article 3 of the Convention gives rise to a positive obligation to conduct an official investigation (see ECtHR, *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, Reports 1998-VIII, § 102; *M.C. v Bulgaria*, no. 39272/98, judgment of 4 December 2003, §151).
120. The obligation to investigate torture and inhuman and degrading treatment is likewise reflected and further developed in the jurisprudence of most major human rights juridical bodies, as discussed below.

121. For instance, the Panel notes that the HRC considers that the prohibition of torture and ill-treatment in ICCPR, Article 7 applies regardless of whether the acts were “committed by public officials or other persons acting on behalf of the State, or by private persons ... whether by encouraging, ordering, tolerating or perpetrating prohibited acts” (HRC, General Comment no. 20, *Article 7*, 1992, UN document HRI/GEN/1/Rev.1, § 13). Thus, the prohibition on ill-treatment creates both a duty on State agents not to engage in such treatment, as well as a positive duty to protect persons under its jurisdiction from acts of private individuals. “Administrative mechanisms are particularly required to give effect to the general obligation to investigate allegations of violations promptly, thoroughly and effectively through independent and impartial bodies.” (see HRC, General Comment No. 31, *Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN document CCPR/C/21/Rev.1/Add.13, § 8).
122. The UN Committee Against Torture (UNCAT) similarly considers that “where State authorities or others acting in official capacity or under color of law, know or have reasonable grounds to believe that acts of torture or ill-treatment are being committed by non-State officials or private actors and they fail to exercise due diligence to prevent, investigate, prosecute and punish such non-State officials or private actors consistently with [the] Convention, the State bears responsibility and its officials should be considered as authors, complicit or otherwise responsible under the Convention for consenting to or acquiescing in such impermissible acts” (UNCAT, General Comment No. 2 on the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, UN Document no. CAT/C/GC/2, 24 January 2008, § 18).
123. The standards of investigation into the allegations of torture and ill-treatment were established in detail in the UN General Assembly Resolution no. 55/89 *Torture and other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted on 4 December 2000<sup>3</sup>. Its Annex announces the Principles on the *Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, among which are the following provisions:
1. The purposes of effective investigation and documentation of torture and other cruel, inhuman or degrading treatment or punishment (hereinafter “torture or other ill-treatment”) include the following:
    - (a) Clarification of the facts and establishment and acknowledgement of individual and State responsibility for victims and their families;
    - (b) Identification of measures needed to prevent recurrence;
    - (c) Facilitation of prosecution ... and demonstration of the need for full reparation and redress from the State, including fair and adequate financial compensation and provision of the means for medical care and rehabilitation.
  2. States shall ensure that complaints and reports of torture or ill-treatment are promptly and effectively investigated. Even in the absence of an express complaint,

---

<sup>3</sup> UN Document A/RES/55/89; available on the UN official website.

an investigation shall be undertaken if there are other indications that torture or ill treatment might have occurred. The investigators, who shall be independent of the suspected perpetrators and the agency they serve, shall be competent and impartial..

124. These standards are also reflected and developed in the jurisprudence of the IACtHR (see: IACtHR, *Servellon-Garcia v. Honduras*, judgment of 21 September 2006, § 119; IACtHR, *Vargas Areco v. Paraguay*, judgment of 26 September 2006, §§ 74-81; IACtHR, *Montero-Aranguren and Others (Detention Centre of Catia) v. Venezuela*, IACHR (Series C) No. 150, judgement of 5 July 2006, § 79; IACtHR, *Ximenes-Lopes v. Brazil*, judgment of 4 July 2006, § 148; IACtHR, *Ituango Massacres v. Colombia*, IACHR (Series C) No. 148, judgement of 1 July 2006, § 296; *Pueblo Bello Massacre v. Colombia*, judgment of 31 January 2006, § 143).

