



OPINION

Date of adoption: 31 October 2013

Case No. 81/09

Milivoje TODOROVSKI

against

UNMIK

The Human Rights Advisory Panel, sitting on 31 October 2013,
with the following members taking present:

Ms Christine CHINKIN, Presiding Member
Ms Françoise TULKENS

Assisted by

Mr Andrey Antonov, Executive Officer

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

Having noted Mr Marek NOWICKI's withdrawal from sitting in the case pursuant to Rule 12 of the Rules of Procedure,

Having deliberated, makes the following findings and recommendations:

I. PROCEEDINGS BEFORE THE PANEL

1. The complaint was introduced on 17 April 2009 and registered on 30 April 2009.

2. On 24 July 2009, the complaint was communicated to the Special Representative of the Secretary-General (SRSG)¹, for UNMIK's comments on admissibility. The SRSG responded on 3 August 2009, asking for additional information.
3. On 9 December 2009, the Panel requested the complainant to provide additional information. On 8 December 2010, the Panel repeated its request.
4. On 27 February 2011, the Panel received a response from the complainant's son (the brother of the victim), on behalf of the complainant.
5. On 25 March 2011, the Panel re-communicated the complaint to the SRSG, for comments on the admissibility of the complaint. On 30 June 2011, SRSG provided UNMIK's response.
6. On 24 August 2011, the Panel requested the complainant's son to provide additional information. He responded on 4 September 2011.
7. On 16 September 2011, the Panel declared the complaint admissible.
8. On 19 September 2011, the Panel forwarded its decision to the SRSG requesting UNMIK's comments on the merits of the complaint, as well as copies of all police, forensic and other investigation files relied upon by UNMIK in preparation of its response.
9. On 1 March 2013, the SRSG provided UNMIK's comments on the merits of the case, together with copies of relevant investigative documents.
10. On 16 September 2013, the Panel requested UNMIK to confirm if the disclosure of files concerning the case could be considered final.
11. On the same day, UNMIK provided its response.

II. THE FACTS

A. General background²

12. The events at issue took place in the territory of Kosovo after the establishment of the United Nations Interim Administration Mission in Kosovo (UNMIK), in June 1999.
13. 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

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

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

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.

14. 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.
15. 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.
16. Meanwhile, members of the non-Albanian community – mainly but not exclusively Serbs, Roma and Slavic Muslims – as well as Kosovo Albanians suspected of collaboration with the Serbian authorities, became the target of widespread attacks by Kosovo Albanian armed groups. Current estimates relating to the number of Kosovo Serbs displaced fall within the region of 200,000 to 210,000. Whereas most Kosovo Serbs and other non-Albanians fled to Serbia proper and the neighbouring countries, those remaining behind became victims of systematic killings, abductions, arbitrary detentions, sexual and gender based violence, beatings and harassment.
17. 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.
18. 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.

19. 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.
20. 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”.
21. 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.
22. 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.
23. On the same date, UNMIK and EULEX signed a MoU on the modalities, and the respective rights and obligations arising from the transfer from UNMIK to EULEX of cases and the related files which involved on-going investigations, prosecutions and other activities undertaken by UNMIK International Prosecutors. Shortly thereafter, similar agreements were

signed with regard to the files handled by international judges and UNMIK Police. All agreements obliged EULEX to provide to UNMIK access to the documents related to the actions previously undertaken by UNMIK authorities. Between 9 December 2008 and 30 March 2009, all criminal case files held by the UNMIK DOJ and UNMIK Police were handed over to EULEX.

B. Circumstances surrounding the abduction and disappearance of Mr Aleksandar Todorovski

24. The complainant is the father of Mr Aleksandar Todorovski. He states that his son was abducted on 25 June 1999 from his workplace in Prishtinë/Priština hospital, by armed KLA members. Since then his whereabouts have remained unknown.
25. The complainant further states that on that day, while being on duty at the emergency centre of the Prishtinë/Priština hospital, in the presence of other employees, Mr Aleksandar Todorovski was taken for questioning by a self-appointed, “new security” officer, whose identity was known to the complainant and many other people. As the complainant states, the reason for questioning was that Mr Aleksandar Todorovski possessed an ID card issued in Belgrade, which would make him a “Serbian spy” in the eyes of KLA. After being held for a short time in one of the offices, Mr Aleksandar Todorovski was taken out of the building, with his hands tied behind him, and handed over to two uniformed KLA members. They escorted him through the KFOR checkpoint, put him in an ambulance vehicle and drove away. According to the complainant, there were identified eye-witnesses to the initial detention and the abduction, including the ambulance driver. A Kosovo Albanian doctor, also working at the clinic and known to the complainant and some witnesses, allegedly participated in this detention and questioning of the complainant’s son.
26. The other son of the complainant adds that he immediately reported the abduction of Mr Aleksandar Todorovski to KFOR and that the complainant also reported the abduction to UNMIK Headquarters, on 26 June 1999, and in the following few days to the Yugoslav Red Cross in Belgrade. The full details of the abduction were likewise given by the complainant to the KFOR Commander, at a personal meeting shortly thereafter. During the following months, the complainant submitted detailed statements to the ICMP and the ICRC offices in Belgrade, the Serbian State Prosecutor’s Office in Belgrade, and the Public Prosecutor’s Office in Prishtinë/Priština. Until the beginning of 2004 they have not received any official information from any authorities about the investigation.
27. A certificate of the Yugoslav Red Cross, dated 19 March 2001, confirms that since 2 July 1999 Mr Aleksandar Todorovski has been on their list of the missing and abducted in Kosovo. On 15 July 1999, the ICRC had also opened a tracing request for the complainant’s son, which remains open³. His name is also found in the online database maintained by the ICMP⁴, which reads, in relevant fields “Sufficient Reference Samples Collected” and “DNA match not found”, and in the electronic database compiled by the UNMIK OMPF.
28. The name of the complainant’s son and a brief description of the circumstances of his abduction is likewise found in the CCIU War Crimes Division’s “List of the kidnapped Serbs

