



# *The Human Rights Advisory Panel*

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## **OPINION**

**Date of adoption: 23 January 2014**

**Case Nos 139/09, 218/09 and 325/09**

**Tatjana VITOŠEVIĆ, Veska MAJMAREVIĆ and Nataša MAJMAREVIĆ**

**against**

**UNMIK**

The Human Rights Advisory Panel, sitting on 23 January 2014,  
with the following members present:

Marek Nowicki, Presiding Member  
Christine Chinkin  
Françoise Tulkens

Assisted by

Anna Maria Cesano, Acting Executive Officer

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

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

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

1. The complaint of Mrs Tatjana Vitošević (case no. 139/09) was introduced on 20 March 2009 and registered on 30 April 2009. The complaint of Mrs Veska Majmarević (case no. 218/09) was introduced on 6 April 2009 and registered on 30 April 2009. The complaint of Ms Nataša Majmarević (case no. 325/09) was introduced on 29 September 2009 and registered on 4 December 2009.

2. On 9 December 2009, the case of Mrs Vitošević was communicated to the Special Representative of the Secretary-General (SRSG)<sup>1</sup>, for UNMIK's comments on admissibility. On 30 April 2010 UNMIK provided its response.
3. On 23 December 2009 and 12 May 2010, the Panel requested additional information from Mrs Veska Majmarević, but received no reply.
4. On 9 September 2010, pursuant to Rule 20 of the Panel's Rules of Procedure, the Panel joined the three complaints.
5. On 2 November 2010, the Panel re-communicated case no. 139/09, and communicated cases nos 218/09 and 325/09, to the SRSG, for UNMIK's comments on their admissibility.
6. On 13 December 2010, the SRSG provided UNMIK's response.
7. On 4 March 2011, the Panel asked the SRSG whether UNMIK could comment on information published in the media, which could have some bearing on the case. The SRSG responded on 23 March 2011.
8. On 15 September 2011, the Panel declared the complaints admissible.
9. On 19 September 2011, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaints, as well as copies of all police, forensic and other investigation files relied upon by UNMIK in preparation of its response.
10. On 13 January 2012, the SRSG provided UNMIK's comments on the merits of the case together with the relevant documentation.
11. On 2 August 2013, the Panel requested UNMIK to confirm that the disclosure of files concerning the case could be considered final.
12. On 5 August 2013, the SRSG provided UNMIK's response.
13. On 16 September 2013, the Panel requested UNMIK to confirm whether the disclosure of files concerning the case could be considered final. On the same day, UNMIK provided its response.
14. On 22 November 2013, the Panel requested UNMIK's comments with regard to a possibility of using additional information available in the public domain in its opinion. The SRSG has not responded to this request.

## **II. THE FACTS**

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

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

<sup>2</sup> The references drawn upon by the Panel in setting out this general background include: OSCE, "As Seen, as Told", Vol. 1 (October 1998 – June 1999) and Vol. II (14 June – 31 October 1999); quarterly reports of the UN Secretary-

15. The events at issue took place in the territory of Kosovo after the establishment in June 1999 of the United Nations Interim Administration Mission in Kosovo (UNMIK).
16. The armed conflict during 1998 and 1999 between the Serbian forces on one side and the Kosovo Liberation Army (KLA) and other Kosovo Albanian armed groups on the other is well documented. Following the failure of international efforts to resolve the conflict, on 23 March 1999, the Secretary General of the North Atlantic Treaty Organisation (NATO) announced the commencement of air strikes against the Federal Republic of Yugoslavia (FRY). The air strikes began on 24 March 1999 and ended on 8 June 1999 when the FRY agreed to withdraw its forces from Kosovo. On 9 June 1999, the International Security Force (KFOR), the FRY and the Republic of Serbia signed a “Military Technical Agreement” by which they agreed on FRY withdrawal from Kosovo and the presence of an international security force following an appropriate UN Security Council Resolution.
17. 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.
18. 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.
19. 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

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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>).

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.

20. Although figures remain disputed, it is estimated that more than 15,000 deaths or disappearances occurred during and in the immediate aftermath of the Kosovo conflict (1998-2000). More than 3,000 ethnic Albanians, and about 800 Serbs, Roma and members of other minority communities went missing during this period. More than half of the missing persons had been located and their mortal remains identified by the end of 2010, while 1,766 are listed as still missing by the International Committee of the Red Cross (ICRC) as of October 2012.
21. 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.
22. 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.
23. 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”.
24. In July 1999, the UN Secretary-General reported to the Security Council that UNMIK already considered the issue of missing persons as a particularly acute human rights concern in Kosovo. In November 1999, a Missing Persons Unit (MPU) was established within UNMIK Police, mandated to investigate with respect to either the possible location of missing persons and/or gravesites. The MPU, jointly with the Central Criminal Investigation Unit (CCIU) of UNMIK Police, and later a dedicated War Crimes Investigation Unit (WCIU), were responsible for the criminal aspects of missing persons cases in Kosovo. In May 2000, a Victim Recovery and Identification Commission (VRIC) chaired by UNMIK was created for the recovery, identification and disposition of mortal remains. As of June 2002, the newly established Office on Missing Persons and Forensics (OMPF) in the UNMIK Department of Justice (DOJ) became the sole authority mandated to determine the whereabouts of missing persons, identify their mortal remains and return them to the family

of the missing. Starting from 2001, based on a Memorandum of Understanding (MoU) between UNMIK and the Sarajevo-based International Commission of Missing Persons (ICMP), supplemented by a further agreement in 2003, the identification of mortal remains was carried out by the ICMP through DNA testing.

25. 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.
26. 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 abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević**

27. The first complainant, Mrs Tatjana Vitošević (case no. 139/09) is the wife of Mr Siniša Vitošević. The second complainant, Mrs Veska Majmarević (case no. 218/09) is the wife of Mr Gradimir Majmarević. The third complainant, Ms Nataša Majmarević (case no. 325/09), is the daughter of Mr Gradimir Majmarević.
28. The complainants state that Mr Vitošević and Mr Majmarević were abducted on 22 June 1999, by members of the KLA. Mrs Vitošević states that this occurred on the road between Rahovec/Orahovac and Hoca i Madhe/Velika Hoča. Mrs Veska Majmarević and Ms Nataša Majmarević both state that the victims were abducted from Mr Majmarević's weekend cottage located between Rahovec/Orahovac and Hoca i Madhe/Velika Hoča, which they were visiting on that day. Since then their whereabouts have remained unknown.
29. Ms Nataša Majmarević adds that on that day her father and Mr Vitošević left the house at around 12:00 in Mr Vitošević's vehicle, a red "Reno 4", with a green front-right door. As they did not return, her brother went to look for them. He noticed that the door to the weekend cottage was broken so he did not go in. On his way back her brother met a Kosovo Albanian male, who told him that he had seen armed KLA members taking away her father and Mr Vitošević by force, and that he recognised one of those KLA members. On a subsequent date, a Kosovo Serbian neighbor, Z.M., informed her family that Mr Majmarević and Mr Vitošević had first been taken to the former Police station in Rahovec/Orahovac, where a KLA command centre was located. That person had seen both victims on that day, when they were taken into that building. The information was confirmed by French journalists who had also seen Mr Vitošević's "Reno 4" vehicle parked in front of the police station building. At some point, they were apparently taken to a fire station, where a KLA prison was situated.