125. The Panel notes that it is well established that rape and other forms of sexual violence, including when committed by non-State actors, can amount to torture and ill-treatment, in violation of Article 3 of the ECHR (see ECtHR, *M.C v. Bulgaria*, cited in § 119 above, at § 151; see in the Inter-American system IACtHR, *Ortega et al. v. Mexico*, judgment of 30 August 2010, § 90). The Panel also notes that the United Nations Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment has stated that “[r]ape constitutes torture when it is carried out by, at the instigation of, or with the consent or acquiescence of public officials. States are responsible for the acts of private actors when States fail to exercise due diligence to prevent, stop or sanction them, or to provide reparations to victims.”<sup>4</sup>

126. The Panel also notes that the Special Rapporteur has recognized that:

“More recent developments in international criminal law have determined that torture can occur when the State had no role in its perpetration and where the State did not fail to exercise due diligence obligations, with the ‘characteristic trait of the offence [being] found in the nature of the act committed rather than in the status of the person who committed it’. The Special Rapporteur welcomes these developments and finds that the international humanitarian and criminal law frameworks complement the application of international human rights law [...]”<sup>5</sup>

127. Likewise, the Panel notes that the United Nations Security Council has emphasised the need to ensure accountability for acts of sexual violence in conflict type situations. The Security Council “calls upon Member States to comply with their relevant obligations to continue to fight impunity by investigating and prosecuting those subject to their jurisdiction who are responsible for such crimes; encourages Member States to include the full range of crimes of

---

<sup>4</sup> UNGA Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment of 5 January 2016, A/HRC/31/57, § 51. This is a UN document that is available at the HRC website, accessed on 17 March 2016.

<sup>5</sup> See *Ibid*, at § 52.

sexual violence in national penal legislation to enable prosecutions for such acts” (see United Nations Security Council resolution 2106 of 24 June 2013 on *Women, Peace and Security*, S/RES/2106).

128. Therefore, in light of the above and in light of the relevant case law of the ECtHR, the Panel considers it established in international human rights law that there is an obligation to investigate acts of rape, and failure to do so is a violation of the procedural limb of Article 3 of the ECHR (see ECtHR, *M.C. v. Bulgaria*, cited in § 119 above, at §§ 151-153; ECtHR, *I.G. v. the Republic of Moldova*, no. 40020/03, judgment of 15 May 2012, § 42; ECtHR, *P.M. v. Bulgaria*, no. 49669/07, judgment of 24 January 2012, § 58).

*i. Applicability of those principles to the Kosovo context*

129. 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 §§ 74 - 84 above).

130. 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).

131. 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.

132. For these reasons, the Panel considers that it has to establish with regard to the present case whether the attitude and reactions of UNMIK authorities to the rape and killing of Ms X. and the assault of Mrs M. would amount to a violation of the procedural limb of Article 3 of the ECHR and Article 7 of the ICCPR, having regard to the realities in Kosovo at the relevant time.

*ii. Compliance with the general principles in the present case*

133. The Panel considers that, in the circumstances of this case, the complaints under the procedural leg of Article 3 of the ECHR, are the same as those that it has already examined under the procedural leg of Article 2 of the ECHR. Thus, in the Panel’s view, the main legal questions arising from these complaints have already been examined under Article 2, in respect of which it has found a violation.

134. Accordingly, the Panel would normally consider it unnecessary to determine separately whether in the instant case there has been a violation of Article 3 of the ECHR. However, due to the brutality of the case and the importance of recognizing the incidence of sexual violence during and in the aftermath of conflict, the Panel finds it necessary to explicate the matter.