³ The ICRC database is available at: <http://familylinks.icrc.org/kosovo/en/pages/search-persons.aspx> (accessed on 31 October 2013).

⁴ The ICMP database is available at: http://www.ic-mp.org/fdmsweb/index.php?w=mp_details&l=en (accessed on 31 October 2013).

in Kosovo and Metohija from 13th of June until 23rd of November 1999” (page 5, entry no. 75), apparently compiled by the CCIU by the end of 1999 and in the ICRC’s “List of persons still unaccounted for as a result of the armed conflict in Kosovo”, communicated to UNMIK Police MPU on 10 Sep 2001 (page 14, entry no. 536),

C. The complainant’s quest for information

29. The complainant further states that during 2004 his other son, through his personal contact in UNMIK, found the names of UNMIK Police officers in charge of the investigation and managed to contact them, in order “to push them to do more about it.” They were allegedly informed that the reports of the investigator in charge of the case “were constantly mysteriously disappearing from the dossier”, thus until that time there had been no progress in the case.
30. The complainant also states that in 2004 two new investigators were assigned to this case and that the case was reviewed by a representative of UNMIK DOJ. The complainant and his other son reportedly “had a very intensive email correspondence” with these two investigators, again providing detailed information on what had happened to Aleksandar Todorovski, including full names of perpetrators and witnesses. They were assured that most of these people were interviewed, their statements taken and officially filed under record No. 662/04.
31. The complainant continues that some time later, two other investigators were assigned to the case, as the previous two had finished their tours of duty with UNMIK. After the complainant and his other son contacted them, the officers again asked them to describe the circumstances of the abduction and to help the investigators in locating and contacting witnesses. The questions put by the investigators were in such a way “as if the [case] record was completely empty.” Nevertheless, the complainant and his other son again presented all that they knew.
32. As there was no news, on 21 October 2004 the complainant wrote to the Kosovo Ombudsperson, copying the letter to the UN Ombudsman in New York, the UNMIK Police Commissioner, and two international non-governmental organisations in the field of human rights. The Kosovo Ombudsperson reacted by contacting the UNMIK Police Commissioner, asking for information on the investigation.
33. The complainant furnished the Panel with a copy of an UNMIK Police memorandum from the Chief of WCIU to the UNMIK Police Commissioner, date 3 January 2005, which provided the Commissioner with the information related to the investigation into Mr Aleksandar Todorovski’s abduction, to enable him to respond to the Ombudsperson. The memorandum, among other information, states that:

“There has been a considerable amount of investigation into this incident and in April and May of 2004 the investigators assigned to the case conducted a number of interviews that provided additional names and details to assist in the further development of the case. Unfortunately, the case was placed in an inactive status due to further case prioritization by the Department of Justice. ... [the] files contain a considerable amount of information and potential evidence to substantiate a prompt an in-depth investigation. I am currently assigning two investigators to continue with this investigation in an attempt to gain information as to the victim’s possible whereabouts and to bring those persons

responsible to justice. After the investigator's detailed review of the file and formulation of a plan of action, they will be required to contact the family to ensure them that this case will be aggressively and progressively investigated."

34. In the letter of response to the Ombudsperson, dated 5 January 2005, also presented to the Panel by the complainant, the UNMIK Police Commissioner did not mention the "unfortunately inactive" status of the investigation, but generally described what had been done in this case, repeating what was stated in the above-mentioned memorandum. He also stated:

"... I assure you that much has been done, and continues to be done. The investigators will be contacting Dr. Todorovski seeking any additional investigative information that he might know."

35. On 10 January 2005, the complainant received an e-mail from a WCIU investigator (a copy provided by the complainant), who explained that he and another investigator were assigned to conduct this investigation on 8 January 2005. The investigator asked him to provide some additional information related to a number of potential suspects and witnesses. The complainant, again, complied.

36. In an e-mail to the complainant, dated 2 February 2005 (a copy also provided by the complainant), the same investigator expressed appreciation to the family for their help in locating two witnesses, whom the investigators had already contacted and interviewed. They asked for assistance in locating another potential witness, who worked at the time of abduction as a dispatcher in the hospital emergency centre, but who had left Kosovo in the meantime.

37. In another e-mail, dated 24 March 2005, the same police officer informed the complainant that, to that date, nine witnesses had been interviewed. In addition, a suspect, who allegedly had driven the car in which Mr Aleksandar Todorovski was taken away, had been interviewed twice. Despite "very intensive" interviews, he denied any involvement in the incident. As follows from the same e-mail, another witness, an UNMIK interpreter, was still to be interviewed. After that interview, if new leads appeared, they would follow them up. After that, in any event, the officer would summarise the case and forward it to an international prosecutor, for a decision on further action to be taken against the suspect.