30. Ms Nataša Majmarević further explains that her father and Mr Vitošević were interrogated by two well-known local KLA commanders, brutally beaten and tortured. This was revealed to their family by two named Kosovo Serbian males, who had likewise been detained there by the KLA, but later released. For a few months after the abduction, unknown Kosovo Albanian men often called the family, laughing, asking about her dad and threatening to kill them and to rape her older sister. One evening the callers told her mother they were having a “sex match” and they could hear screams. They were able to establish that the phone calls came from a telephone located at the fire brigade building. About a year after the abduction, a Kosovo Albanian woman told them that her father and Mr Vitošević were still alive and that they were kept in a camp in Kukës, Republic of Albania. She finally adds that “her dad and his friend Siniša were victims of the trade in human organs.”
31. A copy of a handwritten document, which appears to be a statement from Mr Majmarević’s brother, is attached to the complaint of Mrs Veska Majmarević. In addition to the above information, this statement provides names of four more KLA members suspected to have been involved in the abduction and detention of both victims, as well as the registration plates for Mr Vitošević’s vehicle.
32. All the complainants state that the abduction was reported to the Red Cross of Niš in Serbia proper, the Red Cross of Serbia, the Yugoslav Red Cross, the ICRC, the Ministry of Internal Affairs of the Republic of Serbia (MUP), the OSCE and UNMIK. Ms Nataša Majmarević adds that the disappearance of her father was also immediately reported to a KFOR unit stationed in Rahovec/Orahovac, although KFOR took no action.
33. In addition, Mrs Veska Majmarević attached a copy of her undated criminal report to the International Public Prosecutor at the District Public Prosecutor’s Office in Prizren. She also provided a copy of her letter, dated 20 August 2000, addressed to the UNMIK Municipal Administration in Rahovec/Orahovac, requesting it to issue a certificate confirming the abduction of her husband; in the same letter she informed UNMIK of the abduction of Mr Vitošević, as well as of her failed attempts to receive any response from the authorities with regard to their fate.
34. A copy of a certificate, dated 23 August 2001, confirms that Mrs Veska Majmarević also gave a statement to the representatives of the War Crimes Documentation Project organised by the American Bar Association, Central European and Eurasian Law Initiative (ABA/CEELI).
35. On 6 August 1999, the ICRC opened a tracing request for Mr Majmarević. This tracing request, as well as the one for Mr Vitošević, remains open<sup>3</sup>. The names of both missing persons likewise appear in the online database maintained by the ICMP<sup>4</sup>, which reads, in the relevant fields “Sufficient Reference Samples Collected” and “DNA match not found”.

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<sup>3</sup> The ICRC database is available at: <http://familylinks.icrc.org/kosovo/en/pages/search-persons.aspx> (accessed on 22 January 2014).

<sup>4</sup> The ICMP database is available at: [http://www.ic-mp.org/fdmsweb/index.php?w=mp\\_details&l=en](http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en) (accessed on 22 January 2014).

### C. The investigation

36. In the present case, the Panel received from UNMIK investigative documents previously held by the UNMIK OMPF, UNMIK Police (MPU and WCIU), and KFOR.
37. Concerning disclosure of information contained in the files, the Panel recalls that investigative files have been made available for the Panel's review under a pledge of 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.
38. The earliest document in the investigative file is a "Police Inquiry Proforma", dated 28 October 1999, recorded by UNMIK Police in Prishtinë/Priština. On that day, Mr Siniša Vitošević's mother-in-law came to report his, and Mr Majmarević's, abduction. Her original handwritten statement, as well as its translation, is attached to this form. It provides most of the details related to the incident, including names of six possible suspects and two eye-witnesses, a complete description of Mr Vitošević's vehicle, as well as the address and the telephone number of the reporting party. This document classifies the incident as "kidnapping" and "missing person".
39. The file also contains several KFOR reports and witness statements collected by KFOR, related to various alleged war crimes by Serbian forces in the Prizren region. Mr Majmarević is mentioned in some of them as a member of the MUP.
40. On 2 November 1999, the MPU commander sent a request to the chiefs of all UNMIK Police regional headquarters (RHQ), Border and Boundary Police Headquarters, the CCIU and KFOR, informing them of an ongoing investigation in the "kidnapping" of Mr Vitošević and Mr Majmarević, and asking for any relevant information from their respective services.
41. An entry in the MPU Case Continuation Report, dated 19 January 2000, reads "input OK".
42. A reply from the Investigation Unit of the Rahovec/Orahovac UNMIK Police station, dated 25 February 2000, reads that Mr Vitošević "[...] was wanted for investigation of possible War Crimes involvement", while Mr Majmarević "[...] appears on a list of deceased persons maintained by KFOR." The responses to this request from the Prizren Regional Investigation Unit (RIU), the Pejë/Peć RIU, and the CCIU were all negative.
43. By a memorandum dated 31 March 2000, the MPU requested the Investigation Unit of the Rahovec/Orahovac UNMIK Police station to be provided with the above-referred list. A response from Rahovec/Orahovac UNMIK Police station, dated 12 April 2000, provides the necessary information.
44. On 11 February 2000, the MPU sent a request for information with regard to Mr Vitošević to the ICRC.
45. The file also contains undated Victim Identification Forms with the ante-mortem details for both Mr Vitošević and Mr Majmarević.

46. In an UNMIK Police interoffice memorandum, dated 19 December 2002, the Chief Identification Officer of the UNMIK Police MPU wrote:

This memo is to inform all Officers that the content of this file is only a printed version of the Ante Mortem inputted in the Disaster Victim Identification Database of the Missing Persons Unit. The Original file went missing (date unknown), and could not be located anymore. Please be aware that this information is poor, and by contacting the families all Officers should check if more information is available.

47. The Ante-Mortem Investigation Report, dated 4 April 2005, describes the status of the MPU investigation with regard to both missing persons. The report recounts the events surrounding the abduction and disappearance of Mr Vitošević and Mr Majmarević. It presents summaries of the MPU officers' interviews with Mrs Veska Majmarević and Mrs Tatjana Vitošević, which apparently took place on 1 April 2005, in Rahovec/Orahovac. In their statements, both complainants recounted the events as were described above. No written and signed formal statements of this date are found in the file. The Ante-Mortem Investigation Report also states that the families of both missing persons had given blood samples. In the conclusion part, this report reads that "There is no further input about the whereabouts [of the missing persons], nor there is any credible information that they have been killed and buried somewhere. As such it is recommended that the case be kept pending."
48. A letter from the Serbian MUP to the UNMIK Police, dated 28 September 2005, states that the MUP possesses credible information on the persons allegedly responsible for the kidnapping, detention and killing of Mr Vitošević and Mr Majmarević. One of the suspects was reported to be a member of the Kosovo Police Service. This letter was received by the UNMIK Police WCIU on 1 October 2005. A reply to it, asking for further information and proposing a meeting to discuss the matter, was sent on 12 October 2005. As there was no response to it, a follow-up letter with the same request was sent to the Serbian MUP on 18 August 2006.
49. On 1 June 2006, the WCIU requested the ICMP to provide information on the known relatives of the two missing persons. The ICMP responded on 5 June 2006, providing the names and addresses of two blood relatives for each of them, including Mrs Vitošević and Mrs Majmarević.
50. A witness statement of Mrs Tatjana Vitošević, collected by the UNMIK WCIU, is dated 4 August 2006. In that statement she repeated and detailed the information provided above, again providing the names of potential witnesses and suspects. She stressed that when she informed the Dutch KFOR commander responsible for the Serbian part of Rahovec/Orahovac about the abduction and probable location of her husband and Mr Majmarević, he lied to her saying that KFOR could not enter the fire brigade building without a warrant. He did not do anything. She also stated that when abducted, her husband had several thousand deutschemarks with him, which may have been the reason why he was not released afterwards. She mentioned an officer from the Kosovo Police Service, who gave her some information about the reasons why her husband was taken by the KLA.
51. The file further reveals that in September 2006, the WCIU succeeded in identifying the two journalists from "France2" TV station, who were in Rahovec/Orahovac in June 1999. One of

them gave a statement by e-mail, but he could only vaguely recall their involvement in a search for two missing Serbian men at that time, and provided no concrete details.

52. A WCIU report, dated 18 September 2006, reflects the results of another contact by the investigators with Mrs Vitošević, where she, again, provided a list of potential witnesses. Her formal, signed statement is not in the file.
53. A Kosovo Albanian witness was interviewed by the WCIU on 28 September 2006, but this provided no valuable information.
54. On 6 October 2006, the investigator collected the names and addresses of other potential witnesses from Rahovec/Orahovac municipality. In another WCIU officer's report of the same date, the investigator describes the possible connections between the two missing persons and some alleged war crimes committed by the Serbian MUP in the area, without revealing any sources of this information. He lists their potential MUP associates and proposes interviewing them, in order to acquire additional information with respect to the motives for the victims' abduction.
55. On 31 October 2006, the WCIU asked the UNMIK Central Civil Registry Office for the addresses and identification details of nine potential witnesses / suspects in relation to this case. On 3 November 2006, the Civil Registry provided available details for only three of them.
56. According to a police report dated 12 November 2006, on 10 November 2006 a team of WCIU investigators went to Rahovec/Orahovac, where they interviewed five potential witnesses, who had been identified by that date. None provided any substantive information. The investigators also learned that two of the other potential witnesses had passed away.
57. The related Investigator's Diary has 42 entries reflecting actions undertaken by the WCIU investigators on this case, between 31 July and 15 November 2006. Attached to it are lists of ten suspects and eleven witnesses (including Mrs Vitošević), as well as a brief overview and analyses of the other available information sources.
58. Another WCIU report, dated 5 March 2007, provides an overview of the investigation. The investigator concluded that the witness Z.M., who allegedly saw Mr Vitošević and Mr Majmarević on the day of the abduction being escorted by KLA members into the fire brigade building (see § 29 above): "... can not be accepted as eye witness in terms of investigative skills" [sic.], adding that the witness had moved to Serbia proper with his family. The investigator proposed to put this investigation "in inactive position because of lacking evidence."
59. On 7 March 2007, the WCIU requested the Head of the UNMIK Central Civil Registry to provide identification details of six more persons. The response was apparently received on the following day, providing details for two of them.
60. On 29 May 2007, an UNMIK International Prosecutor (IP) requested the WCIU to undertake additional investigative actions. In particular, the IP insisted that the WCIU locate and interview two witnesses, including Z.M., as well as the two identified French journalists.