135. The Panel notes that, concerning the burden of proof, 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 (see §§ 86-89 above).
136. Turning to the circumstances of the present case, the Panel recalls that Ms X. was brutally raped and killed and Mrs M. was assaulted on 26 June 1999, shortly after the deployment of UNMIK in Kosovo. The Panel also recalls that rape constitutes inhuman and degrading treatment, such that UNMIK was obligated to investigate it, and any failure to have done so would amount to a violation of Article 3 of the ECHR (see § 125 above).
137. The Panel also takes account of the especially cruel acts in this case, specifically that Ms X., a physically and mentally challenged woman, was assaulted by multiple armed men, then brutally raped and butchered by slitting her throat with a razor. Meanwhile, her elderly mother was assaulted, tied to a chair and blindfolded by armed men before being forced to listen to her daughter screaming as she was being raped and slaughtered in the room next door (see § 22 above).
138. The Panel finds that such a heinous situation is properly classified as reaching the threshold of torture. This is obvious in regards to Ms X. where the accumulation of the acts of physical violence and the especially cruel acts of rape to which she was subjected amounted to torture in breach of Article 3 of the ECHR. The treatment her mother Mrs M. was subjected to also amounts to torture, as she was forced to bear witness to the horror acted upon her mentally challenged daughter (see ECtHR, *Maslova and Nalbandov v. Russia*, 839/02, judgment of 24 January 2008, § 106). In fact, the United Nations Security Council has itself recognized “those secondarily traumatized as forced witnesses of sexual violence against family members” (see United Nations Security Council resolution 2106 of 24 June 2013, cited in § 127 above). Similarly, the Panel notes that the IACtHR has found that rape in the presence of a member of the family has a particularly serious significance, increasing the humiliation of the victim and the trauma for both of them (see IACtHR, *Ortega et al. v. Mexico*, cited in § 125 above, at § 91).
139. In such a case, the Panel finds that UNMIK had an obligation to conduct an investigation, pursuant to Article 3 of the ECHR. However, the Panel has already found that there is no indication in the investigative files that UNMIK carried out an effective investigation into finding the perpetrators of these crimes and bringing them to justice.
140. Therefore, the Panel concludes that UNMIK failed to carry out an effective investigation into the assault and rape of Ms X. and the assault of Mrs M. There has accordingly been a violation of the procedural limb of Article 3 of the ECHR and Article 7 of the ICCPR.

#### *Alleged Violation of the CEDAW*

141. The Panel deems that the complainant alleges a violation of Ms X.’s right to be free from gender-based violence, guaranteed by the CEDAW.

142. The Panel recalls that the CEDAW is applicable to UNMIK pursuant to UNMIK Regulation No. 1999/1 on 25 July 1999 and UNMIK Regulation No. 1999/24 of 12 December 1999, where UNMIK undertook an obligation to observe internationally recognised human rights standards in exercising its functions, including the CEDAW (see § 37 above).
143. The Panel recognises that under General Recommendation No. 19 adopted by the CEDAW Committee, gender-based violence against women and girls constitutes discrimination and, as such, is itself a violation of CEDAW. The Committee defines gender-based violence as violence directed against a woman because she is a woman or that affects women disproportionately.
144. The Panel also recognises that in its General Recommendation No. 19, the CEDAW Committee states that “[u]nder general international law and specific human rights covenants, States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation” (see CEDAW Committee, General Recommendation No. 19: *on Violence against Women*, 1992, UN Doc. A/54/38/Rev.1, at § 9).
145. Further, the Panel notes that this has been reinforced by the CEDAW Committee General Recommendation No. 30 on women in conflict-prevention, conflict and post-conflict situations. The General Recommendation draws attention to the levels of violence against women in post-conflict situations and notes that “[t]he failure to prevent, investigate and punish all forms of gender-based violence... can also lead to further violence against women in post-conflict periods.” It also states that “during and after conflict specific groups of women are at particular risk of violence, especially sexual violence, such as ... ethnic ... minorities women with disabilities to the vulnerability of women of ethnic minorities ... and women with disabilities”. It accordingly recommends that States Parties “[p]revent, investigate and punish all forms of gender-based violence, in particular sexual violence perpetrated by State and non-State actors” (see CEDAW Committee General Recommendation No. 30 of 18 October 2013 on *Women in Conflict-Prevention, Conflict and Post-Conflict Situations*, CEDAW/C/GC/30 at §§ 15, 36, 38).
- 146.
147. The Panel also recognises that other international law instruments also support the CEDAW position, including: the United Nations General Assembly Declaration on the Elimination of Violence against Women, 1993<sup>6</sup>; the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Belem do Para), 1994<sup>7</sup>; the Council of Europe Convention on Combating and Preventing Violence against Women, (Istanbul), 2011<sup>8</sup>.