38. On 3 June 2005, the complainant received an e-mail (copy likewise provided by the complainant) from a WCIU investigator newly assigned to this investigation due to the previous officers leaving UNMIK. According to this officer, during the hand-over of the case, the previous investigators had told him that "the case was almost closed due to lack of evidences". As he read the file himself, he noticed that some witnesses could not be located; others did not provide "reliable statement for security reason may be". As per his assessment, all that was known for sure from the file at that time was that the victim was "taken from the hospital by some [KLA] soldiers". Finally, he expressed his doubt that the case may be at all resolved after seven years, and assured that the family would be informed of any progress.

39. On the next day, the same officer wrote again. He further explained that almost all that had to be done in this case, had in fact been done, and that the previous investigators had met with an international prosecutor several times. There were two more witnesses to be located and interviewed, one living in Libya and the other one in Montenegro. According to him, the

evidence in the file provided “a clear view about the scene of the kidnapping”, although none of the interviewed witnesses knew any of those KLA members. There is no clue about Mr Aleksandar Todorovski’s destiny and the body had not been found. The officer was apparently to meet an international prosecutor, who would make a decision on further steps to take, or to close the investigation. The investigator ended this e-mail with a line “starting from scratch”.

40. The complainant also provided an e-mail, dated 5 July 2005, allegedly from an UNMIK international judge. The e-mail reads: “I have had a meeting with the OPm [*sic.*] who have assured me that legal steps will be taken in the not too distant future in your case. I will try to follow up personally.”
41. The complainant also submits that some time later, a legal officer from the Ombudsperson’s institution had advised him that the investigation was officially closed by the “Public Prosecutor of Kosovo” and that he was to be officially notified of that decision. However, he never received anything in this regard.

D. Overview of the investigative file provided to the Panel

42. In the present case, the Panel received from UNMIK a limited number of investigative documents previously held by the UNMIK OMPF and UNMIK Police MPU.
43. 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 from UNMIK. In this regard, the Panel must clarify that although its assessment of the present case stems from a thorough examination of the available documentation, only limited information contained therein is disclosed. Hence a synopsis of relevant investigative steps taken by investigative authorities is provided in the paragraphs to follow.
44. The OMPF file bears the case number 2000-00049. It only contains a Victim Identification Form with the ante-mortem description of Mr Aleksandar Todorovski. The signature box at the bottom of each page designed for the police officers has a name of an MPU language assistant, and a date 10 April 2003. Along with the description of the missing person, this document contains names and contact details of the complainant and his wife. The UNMIK Police MPU is mentioned as the “Organisation handling identification”.
45. The MPU investigative file presented to the Panel consists of only two documents. The first is the MPU Ante-Mortem Investigation Report with a reference to an MPU case no. 0162/INV/03, describing the status of the MPU investigation with regard to the abduction of Mr Aleksandar Todorovski. It has 16 December 2003 in the field “Date Started” and 8 January 2004 in the field “Date Completed”.
46. The report presents a summary of an MPU officer’s conversation with the complainant, which apparently took place on 16 December 2003. On that occasion, the complainant apparently recounted the events as described above. He also named two potential suspects and three eye-witnesses to the abduction. No written and signed formal statement of this date is in the file.

47. The same report also describes an MPU officer's conversation with one of the witnesses named by the complainant. The witness was apparently contacted on 29 December 2003; he generally repeated the description of the abduction and named the same Kosovo Albanian doctor and ambulance driver, allegedly involved in the incident. The report also indicates that the other two witnesses could not be interviewed, as both had moved to Serbia proper and could not be traced.
48. The same report provides information apparently received at a meeting between the CCIU and MPU, which took place on 25 November 2003. At the meeting, a CCIU officer stated that "... there was 144 Prison camps where the Serbs prisoners were kept. Whenever CCIU arrived to the camps, the camps were removed and no evidence was left over."
49. The MPU officer who compiled this report concluded that because there were witnesses and at least two identified suspects, the case "should be handed over to CCIU for War crime investigation". In turn, the MPU file is recommended to remain "open pending", as no information with regard to a grave was available.
50. The other document in the MPU file is an undated officer's report confirming that the officer had contacted the complainant and a witness on 16 and 29 December 2003 respectively, for recording their statements. However, the file contains no other documents related to any further investigative action.

III. THE COMPLAINT

51. The complainant complains about UNMIK's alleged failure to properly investigate the abduction and disappearance of his son, Aleksandar Todorovski. In this regard, the Panel deems that the complainant invokes a violation of the procedural limb of Article 2 of the European Convention on Human Rights (ECHR).
52. The complainant also complains about the mental pain and suffering allegedly caused to himself and his family by this situation. In this regard, the Panel deems that the complainant relies on Article 3 of the ECHR.

IV. THE LAW

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

1. The scope of the Panel's review

53. Before turning to the examination of the merits of the complaint, the Panel needs to clarify the scope of its review.
54. 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.