61. On 8 June 2007, the WCIU sent a letter to the Office of the War Crimes Prosecutor of the Republic of Serbia, asking for assistance in locating these two witnesses, as well as for any additional information in connection with the potential suspects in this case.
62. On 25 June 2007, a WCIU investigator sent an e-mail to the French journalist who had previously given an e-mail statement, requesting a personal meeting in order to record a formal statement. No answer to this e-mail is in the file.
63. A printout from the WCIU database, dated 5 September 2007, refers to the above information received from the MUP (see § 48), which was apparently entered into the database on 8 October 2005. The last entry, dated 15 November 2005, reads that the investigator received all files from the MPU and OMPF, that the case was ready for investigation, and that no International Prosecutor was yet assigned to it.
64. A WCIU Case Analysis Report, dated 5 September 2007, classifies this investigation as an "A2" case, has "4" in the field "Number of Known Suspects", "1" in the field related to witnesses, and "0" in the field "Number of Witness Statements". It states that the victims are also war crime suspects with regard to the Krusha e Vogël/Mala Kruša incident. This report has "none" in the field "Brief Description of Evidence". It ends with a recommendation that the case "should be open and assigned to an IPO for further investigation. There is a good chance that witnesses can be found as the two missing persons allegedly were taken to the KLA HQ in Orahovac Fire Station."
65. On 31 January 2008, upon a request from the UNMIK DOJ, the WCIU confirmed that no response to the request of 8 June 2007 had been received from the Serbian Office of the War Crimes Prosecutor. In an e-mail dated 4 February 2008, the same IP informed the WCIU that although the investigative file shows that most of the witnesses in this case had been interviewed, it contains no written statements.
66. On 3 July 2008, the IP again requested the WCIU to conduct interviews of the persons mentioned in § 60 above. On 5 July 2008, a WCIU investigator was assigned to conduct the four interviews.
67. 10 July 2008, the assigned investigator sent a request to the UNMIK Central Civil Registry, asking for the details of the witness Z.M. On 4 August 2008, a request for his identification and location was also sent to the UNMIK Police Liaison Officer to the Serbian MUP.
68. On 18 August 2008, a WCIU investigator informed the IP by e-mail that one of the witnesses refused to give a statement, that the attempts to obtain more information on the whereabouts of the witness Z.M. in Graçanicë/Gračanica were fruitless, and that the French journalists do not respond to their e-mails. The same information was repeated in an undated Officer's Report.
69. The file also contains a Case Initiation Report of the UNMIK DOJ's Criminal Division in relation to the abduction of Mr Vitošević and Mr Majmarević, filed against three named suspects, the KLA commanders in the area. It states that there was "no evidence at the moment as to which [KLA] operatives had arrested the victims", but that the local KLA commanders in the area were positively identified. The case is recommended for further investigation and assigned to UNMIK Police WCIU.

70. An undated note to the file from the IP states that there was still no reply from the French journalists, although another e-mail to them was sent on 28 July 2009.
71. No further investigative activity is recorded in the case files. According to the SRSG, as of 30 April 2010, the investigation was still pending with the EULEX.
72. However, the Panel has become aware of publicly available documents indicating that UNMIK engaged with the ICTY in 2003 and 2004 in investigating alleged war crimes, including with respect to the victims in this case. As far as the Panel is aware, no relevant indictments have been issued by the ICTY.

### **III. THE COMPLAINTS**

73. The complainants complain about UNMIK's alleged failure to properly investigate the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević. In this regard, the Panel deems that the complainants invoke a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
74. The complainants also complain about the mental pain and suffering allegedly caused to them by this situation. In this regard, the Panel deems that the complainants rely on Article 3 of the ECHR.

### **IV. THE LAW**

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

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

75. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
76. In determining whether it considers that there has been a violation of Article 2 (procedural limb) and of Article 3 of the ECHR, the Panel is mindful of the existing case-law, notably that of the European Court of Human Rights. However, the Panel is also aware that the complaints before it differ in some significant ways from those brought before that Court. First, the respondent is not a State but an interim international territorial administration mandated to exercise temporary responsibilities in Kosovo. No suspicion attaches to UNMIK with respect to the substantive obligations under Article 2 of the ECHR. Second, as in a limited number of cases before the European Court, those suspected of being responsible for the alleged killings and/or abductions are in all cases before the Panel non-state actors, mostly but not exclusively connected to the conflict. These are factors for the Panel to take into consideration as it assesses the procedural positive obligations of an intergovernmental organisation with respect to acts committed by third parties in a territory over which it has temporary legislative, executive and judicial control.

77. 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.
78. 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.
79. 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 § 77). 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.
80. 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**

81. The complainants in substance allege a violation concerning the lack of an adequate criminal investigation into the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir

Majmarević. The complainants also state that they were not informed as to whether an investigation was conducted and what the outcome was.

82. In his comments on the admissibility of the complaint of Mrs Vitošević, dated 30 April 2010, the SRSG put forward a number of issues to consider with respect to the merits of the case. First, that the form and extent of the investigation required to achieve the purpose of Article 2 of the ECHR shall depend upon the circumstances of the specific case. In this regard, the SRSG recalls the judgment of 18 May 2000 rendered by the European Court of Human Rights in the case *Velikova v. Bulgaria*, stating at paragraph 80:

“ [...] the nature and degree of scrutiny which satisfies the minimum threshold of the investigation’s effectiveness depends on the circumstances of the particular case. It must be assessed on the basis of all relevant facts and with regard to the practical realities of investigation work. It is not possible to reduce the variety of situations which might occur to a bare check-list of acts of investigation or other simplified criteria.”

83. The SRSG is of the view that notwithstanding UNMIK’s responsibility for policing, “special circumstances” affecting UNMIK’s ability to investigate crimes, in particular in the initial phase of its mission, must also be acknowledged.

84. In particular, it shall be taken into account that during the initial phase of its mission, UNMIK could not rely on a functioning police apparatus or on specialised personnel who were able to investigate into all committed crimes. The SRSG states that the international police force of UNMIK was very slow to deploy. By mid-September 1999 UNMIK had approximately 1,300 international police officers on the ground, while a proper police structure, including a system of criminal investigation units throughout Kosovo, was established only in the following months. In the meantime, the police were required to perform multiple tasks, from investigation of crimes, maintaining law and order, to policing traffic and other tasks.

85. The SRSG states that another circumstance to take into account in assessing the effectiveness of the investigation in the present case is the fact that the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević occurred when the crime rate in Kosovo was at its highest, that is in June 1999, in the aftermath of the NATO bombing. According to the SRSG, during the years 1999 and 2000 UNMIK received hundreds of reports on disappearances and killings of Kosovo Serbs which were particularly challenging to investigate due to the limited resources as well as to a lack of leads, such as in the present case.

86. As the UN does not have a standing police force of its own and has to rely on contributions of forces from UN member States, UNMIK had no control over the recruitment of international police officers, who often had insufficient experience in investigating crimes with an inter-ethnic aspect in a post-conflict context. Similarly, the rotation of police officers, who were assigned only for periods of six months to one or two years, hampered the continuity of investigation.

87. Furthermore, the SRSG is of the view that an effective investigation was carried out by UNMIK Police in relation to the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević. However, since the “potential witnesses appeared non-cooperative

[...], unwilling to provide information [...], or having little first-hand information [...] that could provide clues or valuable leads for the investigation, or were impossible to locate [...], or to get hold of.” In SRSB’s opinion, “... public knowledge of who was in command of the KLA in the Rahovec/Orahovac area at the time of the alleged kidnapping by KLA [...] did neither further the investigation, due to lack of substantive information.”