---

<sup>6</sup> UN Document A/RES/48/104; Available on the official UN website.

<sup>7</sup> Organization of American States document; Available at <http://www.oas.org/juridico/english/treaties/a-61.html>.

<sup>8</sup> Council of Europe document; available at [https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/violence-against-women/Conv\\_VAW\\_en.pdf](https://www.coe.int/t/DGHL/STANDARDSETTING/EQUALITY/03themes/violence-against-women/Conv_VAW_en.pdf).

*Application in the present case*

148. The Panel notes that one of the victims in the case, Ms X., was a woman with disabilities subjected to a horrific incident of gender-based sexual violence, directed against her because of her ethnicity and because she was a woman. As such, the Panel notes that pursuant to CEDAW General Recommendation No. 19, UNMIK had an obligation to act with due diligence to investigate, prosecute and punish the act of violence that was committed against her. However, the Panel reiterates that there is no evidence in the file that UNMIK made any investigation whatsoever into Ms X.'s rape.
149. In such circumstances, the Panel concludes that Ms X. was subject to gender-based violence that was not investigated with the due diligence by UNMIK, in violation of the relevant provisions of the CEDAW Convention.

## **V. CONCLUDING COMMENTS AND RECOMMENDATIONS**

150. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
151. The Panel notes that enforced disappearances 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 the rape and killing of Ms X. and the assault of Mrs M., and that its failure to do so constitutes a further serious violation of the rights of the victims and his next-of-kin, in particular the right to have the truth of the matter determined.
152. 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.
153. 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 above), UNMIK's responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008. 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 unilateral 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.
154. 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 appropriate that UNMIK:**

- In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, 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 means available to it *vis-à-vis* competent authorities in Kosovo, 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 rape and killing of Ms X. and the assault of Mrs M. will be established and that the possible 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, including through media, within a reasonable time, responsibility with respect to UNMIK's failure to adequately investigate the rape and killing of Ms X. and the assault of Mrs M., and makes a public apology to him and his 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 and the violation of the CEDAW.

**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, including gender-based violence which occurred during and in the aftermath of the Kosovo conflict;
- In line with the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) “General Recommendation No. 19: Violence against women”, 1992 (§ 19) and the “General Recommendation No. 30: on Women in Conflict Prevention, Conflict and Post-Conflict Situations” 2015 (§§ 15, 38) (cited in §§ 143-145 above), ensure that sufficient remedies are further provided to the female victims in this case;

- 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 PROCEDURAL OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS AS WELL AS A VIOLATION OF THE UNITED NATIONS CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN.**
- 3. RECOMMENDS THAT UNMIK:**
  - a. URGES THE COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE RAPE AND KILLING OF MS X. AND THE ASSAULT OF MRS M. IS CONTINUED IN COMPLIANCE WITH ARTICLE 2 AND ARTICLE 3 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;**
  - b. PUBLICLY ACKNOWLEDGES, INCLUDING THROUGH MEDIA, RESPONSIBILITY FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE RAPE AND KILLING OF MS X. AND THE ASSAULT OF MRS M., AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT AND HIS FAMILY;**
  - c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION TO THE COMPLAINANT FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 AND ARTICLE 3 OF THE ECHR AND THE VIOLATION OF THE CEDAW;**
  - 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**

**BDMP** - Bureau for Detainees and Missing Persons  
**CCPR** - International Covenant on Civil and Political Rights  
**CEDAW** – Convention on the Elimination of All Forms of Discrimination against Women  
**DOJ** - Department of Justice  
**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  
**MPU** - Missing Persons Unit  
**NATO** - North Atlantic Treaty Organization  
**OMPF** - Office on Missing Persons and Forensics  
**OSCE** - Organization for Security and Cooperation in Europe  
**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