55. 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.
56. 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.
57. 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 § 55). 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.
58. 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

59. The complainant in substance alleges a violation concerning the lack of an adequate criminal investigation into the abduction and disappearance of Mr Aleksandar Todorovski. The complainant also states that he was not informed as to the outcome of the investigation.
60. In his comments on the merits of the complaint, the SRSG does not dispute that starting from 11 June 1999, UNMIK undertook a responsibility to conduct an effective investigation into the abduction and disappearance of Mr Aleksandar Todorovski, in line with its general obligation to secure the effective implementation of the domestic laws which protect the right to life, given to it by UN Security Council Resolution 1244 (1999) (see § 14 above), and further defined by UNMIK Regulation No. 1999/1 *On the Authority of the Interim Administration in Kosovo* and subsequently, UNMIK Regulation 1999/24 *On the Law Applicable in Kosovo*, and Article 2 of the ECHR.
61. In this regard, the SRSG stresses that this responsibility “stems from the procedural obligation under Article 2 of the ECHR to conduct an effective investigation where death occurs in suspicious circumstances not imputable to State agents”. He further argues that, in general, when considering whether UNMIK has satisfied its procedural obligations under Article 2 of the ECHR, the Panel must take into consideration the special circumstances in Kosovo at the time.
62. The SRSG accepts that Mr Aleksandar Todorovski disappeared in life-threatening circumstances. The SRSG adds that in June 1999, when he was abducted, “the security situation in Kosovo was still tense, and there was a considerable level of violence all over Kosovo [...] KFOR was still in process of reaching sufficient strength to maintain public safety and law and order and there were a number of serious criminal incidents targeting Kosovo-Serbs, including abductions and killings.”
63. The SRSG considers that such an obligation is two-fold, including “an obligation to determine through investigation the fate and/or whereabouts of the missing person; and an obligation to conduct an investigation capable of determining whether the death was caused unlawfully and leading to the identification and punishment of those responsible for the disappearance and/or death of the missing person.”
64. The SRSG argues that in its case-law on Article 2, the European Court of Human Rights has stated that due consideration shall be given to the difficulties inherent to post-conflict situations and the problems limiting the ability of investigating authorities in investigating such cases. In this regard, the SRSG recalls the judgment of 15 February 2011 rendered by the European Court in the case *Palić v. Bosnia and Herzegovina* stating at paragraph 70:

“The Court takes into account the complex situation in Bosnia and Herzegovina, notably in the first ten years following the war. In such a post-conflict situation, what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and context. In this connection, the Court notes that more than 100,000 people were killed, almost 30,000 people went missing and more than two million people were

displaced during the war in Bosnia and Herzegovina. Inevitably choices had to be made in terms of post-war priorities and resources [...].”

65. In the view of the SRSG, in the aftermath of the Kosovo conflict, UNMIK was faced with a very similar situation, where thousands of people were displaced or went missing. Many of the persons who went missing were abducted, killed, and buried in unmarked graves inside or outside Kosovo, which made very difficult locating and recovering their mortal remains.
66. The SRSG explains that in June 2002, UNMIK created the OMPF with the mandate to determine the fate of the missing; however its work was faced with many challenges at the beginning of the operations, due to the work previously done mostly by actors independent from UNMIK. In particular, the SRSG states that the collection of evidence of war crimes began with the arrival of NATO in 1999 with independent teams from several countries operating under the loose coordination of the ICTY. A lack of standard operating procedures or centralisation led to problems with the evidence gathered in this phase. In 2000, the ICTY launched a large, centralised forensic operation, based at the Rahovec/Orahovac mortuary, with standard operating procedures for all forensic teams except the British one, which operated independently out of Prishtinë/Priština. The SRSG states that, in the effort to demonstrate that crimes were systematic and widespread, the ICTY teams conducted autopsies on as many bodies as possible, carrying out little or no identification work; moreover, unidentified bodies exhumed in 1999 were reburied in locations still unknown to the OMPF. After the ICTY closed their operation in 2000, the UNMIK Police MPU continued small-scale investigations on missing persons “ex-officio, without any broader prosecutorial strategy”. As a consequence, a large amount of unstructured information was collected. The SRSG states that, taking into account the difficulties described above, “the process of dealing effectively with disappearances and other serious violations of international humanitarian law has been understandably incremental” in Kosovo. The SRSG concludes that the work of the OMPF contributed greatly to determining the whereabouts and fate of the missing from the Kosovo conflict; however it was not possible to locate all the missing within the timeframe and resources available at that time.
67. The SRSG further argues that fundamental to conducting effective investigations is a professional, well-trained and well-resourced police force and that such a force did not exist in Kosovo in the aftermath of the conflict. In the policing vacuum following the end of the conflict, UNMIK had to build a new Kosovo Police Service from scratch, a long and challenging task which, according to the SRSG, is still in progress. The SRSG also states that UNMIK Police faced numerous challenges in exercising law enforcement functions gradually transferred to it by KFOR in 1999-2000. In this regard, he refers to the UNMIK Police Annual Report of 2000 describing the situation as follows:

“UNMIK Police had to deal in the aftermath of war with dead bodies and looted and burnt houses. Ethnic violence flared through illegal evictions, forcible takeovers of properties, the burning of houses and physical violence against communities all over Kosovo. Tempers and tensions were running high amongst all ethnic groups, exacerbated by reports of missing and dead persons. It became imperative for UNMIK to establish order and to quickly construct a framework to register and investigate crimes.

All of this had to be done with limited physical and human resources. Being the first executive mission in the history of the UN, the concept, planning and implementation was being developed on the ground. With 20 different contributory nationalities at the

beginning, it was very challenging task for police managers to establish common practices for optimum results in a high-risk environment.”