88. The SRSB accepts that active investigative actions into the circumstances of this abduction were mostly carried out in 2005 – 2008. The “period between 2000 and 2005 of apparent investigative inactivity”, according to the SRSB, could be “credibly explained in the fact that the International Criminal Tribunal for former Yugoslavia (ICTY) had a keen interest in all war criminal activities of the KLA. It explains, aside from the great number of war related crimes committed in the aftermath of the conflict ... and the limited resources to investigate them, why UNMIK Police appears to have not specifically or significantly investigated between 2000 and 2005 the alleged kidnapping ... The crimes committed against [Mr Vitošević and Mr Majmarević] were among many crimes committed in the area of Rahovec/Orahovac in the summer of 1999, for which the ICTY have been contemplating an aggregate indictment, including several crimes involving KLA top brass operating at the time in the area, under the charge of command responsibility or as first-hand perpetrators.”
89. The SRSB also states that “it was appropriate for UNMIK Police not to duplicate the efforts of the ICTY considering its limited resources and to prioritize investigations of war related crimes not primarily investigated by the ICTY. In addition, UNMIK Police has often given assistance to the ICTY in its investigative efforts. It is thus clear that UNMIK Police, between 1999 and 2005, has indirectly, by assisting the ICTY in their investigation [...], taken no action to investigate the alleged kidnapping and murdering of Messrs. Vitošević and Majmarević.”
90. It is the SRSB’s opinion that the investigation into this alleged crime carried out by UNMIK Police fulfilled the requirements set forth by Article 2 of the ECHR. He concludes that “taking into account the practical realities of investigations, especially during the initial phase of the Mission, the lack of further information, leads or witness statements, [...] UNMIK could not have been successful despite its copious investigative efforts in the circumstances of this particular case”.
91. In addition, the SRSB submits that Mrs Vitošević “...was involved in the [investigation] to the extent necessary to safeguard her legitimate interests”, as she was interviewed by UNMIK Police three times (see §§ 47, 52 and 50 above).
92. In the additional comments on the admissibility, dated 13 December 2010, the SRSB did not put forward any new arguments. He reiterated that “an effective investigation was carried out by UNMIK Police in relation to disappearance of Messrs. Vitošević and Majmarević. However, due to the lack of witnesses and further leads, no concrete results could be achieved.”
93. In his comments at the merits stage, the SRSB, likewise, does not raise any additional concern with regard to this part of the complaints.

### 3. The Panel's assessment

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

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

95. UNMIK confirmed that all available files regarding the investigation have been presented to the Panel. The Panel also notes the information in an UNMIK Police memorandum, dated 19 December 2002 (see § 46 above), that the original file had gone missing at some point prior to that date, in unknown circumstances.

96. 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, *Çelikkbilek v. Turkey*, no. 27693/95, judgment of 31 May 2005, § 56).

97. The Panel notes that UNMIK was requested to submit relevant documents in relation to the case. In response to the request from the Panel, on 5 August 2013 UNMIK stated that the disclosure of files concerning the case could be considered final.

98. 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. The Panel likewise notes that by asserting that this investigation was initially conducted by the ICTY, UNMIK also suggests that some documents related to this investigation may be in ICTY's possession. However, UNMIK has not provided any confirmation in this regard, in particular which documents are there.

99. The Panel itself is not in the position to verify the completeness of the investigative files received. The Panel will therefore assess the merits of the complaint on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of 15 March 2011, § 146). It will not take into account additional material in the previously mentioned publicly available documents (see § 72 above).

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

100. The complainants state that UNMIK failed to conduct an effective investigation into the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević.

101. The Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights (IACtHR) *Velásquez-Rodríguez* (see IACtHR, *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been stated by the United Nations Human Rights Committee (HRC) as stemming from Article 6 (right to life), Article 7 (prohibition of cruel and inhuman treatment) and Article 9 (right to liberty and security of person), read in conjunction with Articles 2 (3) (right to an effective remedy) of the (ICCPR) (see United Nations Human Rights Committee (HRC), General Comment No. 6, 30 April 1982, § 4; HRC, General Comment No. 31, 26 May 2004, §§ 8 and 18, CCPR/C/21/Rev.1/Add. 13; see also, among others, HRC, *Mohamed El Awani, v. Libyan Arab Jamahiriya*, communication no. 1295/2004, views of 11 July 2007, CCPR/C/90/D/1295/2004). The obligation to investigate disappearances and killings is also asserted in the UN Declaration on the Protection of all Persons from Enforced Disappearances (A/Res/47/133, 18 December 1992), and further detailed in UN guidelines such as the UN Manual on the Effective Prevention and Investigation of Extra-Legal Arbitrary and Summary Executions (1991) and the “Guidelines for the Conduct of United Nations Inquiries into Allegations of Massacres” (1995). The importance of the obligation is confirmed by the adoption of the International Convention for the Protection of All Persons from Enforced Disappearance in 2006, which entered into force on 23 December 2010.
102. In order to address the complainant’s allegations, the Panel refers to the well-established case-law of the European Court on Human Rights on the procedural obligation under Article 2 of the ECHR. The Court has held that “[The] obligation to protect the right to life under Article 2, read in conjunction with the State’s general duty under Article 1 of the Convention to “secure to everyone within [its] jurisdiction the rights and freedoms defined in [the] Convention”, requires by implication that there should be some form of effective official investigation when individuals have been killed (see, *mutatis mutandis*, ECtHR, *McCann and Others v. the United Kingdom*, judgment of 27 September 1995, § 161, Series A no. 324; and ECtHR, *Kaya v. Turkey*, judgment of 19 February 1998, § 86, Reports 1998-I; see also ECtHR, *Jasinskis v. Latvia*, no. 45744/08, judgment of 21 December 2010, § 71). The duty to conduct such an investigation arises in all cases of killing and other suspicious death, whether the perpetrators were private persons or State agents or are unknown (see ECtHR, *Kolevi v. Bulgaria*, no. 1108/02, judgment of 5 November 2009, § 191).
103. 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 § 80 above, at § 136).
104. 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).
105. Setting out the standards of an effective investigation, the Court has stated that “beside being independent, accessible to the victim’s family, carried out with reasonable promptness and expedition, affording a sufficient element of public scrutiny of the investigation and its

results, the investigation must also be effective in the sense that is capable of leading to a determination of whether the death was caused unlawfully and if so, to the identification and punishment of those responsible (see ECtHR [GC], *Varnava and Others v. Turkey*, cited in in § 80 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).

106. 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 § 102, 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).
107. Even with regard to persons disappeared and later found dead, which is not the situation in the present case, 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 § 105 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 80 above, at § 148, *Aslakhanova and Others v. Russia*, nos. 2944/06 and others, judgment of 18 December 2012, § 122). However, the Court also stresses that this procedural obligation "does not come to an end even on discovery of the body ... This only casts light on one aspect of the fate of the missing person and the obligation to account for the disappearance and death, as well as to identify and prosecute any perpetrator of unlawful acts in that connection, will generally remain" (ECtHR, *Palić v. Bosnia and Herzegovina*, cited above; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 80 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).
108. On the requirement of public scrutiny, the Court has further stated that there must be a sufficient element of public scrutiny of the investigation or its results to secure accountability in practice as well as in theory. The degree of public scrutiny required may well vary from case to case. In all cases, however, the victim's next-of-kin must be involved in the procedure to the extent necessary to safeguard his or her legitimate interests (see *Ahmet Özkan and Others v. Turkey*, cited in § 104 above, at §§ 311-314; *Isayeva v. Russia*,

cited in § 104 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).

109. The Court has also underlined the great importance of an effective investigation in establishing the truth of what transpired, 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 [GC], *El-Masri v. The Former Yugoslav Republic of Macedonia*, no. 39630/09, judgment of 13 December 2012, § 191). The United Nations also recognises 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 UN Human Rights Council, Resolutions 9/11 and 12/12: Right to the Truth, 24 September 2008 and 12 October 2009; see also the Report of the Special Rapporteur on the promotion and protection of human rights and fundamental freedoms while countering terrorism, 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).

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

110. The Panel is conscious that the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.

111. On his part, the SRSG does not contest that UNMIK had a duty to investigate the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević 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.

112. 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.

113. 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).