68. The SRSG states that UNMIK international police officers had to adjust to conducting investigations in a foreign territory and country, with limited support from the still developing Kosovo Police. He further states that these investigators were often faced with situations where individuals holding relevant knowledge on the whereabouts and fate of missing persons did not want to disclose this information. According to the SRSG, “such constraints inhibited the ability of the UNMIK Police to conduct all investigations in a manner [...] that may be demonstrated, or at least expected, in other States with more established institutions and without the surge in cases of this nature associated with a post-conflict situation.”
69. With regard to the particulars of the complaint of Mr Milivoje Todorovski and in reference to the attempts to locate his missing son, the SRSG states that UNMIK Police tried to get in touch with the family members, in order to get more information about the abduction and any other information that could lead to establishing the whereabouts of Mr Aleksandar Todorovski. Unfortunately, the information which the police were able to obtain could not shed light on his fate.
70. With respect to the investigation aimed at identifying and bringing to justice those responsible for the abduction and disappearance of Mr Aleksandar Todorovski, the SRSG asserts that an investigation was conducted by UNMIK Police, where they “gathered information from the complainant and other witnesses”, which lead to identification of four suspects. Referring to the above-mentioned MPU report of 8 January 2004 (see §§ 45-49 above), the SRSG stresses that the MPU officer who conducted the case review recommended it to be handed over to the CCIU for “war crime investigation”, and also that it should “remain open within the MPU”.
71. The SRSG concludes that “it is evident that UNMIK Police did conduct investigative efforts in accordance with the procedural requirements of Article 2 of ECHR, aiming at bringing the perpetrators to justice”. However, “without witnesses come forward or physical evidence being discovered, police investigations inevitably stall due to a lack of evidence.” For these reasons, according to the SRSG, there has not been a violation of Article 2 of the ECHR.
72. The SRSG also informed the Panel that in a view of a possibility that “additional and conclusive information exists”, he might make further comments on this matter. No further communication in this regard, other than confirmation of the full disclosure of the investigative files, has been received to date.

3. The Panel’s assessment

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

a) *Submission of relevant files*

74. As noted above, UNMIK provided to the Panel all files previously held by OMPF, UNMIK Police MPU and WCIU, which it was able to obtain to date, and confirmed that there are no additional documents to be disclosed (see § 11). Although there is a possibility that more documents related to this case exist (see §§ 71-72 above), UNMIK has not provided any explanation as to which parts of the documentation may be incomplete.
75. 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).
76. 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.
77. 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.
78. The Panel itself is not in the position to verify the completeness of the investigative files received. The Panel will therefore assess the merits of the complaint on the basis of documents made available (in this sense, see ECtHR, *Tsechoyev v. Russia*, no. 39358/05, judgment of 15 March 2011, § 146).

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

79. The complainant states that UNMIK failed to conduct an effective investigation into the abduction and disappearance of Mr Aleksandar Todorovski.
80. The Panel notes that the positive obligation to investigate disappearances is widely accepted in international human rights law since at least the case of the Inter-American Court of Human Rights *Velásquez-Rodríguez* (see Inter-American Court of Human Rights [IACtHR], *Velásquez-Rodríguez v. Honduras*, judgment of 29 July 1988, Series C No. 4). The positive obligation has also been stated by the United Nations Human Rights Committee (HRC) as stemming from Article 6 (right to life), Article 7 (prohibition of cruel and inhuman treatment) and Article 9 (right to liberty and security of person), read in conjunction with Articles 2 (3) (right to an effective remedy) of the (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.

81. 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).
82. 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 § 58 above, at § 136).
83. 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).
84. 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 § 58 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).

85. 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 § 81, 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).
86. Even with regard to persons who have been disappeared but are later found dead, which is not the situation in this 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 § 84 above, at § 46; in the same sense ECtHR [GC], *Varnava and Others v. Turkey*, cited in § 58 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 § 58 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).
87. 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 § 83 above, at §§ 311-314; *Isayeva v. Russia*, cited in § 83 above, §§ 211-214 and the cases cited therein)." ECtHR [GC], *Al-Skeini and Others v. United Kingdom*, no. 55721/07, judgment of 7 July 2011, § 167, ECHR 2011).

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

88. The Panel is conscious that the abduction and disappearance of Mr Aleksandar Todorovski occurred shortly after the deployment of UNMIK in Kosovo in the immediate aftermath of the armed conflict, when crime, violence and insecurity were rife.
89. On his part, the SRSG does not contest that UNMIK had a duty to investigate the present case under ECHR Article 2. 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.

90. 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.
91. 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).
92. 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 § 87 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 § 83 above, at §§ 85-90, 309-320 and 326-330; *Isayeva v. Russia*, cited in § 83 above, at §§ 180 and 210; ECtHR, *Kanlibaş v. Turkey*, no. 32444/96, judgment of 8 December 2005, §§ 39-51).
93. 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 be⁹³ 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 § 81 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).

94. 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).
95. 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 § 20 above).
96. 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.
97. In response to the SRSG's objection that Article 2 must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities, either in the context of policing activities or that of priorities and resources (see § 64 above), the Panel takes into account that the European Court has established that what amounts to an impossible and/or disproportionate burden must be measured by the very particular facts and contexts (see

ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 84 above, at § 70; *Brecknell v. The United Kingdom*, no. 32457/04, 27 November 2007, § 62).