114. Concerning the applicability of Article 2 to situations of conflict or generalised violence, the Panel recalls that the European Court on Human Rights has established the applicability of Article 2 to post-conflict situations, including in countries of the former Yugoslavia (see, among other examples, ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 63 above, and ECtHR, *Jularić v. Croatia*, no. 20106/06, judgment of 20 January 2011). The Court has further held that 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 § 108 above, at § 164; see also ECtHR, *Güleç v. Turkey*, judgment of 27 July 1998, § 81, Reports 1998-IV; ECtHR, *Ergi v. Turkey*, judgment of 28 July 1998, §§ 79 and 82, Reports 1998-IV; ECtHR, *Ahmet Özkan and Others v. Turkey*, cited in § 104 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 104 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
115. The Court has acknowledged that “where the death [and disappearances] to be investigated under Article 2 occur in circumstances of generalised violence, armed conflict or insurgency, obstacles may be placed in the way of investigators and concrete constraints may compel the use of less effective measures of investigation or may cause an investigation to be delayed” (see, ECtHR [GC], *Al-Skeini and Others v. the United Kingdom*, cited above, at §164; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 121). Nonetheless, the Court has held that “the obligation under Article 2 to safeguard life entails that, even in difficult security conditions, all reasonable steps must be taken to ensure that an effective, independent investigation is conducted into alleged breaches of the right to life (see, amongst many other examples, ECtHR, *Kaya v. Turkey*, cited in § 102 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).
116. Similarly, the HRC has held that the right to life, including its procedural guarantees, shall be considered as the supreme right from which no derogation is permitted even in time of public emergency which threatens the life of the nation (see, HRC, General Comment No. 6, cited in § 59 above, at § 1; HRC, *Abubakar Amirov and Aizan Amirova v. Russian Federation*, communication no. 1447/2006, views of 22 April 2009, § 11.2, CCPR/C/95/D/1447/2006). Further, the HRC has stated the applicability of Article 2 (3), 6 and 7 of the ICCPR with specific reference to UNMIK’s obligation to conduct proper investigations on disappearances and abductions in Kosovo (see HRC, Concluding Observations of the Human Rights Committee: Kosovo (Serbia), 14 August 2006, §§ 12-13, CCPR/C/UNK/CO/1).
117. 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 § 23 above).

118. The Panel further notes that its task is not to review relevant practices or alleged obstacles to the conduct of effective investigations *in abstracto*, but only in relation to their specific application to the particular circumstances of a situation subject of a complaint before it (see, ECtHR, *Brogan and Others v. the United Kingdom*, judgment of 29 November 1988, § 53, Series A no. 145-B). The Panel thus agrees with the SRSG that the nature and degree of scrutiny to determine whether the effectiveness of the investigation satisfies the minimum threshold depends on the circumstances of the particular case. For these reasons, the Panel considers that it will establish with regard to each case if all reasonable steps were taken to conduct an effective investigation as prescribed by Article 2, having regard to the realities of the investigative work in Kosovo.

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

119. The complainants state that Mr Siniša Vitošević’s and Mr Gradimir Majmarević’s abduction and disappearance was reported promptly to the OSCE, KFOR and UNMIK, as well as to Serbian MUP, ICRC and other organisations. The Panel notes that the investigative files indicate that UNMIK became aware of the abduction and disappearance on 28 October 1999 at latest (see § 38 above).

120. Examining the particulars of this case, the Panel notes that there were obvious shortcomings in the conduct of the investigation from its commencement. However, in light of the considerations developed above concerning its limited temporal jurisdiction, the Panel recalls that it is competent *ratione temporis* to evaluate the compliance of the investigation with Article 2 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (see § 80 above). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 25 above).

121. The Panel notes that from that moment for almost 6 years (until April 2005, see 47 above), no active investigative actions directed towards locating Mr Vitošević and Mr Majmarević

or their mortal remains, or identifying the person, or persons, responsible for their abduction and disappearance appears to have taken place. The only actions undertaken by UNMIK Police were registering the case, as well as sending out a general request for information and awaiting responses. No attempt appears to have been made to record formally the statements from the complainants or from any of the witnesses, which were known to them, some of whom were eye-witnesses. No follow up activity was made on the written statement of Mr Vitošević's mother-in-law (see § 38 above), which may have provided additional lines of enquiry.

122. The Panel also notes with concern the fact that whatever limited evidence was collected at that time, all of it, as confirmed by the memorandum of 19 December 2002 (see § 46 above), had been lost, when the original case file went missing, while in the custody of UNMIK Police.
123. Likewise, no attempt appears to have been made to trace Mr Vitošević's vehicle that was also taken by the perpetrators, even though its detailed description was available to the police from the very beginning of the investigation.
124. Coming to the period within its jurisdiction, starting from 23 April 2005, the Panel notes that many investigative steps, as described above in the overview of the investigation, were carried out. However, a formal statement of Mrs Vitošević was recorded only in August 2006, while no statement of Mrs Veska Majmarević or Ms Nataša Majmarević, or other family members, or witnesses, appear to have ever been recorded.
125. As those responsible for the crime had not been located, UNMIK was obligated to use the means at its disposal to regularly review the progress of the investigation to ensure that nothing had been overlooked and any new evidence had been considered, as well as to inform the relatives of Mr Vitošević and Mr Majmarević regarding the progress of the investigation. Although such a review was undertaken a number of times (see §§ 46, 47, 52, 58 and 64), the identified witnesses were first approached and questioned only in 2005 (see § 47 above), while none of their verbal statements was put into the required legal, written format.
126. Recalling the SRSG's assertion that at the time when the abduction of Mr Vitošević and Mr Majmarević occurred, the crime rate in Kosovo "was at its highest" (see § 85 above), the Panel notes that in order to be valid, this argument should have been supported by statistical data. However, no such data was provided by the SRSG (compare with HRAP, *Z.I.*, no. 145/09, opinion of 12 September 2013, §§ 52 and 91)
127. The Panel also notes the SRSG's assertion that the period of complete inaction by UNMIK Police with regard to this investigation (1999 – 2005) may be attributed to an ICTY investigation into the same matter, meaning that UNMIK Police was only providing support, but not conducting its own investigation. The Panel agrees that, under Article 9 of the ICTY Statute, the ICTY at that time had, and still has, primacy jurisdiction over the crimes associated with the armed conflict in Kosovo in 1998 – 1999. However, the SRSG did not present any document which could support his assertion that this case was indeed taken over by the ICTY during that period. In the absence of such a confirmation, the Panel dismisses this assertion of the SRSG, although potentially valid, as not substantiated to it by UNMIK.

128. Even if the ICTY did conduct an investigation into this matter, it should be assumed that it was discontinued by 2005, when UNMIK Police started its own investigation. In this situation, following the above-mentioned responsibility for maintenance of the complete investigative file (see § 98), UNMIK was required to use all its efforts to ensure the return to Kosovo of all documents and evidence collected up to that date. However, the Panel was not presented with any proof of such attempts.
129. The Panel recalls the SRSG's view that "it was appropriate for UNMIK Police not to duplicate the efforts of the ICTY considering its limited resources and to prioritize investigations of war related crimes not primarily investigated by the ICTY" (see § 89 above).
130. The Panel agrees that in a situation of a massive influx of potential criminal reports where there is limited police investigative capacity on the ground, prioritisation is one of the ways of maintaining a level of efficiency, when only the most serious cases with obvious leads are addressed. In this case, if such prioritisation was made, as the SRSG suggests, because of the ICTY engagement in the process, the Panel should have been presented, first, with a confirmation of such ICTY involvement, and, second, with a record of the efforts undertaken by UNMIK to secure the return of the evidence allegedly collected by the ICTY.
131. The Panel stresses that it has to limit its conclusions to the documents officially presented to it by UNMIK. On the basis of those documents, the Panel has to reluctantly conclude that neither UNMIK nor the ICTY proceeded further with sufficient investigations to shed light on the abduction and disappearance of these two victims, in the most critical period of the investigation, in 1999 – 2005. Indicative of this is the situation faced by UNMIK Police investigators in 2006 – 2008; while they tried to locate and interview additional witnesses, some witnesses had died (see § 56 above), some refused to testify (see § 68 above), and the police were no longer able to locate others (see §§ 55, 58, 59, 67 and 68 above).
132. Such a lack of any immediate reaction from UNMIK Police and the absence of any information about the ICTY investigation into the matter, may have suggested to perpetrators that the authorities were either not able, or not willing to investigate such criminal acts. Such an attitude of the authorities towards the gravest crimes in any society, and especially in post-conflict circumstances, inevitably creates a culture of impunity among the criminals and can only lead to a worsening of the situation. The problems which UNMIK had encountered at the beginning of its mission, which were discussed above, do not justify such inaction, either at the outset or subsequently.
133. The Panel therefore considers that, having regard to all the circumstances of the particular case, not all reasonable steps were taken by UNMIK to identify the perpetrators and to bring them to justice. In this sense the Panel considers that the investigation into abduction of Mr Siniša Vitošević and Mr Gradimir Majmarević was not adequate and did not comply with the requirements of promptness, expedition and effectiveness (see §§ 60 - 62 above), as required by Article 2.
134. As concerns the requirement of public scrutiny, the Panel recalls that Article 2 also requires that in all cases the victim's next-of-kin must be involved in the investigation to the extent necessary to safeguard his or her legitimate interests (see ECtHR [GC], *Tahsin Acar v.*

*Turkey*, no. 26307/95, judgment of 8 April 2004, § 226, ECHR 2004-III; ECtHR, *Taniş v. Turkey*, no. 65899/01, judgment of 2 August 2005, § 204, ECHR 2005-VIII).

135. The Panel notes from the investigative file that the first recorded contact between the WCIU investigators and Mrs Tatjana Vitošević and Mrs Veska Majmarević apparently took place only on 1 April 2005, which is almost six years after the abduction of their husbands (see § 47 above). Mrs Veska Majmarević's written statement was never recorded. A formal written statement of Mrs Tatjana Vitošević was taken more than a year later, in August 2006 (see § 50 above). Although it may be assumed that these two complainants were to some extent apprised of the progress of the investigation when they met the WCIU investigators, somewhat belatedly, in the Panel's opinion it is absolutely not adequate to have only one or two such contacts during a decade-long investigation under UNMIK's control. This should be particularly assessed in light of the fact that from October 1999 the police had all the necessary details to proceed with a meaningful investigation (see § 38 above), but did not do so for six years.
136. The Panel therefore considers that the investigation was not accessible to Mrs Tatjana Vitošević and Mrs Veska Majmarević, as required by Article 2.
137. With regard to the third complainant, Ms Nataša Majmarević, the Panel recalls that the file does not reflect any contact by UNMIK Police with her.
138. The Panel cannot disregard the fact that Ms Nataša Majmarević was a child at the time of her father's abduction, thus she may not have been considered by UNMIK Police as an interested party. She does not claim that she ever came forward as a witness in this case, or tried to contact any authority with regard to her father's abduction. Thus, in the Panel's view, it would not be reasonable to expect UNMIK Police to look for her and provide her with any information related to the investigation, in the same way as with respect to Mrs Tatjana Vitošević and Mrs Veska Majmarević.
139. Therefore, the Panel considers that there was no infringement of the requirement of public scrutiny with regard to Ms Nataša Majmarević. However, the Panel's considerations regarding the existence of other systemic failures in this investigation provides a sufficient basis for concluding that a violation of the procedural obligations under ECHR, Article 2 as a result of the lack of investigative efforts into the abduction of Mr Siniša Vitošević and Mr Gradimir Majmarević existed also with regard to Ms Nataša Majmarević's complaint.
140. In light of the deficiencies and shortcomings described above, the Panel concludes that UNMIK failed to carry out an adequate and effective investigation into the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević. There has been accordingly a violation of Article 2 of the ECHR under its procedural limb.

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

141. The Panel considers that the complainants invoke, in substance, a violation of the right to be free from inhumane or degrading treatment, guaranteed by Article 3 of the ECHR.

## **Admissibility**

142. At the admissibility stage, the SRSG did not proffer any comments regarding any violation of Article 3 of the ECHR.
143. At the merits stage, the SRSG argued that in their complaints Mrs Tatjana Vitošević (no. 139/09) and Ms Nataša Majmarević (no. 325/09) had raised “no issue whatsoever, either express or implied, with respect to Article 3.” Therefore, according to the SRSG, their complaints are inadmissible.
144. The Panel considers that, despite the lack of express allegations put forward by the complainants in this respect, the complaints set forth relevant facts relating to the abduction of the complainants’ relatives upon which the alleged violation of the complainants’ rights under Article 3 of the ECHR may be based.
145. The Panel refers to the case law of the European Court of Human Rights with respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR, which prohibits inhuman treatment. The European Court of Human Rights accepts that this may be the case, depending on the existence of “special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation”. The Court further holds that “relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries”. It also emphasises “that the essence of such a violation does not so much lie in the fact of the disappearance of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention” (see, e.g., European Court of Human Rights (ECtHR) [GC], *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, ECHR, 1999-IV; ECtHR [GC], *Cyprus v. Turkey*, no. 25781/94, judgment of 10 May 2001, § 156, ECHR, 2001-IV; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, § 358; ECtHR, *Bazorkina v. Russia*, no. 69481/01, judgment of 27 July 2006, § 139; see also HRAP, *Zdravković*, no. 46/08, decision of 17 April 2009, § 41, and HRAP, *Radisavljević*, no. 156/09, decision of 17 February 2012, § 18).
146. The Panel considers that a complainant may invoke a violation of Article 3 of the ECHR even if there is no explicit reference to specific acts of the authorities involved in the investigation, since also the passivity of the authorities and the absence of information given to the complainant may be indicative of inhuman treatment of the complainant by the authorities (see e.g. HRAP, *Kabaš*, no. 78/09, decision of 11 May 2012, § 20).
147. The Panel considers that this part of the complaints of Mrs Tatjana Vitošević and Ms Nataša Majmarević raises serious issues of fact and law, the determination of which should depend on an examination of the merits. The Panel concludes therefore that this part of the complaints is not manifestly ill-founded within the meaning of Section 3.3 of UNMIK Regulation No. 2006/12, and rejects the objection raised by the SRSG.
148. No other ground for declaring this part of the complaints inadmissible has been established.

## Merits

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

149. The Panel will consider the allegations under Article 3 of the ECHR, applying the same scope of review as was set out with regard to Article 2 (see §§ 76 - 80 above).
150. The Panel recalls that the European Court of Human Rights has found on many occasions that a situation of enforced disappearance gives rise to a violation of Article 3 in respect of close relatives of the victim. It emphasises that, concerning Article 3, “the essence of such a violation does not so much lie in the fact of the ‘disappearance’ of the family member but rather concerns the authorities’ reactions and attitudes to the situation when it is brought to their attention” (see, e.g., ECtHR [GC], *Çakici v. Turkey*, cited in § 145 above, at § 98; ECtHR [GC], *Cyprus v. Turkey*, *ibid*, at § 156; ECtHR, *Orhan v. Turkey*, *ibid*, at § 358; ECtHR, *Bazorkina v. Russia*, *ibid*, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 104 above, at § 74; ECtHR, *Alpatu Israilova v. Russia*, no. 15438/05, judgment of 14 March 2013, § 69; see also HRAP, *Zdravković*, cited in § 145 above, at § 41). “It is especially in respect of the latter that a relative may claim directly to be a victim of the authorities’ conduct” (see, among others, ECtHR, *Er and Others v. Turkey*, no. 23016/04, judgment of 31 July 2012, § 94).
151. Lastly, where mental suffering caused by the authorities’ reactions to the disappearance is at stake, the alleged violation is contrary to the substantive element of Article 3 of the ECHR, not its procedural element, as is the case with regard to Article 2 (ECtHR, *Gelayevy v. Russia*, no. 20216/07, judgment of 15 July 2010, §§ 147-148).

## 2. The Parties' submissions

152. The complainants in substance allege that the lack of information and certainty surrounding the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević, particularly because of UNMIK’s failure to properly investigate their abduction and disappearance, caused mental suffering to them and their families.
153. In the comments on the merits of the complaints under Article 3 of the ECHR, the SRSG commented only on the complaint of Mrs Veska Majmarević (no. 218/09), as he argued the complaints of Mrs Tatjana Vitošević (no. 139/09) and Ms Nataša Majmarević (no. 325/09) on this Article to be inadmissible. Having dismissed his argument with regard to their admissibility, the Panel considers that the comments of the SRSG on the merits of the complaint of Mrs Veska Majmarević should be equally relevant to the complaints of Mrs Tatjana Vitošević and Ms Nataša Majmarević.
154. The SRSG, rejects the allegation under ECHR, Article 3, stressing that there were no assertions made by the complainants of any bad faith on the part of UNMIK personnel involved with the matter, nor evidence of any disregard for the seriousness of the matter or the emotions of the complainants and their families emanating from the continuing missing status of their close relatives. On the contrary, “it is clear that UNMIK remained seized of this matter, and on more than one occasion and at different intervals in the course of its investigations into the disappearance ... contacted and engaged with members of [the] family.”