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

98. Turning to the particulars of this case, the Panel notes the complainant's statement that Mr Aleksandar Todorovski's abduction and disappearance was reported promptly to the OSCE, KFOR and UNMIK, as well as to the Serbian MUP, the ICRC and other organisations.
99. The purpose of this investigation was to discover the truth about the events leading to the abduction of Mr Aleksandar Todorovski, to locate him or his mortal remains and to identify the potential perpetrators. To fulfil these purposes, those conducting the investigation were required to seek, collect and preserve evidentiary material relating to the abduction; to identify possible witnesses and to obtain statements from them concerning the abduction; to identify the person(s) involved in the abduction and to bring the suspected perpetrator(s) before a competent court established by law.
100. The Panel recalls that in order to be effective, the investigation actions must be conducted promptly and expeditiously, with the authorities taking all reasonable steps and following obvious lines of enquiry to secure the evidence concerning the incident, including, *inter alia* eye-witness testimony, forensic evidence etc. The investigation must also ensure a sufficient element of public scrutiny and be reasonably accessible to the victim's family. The investigation's conclusion must be based on thorough, objective and impartial analysis of all relevant elements. In addition, the investigation should be periodically reviewed, in order to ensure that all available information is considered. As the obligation to investigate is not an obligation of results but of means, in assessing the investigation's effectiveness, the circumstances of the particular case and the practical realities of the investigative work must be taken into consideration (see §§ 83 - 84 above).
101. The Panel notes that there were obvious shortcomings in the conduct of the investigation from its commencement. However, in light of the considerations developed above concerning its limited temporal jurisdiction (see § 58 above), the Panel recalls that it is competent *ratione temporis* to evaluate the compliance of the investigation with Article 2 of the ECHR only for the period after 23 April 2005, while taking into consideration the state of the case at that date (see ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 84 above, at § 70). The period under review ends on 9 December 2008, with EULEX taking over responsibility in the area of administration of justice (see § 22 above).
102. The Panel notes in this regard that according to the 2000 Annual Report of UNMIK Police, the complete executive policing powers in the Prishtinë/Priština region, including criminal investigations, were under full control of UNMIK Police from 19 September 1999. Therefore, it was UNMIK's responsibility to ensure, *first*, that the investigation is conducted expeditiously and efficiently; *second*, that all relevant investigative material is properly handed over to the authority taking over responsibility for investigation (EULEX, see § 22 above); and *third*, that the investigative files could be traced and retrieved, should a need arise at any later stage.
103. The Panel infers from the absence of a complete investigative file that one of the following situations may have occurred: no proper investigation was carried out; the file was not accurately and fully handed over to EULEX; or UNMIK failed to retrieve the complete file

from the current custodian. The Panel has already noted above that it has no reason to doubt UNMIK's good faith in seeking to provide the complete investigative file for its review. However, the Panel considers that whichever of these potential explanations is applicable, it indicates a failure, which is directly attributable to UNMIK, either when it was exercising its executive functions, or in its current capacity.

104. The Panel also notes that there are other actions mentioned in the memorandum of the Chief of the WCIU (a "considerable amount of investigation") and the answer of the UNMIK Police Commissioner to the Ombudsperson ("much has been done, and continues to be done") (see §§ 33 and 34 above), as well as in the copies of e-mails provided by the complainant (see §§ 35-40 above). The fact that none of those actions is reflected in the investigative file, in Panel's view, means that either none of those actions were in fact undertaken, or they were not properly recorded. Either of these explanations also indicates a systemic problem on UNMIK's part, either related to the investigation process itself, or to storing, handing over and ensuring an ability to trace and retrieve the investigative files at later stages.
105. With regard to the first part of the procedural obligation, that is establishing the fate of Mr Aleksandar Todorovski, the Panel notes that his whereabouts are not known to date. Having analyzed the MPU Victim Identification Form dated 10 April 2003, which is the only document in the OMPF file (see § 44 above), the Panel assumes that the DNA samples were collected from the complainant and his wife sometime prior to that date. The fact that the document was completed by a language assistant instead of a police officer suggests that the same information was most probably in Serbian, in another document. In a number of other similar complaints considered by the Panel, such sources of information in Serbian were manually completed ICRC Victim Identification Forms. Information in such a form would be translated by a language assistant and transferred into a similar electronic MPU form. This suggests that the DNA samples were collected by the ICRC and thereafter handed over to UNMIK authorities.
106. In this respect, the Panel notes that the collection of the DNA samples is of itself an essential action that secures the necessary material for any future comparative examination and possible identification of located mortal remains. However, as in this case no such identification has yet occurred, the Panel will turn to the investigation carried out by UNMIK Police with the aim of identifying perpetrators and bringing them to justice, that is the second element of the procedural obligation under Article 2 of the ECHR.
107. As regards the requirements of promptness and expedition, the Panel is mindful that in any investigation, and particularly in an investigation of an abduction in life-threatening circumstances and a subsequent disappearance, the initial stage is of utmost importance, and that it serves two main purposes: identifying the direction of the investigation and ensuring preservation and collection of evidence for future possible court proceedings (see the Panel's position on a similar matter expressed in the case *X.*, nos. 326/09 and others, opinion of 6 June 2013, § 81).
108. Lacking any particular information in this regard, the Panel assumes from the investigative file that UNMIK became aware of the abduction and disappearance some time in 1999 (see § 28 above). By the end of 2000, the WCIU had opened an investigation in this regard (see § 44 above).

109. Nevertheless, it took UNMIK Police another three years, until December 2003 (see § 46 above), to have a first, although not properly recorded, contact with the family of the Mr Aleksandar Todorovski, in order to obtain additional information. In the same report, the investigator also states that the two other witnesses were not interviewed, as by the time UNMIK Police tried to reach them both had moved to Serbia proper and could no longer be traced. First, the Panel considers that this attempt to contact witnesses, four years after the abduction, was obviously belated. Second, the file should have at least a brief explanation as to how UNMIK Police attempted to actually locate them. Even though the investigators were still able to trace and talk to one of the witnesses, his statement was never officially recorded.
110. In Panel's view, this lack of prompt reaction from UNMIK Police may have suggested to perpetrators that the authorities were either not able, or not willing to investigate such criminal acts. Such an attitude of the authorities towards the gravest crimes in any society, and especially in post-conflict circumstances, inevitably creates a culture of impunity among the criminals and can only lead to a worsening of the situation. The problems which UNMIK had encountered at the beginning of its mission, which were discussed above, do not justify such inaction, either at the outset or subsequently.
111. Assessing this investigation against the need to take reasonable investigative steps and to follow the obvious lines of enquiry to secure the evidence, the Panel takes into account that a properly maintained investigative file should have included records of all investigative actions and particularly of the interviews with the complainant, suspects and all potential witnesses to the abduction. In all cases, such interviews should take place as soon as possible and should be recorded and retained in the case file⁵. The failure to identify, locate and formally interview the persons who were mentioned as being involved in the abduction again undermines the effectiveness of the investigation.
112. With respect to this investigation, the Panel observes that only a summary of a conversation with the complainant and a witness is present in the MPU report of January 2004, but no signed records of those, or any other, interviews are present in the file.
113. Furthermore, during those telephone interviews in December 2003, the police did obtain information, which had obviously opened some additional lines of enquiry, so much needed for any meaningful investigation at its initial stage. However, the file does not show that any of those lines were followed. In particular, no attempts appear to have been made to formally record statements from the complainant or from any of the witnesses, including eye-witnesses to the abduction, who the complainant had named.
114. The Panel also notes that that no action by UNMIK Police, towards identification and interviewing the alleged suspects, except the registering the case is seen from the file. Police did not visit the alleged scene of abduction, in order to gain a better understanding of its circumstances; not even a general request for information for database checks with regard to this missing person, usually sent by the MPU to other UNMIK Police units, appears to have been sent. Thus, in the Panel's view, this investigation did not satisfy the requirements of promptness and expeditiousness.

⁵ See: United Nations Manual On The Effective Prevention And Investigation Of Extra-Legal, Arbitrary And Summary Executions, adopted on 24 May 1989 by the Economic and Social Council, Resolution 1989/65.

115. In this respect, the Panel cannot accept the SRSG's argument that the information which the police were able to obtain could not shed light on Mr Aleksandar Todorovski's fate. If not worked upon, developed, corroborated by other evidence and put in a proper form, the information by itself, however good it might be in relation to a crime under investigation, does not solve it. In order to be accepted in court, information must become evidence, which can only happen through investigative actions undertaken in compliance with the applicable rules of criminal procedure. In this case, the Police appear to have never undertaken any action in this direction.
116. For example, as mentioned above, the police appears to have never inspected the hospital, which is the scene where the abduction took place. The Panel understands that it would not be realistic to expect that some "breakthrough" physical evidence could be found at such a site inspection, when years have passed from the alleged crime. However, such investigative action (especially involving full or a partial re-enactment) is widely accepted as one of the basic and "must-do" steps, which could provide the investigators with much better understanding of the circumstances of an incident.
117. Coming to the period within its jurisdiction, starting from 23 April 2005 the Panel notes that no further investigative activity took place with respect to remedying the apparent deficiencies mentioned above. After that critical date the failure to conduct the necessary investigative actions persisted, thus, in accordance with the continuing obligation to investigate (see § 86 above), bringing the assessment of the whole investigation within the period of the Panel's jurisdiction.
118. The Panel also recalls the SRSG's general argument that "without witnesses come forward or physical evidence being discovered, police investigations inevitably stall due to a lack of evidence" (see § 71 above). Fully supporting this statement, the Panel must note that almost any investigation at its initial stage lacks a significant amount of information. Finding the necessary information to fill those gaps is the main goal of any investigative activity. Therefore, a lack of information should not be used as an argument to defend inaction by the investigative authorities. As was shown, instead of actively searching for information and leads, UNMIK Police simply waited for further information to appear by itself. In this situation it may have led to the loss of potential evidence.
119. The Panel is also aware that the duty to investigate is not breached merely because the investigation does not produce a satisfactory result. Nevertheless, such an investigation must be undertaken in a serious manner and not be a mere formality. The Panel must therefore conclude that with respect to reasonable investigative steps and pursuing obvious lines of enquiry, serious deficiencies existed with respect to the effectiveness of this investigation.
120. The Panel likewise recalls the complainant's statement that on a number of occasions they were informed or believed, that some information had disappeared from the case file, that the investigators assigned to this case had changed a few times, and that the new investigators every time had to repeat the same actions. In this respect, the Panel accepts that in a situation of prolonged investigations and in the absence of a permanent standing police force periodic rotation of police investigators is inevitable and in accordance with the rules of UN peacekeeping operations. However, in such circumstances UNMIK authorities were obliged to prevent any loss of investigative information through ensuring its complete and thorough handover. In this case such handover obviously did not take place.