155. The SRSG adds that the understandable and apparent mental anguish and suffering of the complainants cannot be attributed to UNMIK, but rather results from the disappearance of Mr Vitošević and Mr Majmarević. The SRSG concludes that the complainants' suffering lacks a character distinct from the emotional distress which may be regarded as inevitably caused to the relatives of a victim of a serious human rights violation.

### 3. The Panel's assessment

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

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

157. Setting out the general principles applicable to situations where violations of the obligation under Article 3 of the ECHR are alleged, the Panel notes that the phenomenon of disappearance constitutes a complex form of human rights violation that must be understood and confronted in an integral fashion (see IACtHR, *Velásquez-Rodríguez v. Honduras*, cited in § 101 above, at § 150).

158. The Panel observes that the obligation under Article 3 of the ECHR differs from the procedural obligation on the authorities under Article 2. Whereas the latter requires the authorities to take specific legal action capable of leading to identification and punishment of those responsible, the former is more general and humanitarian and relates to their reaction to the plight of the relatives of those who have disappeared or died.

159. The HRC has also recognised disappearances as a serious violation of human rights. In its decision of 21 July 1983, in the case *Quinteros v. Uruguay*, it stated that disappearances constitute serious violations of the rights of the disappeared person's relatives, who suffer from deep anguish which persists for as long as the uncertainty concerning the fate of their loved one continues, often for many years (see HRC, Communication No. 107/1981, U.N. Doc. CCPR/C/OP/2 at 138 (1990), § 14). Moreover, in its decision of 15 July 1994 in the case *Mojica*, the HRC has deemed that "the disappearance of persons is inseparably linked to treatment that amounts to a violation of article 7 [of the Covenant]", also prohibiting torture, inhumane or degrading treatment and punishment (see HRC, *Mojica v. Dominican Republic*, Communication No. 449/1991, U.N. Doc. CCPR/C/51/D/449/1991 (1994), § 5.7).

160. With respect to the question whether a member of the family of a disappeared person can be considered the victim of a treatment contrary to Article 3 of the ECHR, the Panel refers to the case law of the European Court of Human Rights and to its own case law. The European Court accepts that this may be the case, depending on the existence of "special factors which give the suffering of the [family member] a dimension and character distinct from the emotional distress which may be regarded as inevitably caused to relatives of a victim of a serious human rights violation". The Court further holds that "relevant elements will include the proximity of the family tie, the particular circumstances of the relationship, the extent to which the family member witnessed the events in question, the involvement of the family

member in the attempts to obtain information about the disappeared person and the way in which the authorities responded to those enquiries” (see ECtHR, *Basayeva and Others v. Russia*, nos. 15441/05 and 20731/04, judgment of 28 May 2009, § 159; ECtHR, *Ergi and Others v. Turkey*, cited in § 114 above, at § 94).

161. The Panel takes note that, when assessing the emotional suffering of the victims, the European Court also considers the following circumstances: the length of the disappearance itself and of the period with no information on the fate of the missing person and on the investigation undertaken by the authorities; the delay in initiation of criminal investigation into the disappearance; the absence of any “meaningful” action by the authorities, despite the fact that the complainant approached them to report the disappearance of their relative and to share with them the information they had; lack of any plausible explanation or information as to the fate of their missing relatives despite personal or written inquiries with official bodies (see, among others, ECtHR, *Ergi and Others v. Turkey*, cited above, at § 96; ECtHR, *Osmanoğlu v. Turkey*, no. 48804/99, judgment of 24 January 2008, § 97). Another factor leading to a finding of violation of Article 3 of the ECHR is the continuous nature of the psychological suffering of relatives of a victim of a disappearance (ECtHR, *Salakhov and Islyamova v. Ukraine*, no. 28005/08, judgment of 14 March 2013, § 201).

162. The HRC has also considered the issue and recognised family members of disappeared or missing persons as victims of a violation of Article 7 of the Covenant: parents (*Boucherf v. Algeria*, Communication No. 1196/2003, views of 30 March 2006, § 9.7, CCPR/C/86/D/1196/2003), children (*Zarzi v. Algeria*, Communication No. 1780/2008, views of 22 March 2011, § 7.6, CCPR/C/101/D/1780/2008), siblings (*El Abani v. Libyan Arab Jamahiriya*, Communication No. 1640/2007, views of 26 July 2010, § 7.5, CCPR/C/99/D/1640/2007), spouses (*Bousroual v. Algeria*, Communication No. 992/2001, views of 30 March 2006, § 9.8, CCPR/C/86/D/992/2001), aunts and uncles (*Benaniza v. Algeria*, views of 26 July 2010, § 9.4, CCPR/C/99/D/1588/2007) (*Bashasha v. Libyan Arab Jamahiriya*, views of 20 October 2010, § 7.2, CCPR/C/100/D/1776/2008). It justifies this broad understanding of victim status by the suffering and distress that is caused to family members by the disappearance of an individual, which is often exacerbated by the authorities’ insufficient efforts to investigate the disappearance in order to establish the fate of the victim and to bring perpetrators to justice (*Aboussedra v. Libyan Arab Jamahiriya*, Communication No. 1751/2008, views of 25 October 2010, § 7.5, CCPR/C/100/D/1751/2008). In the *Amirov v. Russian Federation* the Committee observed that “[w]ithout wishing to spell out all the circumstances of indirect victimisation, the Committee considers that the failure of a State party responsibly to discharge its obligations to investigate and clarify the circumstances of the harm suffered by the direct victim will be usually be a factor. Additional factors may be necessary. In the present case, the Committee notes the horrific conditions in which the author came to find his wife's mutilated remains (...), followed by the dilatory, sporadic measures undertaken to investigate the circumstances that have lead to the above findings of violations of articles 6 and 7, read together with article 2, paragraph 3. The Committee considers that, taken together, the circumstances require the Committee to conclude that the author's own rights under article 7 have also been violated” (HRC, *Abubakar Amirov and Aïzan Amirova v. Russian Federation*, cited in § 16 above, § 11.7).

163. The Panel also takes into account that according to the European Court, the analysis of the authorities’ reaction should not be confined to any specific manifestation of the authorities’

attitudes, isolated incidents or procedural acts; on the contrary, in the Court's view, an assessment of the way in which the authorities of the respondent State reacted to the applicants' enquiries should be global and continuous (see ECtHR, *Açış v. Turkey*, no. 7050/05, judgment of 1 February 2011, § 45).

164. In this respect, it is the position of the European Court that findings under the procedural limb of Article 2 would also be of direct relevance in considering the existence of a violation of Article 3 (see ECtHR, *Basayeva and Others v. Russia*, cited in § 160 above, § 109; ECtHR, *Gelayevy v. Russia*, no. 20216/07, cited in § 151 above, at § 147; ECtHR, *Bazorkina v. Russia*, cited in § 115 above, at § 140).

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

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

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

167. 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 §§ 110 - 118).

168. 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 § 23 above).

169. 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.

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

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

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

171. Against this background, the Panel discerns a number of factors in the present case which, taken together, raise the question of violation of Article 3 of the ECHR.
172. The Panel notes the proximity of the family ties between the complainants and the missing persons, as they are their spouses and a daughter. Accordingly, the Panel has no doubt that they indeed suffered serious emotional distress since the abductions, which took place in June 1999.
173. The Panel likewise notes that the Mrs Vitošević and Mrs Majmarević applied to various bodies in Serbia and Kosovo, national and international, with enquiries (see § 32 above), but despite their attempts, they have never received any explanation or information as to what became of their husbands following their abduction.
174. The Panel cannot overlook the period of almost complete inaction of the authorities, between 1999 and 2005, despite the fact that they had all the necessary information to pursue an investigation from the very beginning. In this respect, the Panel reiterates that from the standpoint of Article 3 it may examine UNMIK's reactions and attitudes to the complainants in its entirety.
175. The Panel recalls that the first recorded contact between the WCIU investigators and Mrs Vitošević and Mrs Majmarević apparently took place only on 1 April 2005, which is almost six years after the abduction of their husbands (see §§ 47 above). However, a formal written statement of Mrs Vitošević was only taken more than a year later, in August 2006 (see § 50 above). Mrs Majmarević's statement was never recorded. Although it may be assumed that these two complainants were to some extent appraised of the progress of the investigation when they met the WCIU investigators, somewhat belatedly, in the Panel's opinion it is absolutely not adequate to have only one or two such contacts during a decade-long investigation under UNMIK's control. This should particularly be assessed in light of the fact that from October 1999 the police had all the necessary details to proceed with meaningful investigation (see § 38 above), but did not do so for six years.
176. Drawing inferences from UNMIK's failure to provide any plausible explanation for the absence of any sustained and regular contact with the complainants, or information about the reasons for the prolonged inaction by UNMIK Police with regard to the investigation into the abduction of Mr Vitošević and Mr Majmarević, the Panel considers that this situation, which continued into the period of the Panel's temporal jurisdiction, caused grave uncertainty about their fate and the status of the investigation.
177. In view of the above, the Panel concludes that Mrs Vitošević and Mrs Majmarević suffered severe distress for a prolonged and continuing period of time on account of the way the authorities of UNMIK have dealt with their complaints and as a result of their inability to find out what happened to their husbands. In this respect, it is obvious that, in any situation, their pain to live in uncertainty about their husbands' fate must be unbearable.

178. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the distress and mental suffering of Mrs Tatjana Vitošević and Mrs Veska Majmarević, in violation of Article 3 of the ECHR.
179. With regard to Ms Nataša Majmarević, the Panel recalls that she was not the one who reported the case to UNMIK authorities, and that she was never in contact with the police, in any way letting them know that she had interest in the investigation, or requested to be considered an injured party. Without her so doing, it is not reasonable to expect the police to look for her, in order to provide an update on the status of the investigation. The Panel also considers the fact that she did not claim that she was in any way victimised by the authorities' behaviour. Nevertheless, the Panel notes that Ms Nataša Majmarević, at that time still a child, as well as her mother, Mrs Veska Majmarević, were subjected to extreme verbal threats and abuse following the abduction of Mr Gradimir Majmarević.
180. Thus, in the Panel's view, even having found failures in the conduct, reactions and attitudes of UNMIK's authorities with regard to this investigation, there is no evidence that any additional suffering was caused by that to Ms Nataša Majmarević (compare with HRAP, *Spasić and Others*, nos. 221/09 and *Others*, opinion of 31 July 2013, §§ 141-142). Therefore, the Panel finds no violation of Article 3 with regard to this complainant.

## V. CONCLUDING COMMENTS AND RECOMMENDATIONS

181. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
182. The Panel notes that enforced disappearances and arbitrary executions constitute serious violations of human rights which, shall be investigated and prosecuted under any circumstances. The Panel also notes that UNMIK as the territorial administration of Kosovo from 1999 to 2008 had the primary responsibility to effectively investigate and prosecute those responsible for killings, abductions or disappearances in life threatening circumstances. Its failure to do so constitutes a further serious violation of the rights of the victims and their next-of-kin, in particular the right to have the truth of the matter determined.
183. 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.
184. 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 § 25), UNMIK's responsibility with regard to the administration of justice in Kosovo ended on 9 December 2008, with EULEX assuming full operational control in the area of rule of law. UNMIK therefore is no longer in a position to take measures that will have a direct impact on the investigations that are still pending before EULEX or local authorities. Likewise, following the declaration of independence by the Kosovo Provisional Institutions of Self-Government on 17 February 2008 and subsequently, the entry into force of the Kosovo Constitution on 15 June 2008, UNMIK ceased to perform executive functions in Kosovo, this fact limiting its ability to provide full and effective

reparation of the violation committed, as required by established principles of international human rights law.

185. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible.

**With respect to the complainants and the case the Panel considers appropriate that UNMIK:**

- In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR [GC], *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR [GC], *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 109), must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the requirements of an effective investigation as envisaged by Article 2, that the circumstances surrounding the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević will be established and that perpetrators will be brought to justice. The complainants and/or other next-of-kin shall be informed of such proceedings and relevant documents shall be disclosed to them, as necessary;

- Publicly acknowledges, within a reasonable time, responsibility with respect to UNMIK's failure to adequately investigate the abduction and disappearance of Mr Siniša Vitošević and Mr Gradimir Majmarević, as well as the distress and mental suffering subsequently incurred by Mrs Tatjana Vitošević and Mrs Veska Majmarević, and makes a public apology to the complainants and their families in this regard;

- Takes appropriate steps towards payment of adequate compensation to all complainants for the moral damage suffered due to UNMIK's failure to conduct an effective investigation, as well as for distress and mental suffering incurred by Mrs Tatjana Vitošević and Mrs Veska Majmarević as a consequence of UNMIK's behaviour.

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

- In line with the UN General Assembly Resolution on "Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law" (A/Res/60/147, 21 March 2006), takes appropriate steps, through other UN affiliated entities operating in Kosovo, local bodies and non-governmental organisations, for the realisation of a full and comprehensive reparation programme, including restitution compensation, rehabilitation, satisfaction and guarantees of non-repetition, for the victims from all communities of serious violations of human rights which occurred during and in the aftermath of the Kosovo conflict;

- Takes appropriate steps before competent bodies of the United Nations, including the UN Secretary-General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the United

Nations, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring;

**FOR THESE REASONS,**

The Panel, unanimously,

- 1. FINDS THAT THERE HAS BEEN A VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;**
- 2. FINDS THAT THERE HAS BEEN A VIOLATION OF THE SUBSTANTIVE OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS WITH REGARD TO THE COMPLAINTS OF MRS TATJANA VITOŠEVIĆ AND MRS VESKA MAJMAREVIĆ;**
- 3. FINDS THAT THERE WAS NO VIOLATION OF THE SUBSTANTIVE OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS WITH REGARD TO THE COMPLAINT OF MS NATAŠA MAJMAREVIĆ.**
- 4. RECOMMENDS THAT UNMIK:**
  - a. URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE ABDUCTION AND DISAPPEARANCE OF MR SINIŠA VITOŠEVIĆ AND MR GRADIMIR MAJMAREVIĆ IS CONTINUED IN COMPLIANCE WITH ARTICLE 2 OF THE ECHR AND THAT THE PERPETRATORS ARE BROUGHT TO JUSTICE;**
  - b. PUBLICLY ACKNOWLEDGES RESPONSIBILITY FOR ITS FAILURE TO CONDUCT AN EFFECTIVE INVESTIGATION INTO THE ABDUCTION AND DISAPPEARANCE OF MR SINIŠA VITOŠEVIĆ AND MR GRADIMIR MAJMAREVIĆ, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED BY MRS TATJANA VITOŠEVIĆ AND MRS VESKA MAJMAREVIĆ, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANTS AND THEIR FAMILIES;**
  - c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 TO ALL COMPLAINANTS, AND IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 3 OF THE ECHR TO MRS TATJANA VITOŠEVIĆ AND MRS VESKA MAJMAREVIĆ;**
  - d. TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**

- e. TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
  
- f. TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANTS AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Anna Maria Cesano  
Acting Executive Officer

Marek Nowicki  
Presiding Member

## ABBREVIATIONS AND ACRONYMS

**CCIU** - Central Criminal Investigation Unit  
**CCPR** – International Covenant on Civil and Political Rights  
**DOJ** - Department of Justice  
**DPPO** - District Public Prosecutor’s Office  
**ECHR** - European Convention on Human Rights  
**ECtHR** - European Court of Human Rights  
**EU** – European Union  
**EULEX** - European Union Rule of Law Mission in Kosovo  
**FRY** - Federal Republic of Yugoslavia  
**HRAP** - Human Rights Advisory Panel  
**HRC** - United Nation Human Rights Committee  
**HQ** - Headquarters  
**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  
**IP** - International Prosecutor  
**KFOR** - International Security Force (commonly known as Kosovo Force)  
**KLA** - Kosovo Liberation Army  
**MoU** - Memorandum of Understanding  
**MPU** - Missing Persons Unit  
**MUP** - Ministry of Internal Affairs (*Министарство унутрашних послова*) of the Republic of Serbia  
**NATO** - North Atlantic Treaty Organization  
**OMPF** - Office on Missing Persons and Forensics  
**OSCE** - Organization for Security and Cooperation in Europe  
**RIU** - Regional Investigation Unit  
**SRSG** - Special Representative of the Secretary-General  
**UN** - United Nations  
**UNHCR** - United Nations High Commissioner for Refugees  
**UNMIK** - United Nations Interim Administration Mission in Kosovo  
**VRIC** - Victim Recovery and Identification Commission  
**WCIU** - War Crimes Investigation Unit