121. 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 that any new evidence had been considered, as well as to inform the relatives of Mr Aleksandar Todorovski regarding a progress of the investigation. Such a review was undertaken at the end of 2003 (see §§ 45-48 above) and it led to an interview of the complainant and a witness. The MPU officer who conducted the review recommended that the case be handed over to the WCIU, for further investigation. However, regardless of the fact that there were leads to work on, no further investigative action is registered.
122. Moreover, in the memorandum to the UNMIK Police Commissioner, dated 3 January 2005 (see § 33 above), the Chief of WCIU, he regretted that the case was unfortunately “placed in an inactive status due to further case prioritization by the Department of Justice”, despite “a considerable amount of information and potential evidence to substantiate a prompt an in-depth investigation.” However, the Police Commissioner’s letter in response to the Ombudsperson, dated 5 January 2005 (see § 34 above), does not have that language of the WCIU Chief. Instead, it contains only a general description of the state of the investigation and assurances of further investigative action to come. It indicates to the Panel that the authorities realised that the case was prematurely and wrongly put in the “inactive” category.
123. In this context, the Panel recalls its position in relation to the categorisation of cases into “active” and “inactive”, that any “categorisation of an investigation should take place only after the minimum possible investigative actions have been undertaken and obtainable information has been collected and analysed” (see e.g. HRAP, *B.A.*, no. 52/09, opinion of 14 February 2013, § 82). In this case, such prioritisation should not have been made at the earliest before the complainant, witnesses and suspects had been formally interviewed about the circumstances of the disappearance, especially as it had occurred in obviously life-threatening circumstances, in the immediate aftermath of the conflict.
124. 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).
125. The Panel notes from the investigative file that the only recorded contact between the MPU and Mr Milivoje Todorovski apparently took place only in December 2003, which is almost four and a half years after the abduction of his missing son and three years after opening of the investigation. However, his formal written statement was never recorded. No other contacts are reflected in the file.
126. The Panel also notes that the complainant and his other son had undertaken numerous attempts to be informed of the process and the results of the investigation. They personally found names of the UNMIK Police investigators in charge of the case and established a contact with them. They also, on a number of occasions, provided a description of circumstances of Mr Aleksandar Todorovski’s abduction, including the names of suspects and witnesses.

127. The only official notification of the status of the investigation was provided in a reply to the Ombudsperson, upon his intervention with UNMIK Police in response to Mr Milivoje Todorovski's grievance, dated 5 January 2005. There was apparently a subsequent wave of activity by UNMIK Police, confirmed by a number of e-mail messages from UNMIK Police investigators and even allegedly from an UNMIK international judge, in 2005. Some of those e-mails contain general information as of what had been done and some assurances that the case would be resolved. However, after June 2005, no further information from the investigative authorities was received by the complainant. He was likewise never officially notified of an official decision by the "Public Prosecutor of Kosovo" to discontinue the investigation.
128. In the Panel's opinion, it is not adequate to have so little contact with the authorities during a decade-long investigation under UNMIK's control, keeping in mind that most of the contacts were prompted by the Ombudsperson's intervention, upon the complainant's appeal to him. Moreover, the complainant had to pressure UNMIK Police to give him an update. This should particularly be assessed in light of the fact that, at least from the end of 1999, UNMIK Police possessed brief details of this abduction (see § 28 above), and that from the end of 2003 all necessary information to enable a meaningful investigation was collected (see § 113 above), but nothing was done in following years.
129. The Panel therefore considers that the investigation was not accessible to the complainant as required by Article 2.
130. 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 Aleksandar Todorovski. 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

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

1. The scope of the Panel's review

132. 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 §§ 54 - 58 above).
133. The Panel recalls that the European Court of Human Rights has found on many occasions that a situation of enforced disappearance gives rise to a violation of Article 3 in respect of close relatives of the victim. It emphasises that, concerning Article 3, "the essence of such a violation does not so much lie in the fact of the 'disappearance' of the family member but rather concerns the authorities' reactions and attitudes to the situation when it is brought to their attention" (see, e.g., ECtHR [GC], *Çakici v. Turkey*, no. 23657/94, judgment of 8 July 1999, § 98, ECHR, 1999-IV; ECtHR [GC], *Cyprus v. Turkey*, cited in § 58 above, at § 156; ECtHR, *Orhan v. Turkey*, no. 25656/94, judgment of 18 June 2002, at § 358; ECtHR, *Bazorkina v. Russia*, cited in § 93 above, at § 139; ECtHR, *Palić v. Bosnia and Herzegovina*, cited in § 83 above, at § 74; ECtHR, *Alpatu Israilova v. Russia*, no. 15438/05, judgment of 14 March 2013, § 69; see also HRAP, *Jocić*, no. 34/09, opinion of 23 April 2013, § 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).

134. 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

135. The complainant alleges that the lack of information and certainty surrounding the abduction and disappearance of his son, particularly because of UNMIK's failure to properly investigate it, caused mental suffering to him and his family.

136. Commenting on this part of the complaint, the SRSG rejects the allegations. He underlines that, first, the complainant did not witness the disappearance, neither was he in close proximity to the location at the time it occurred, and second, that there were neither assertions made by the complainant of any bad faith on the part of UNMIK personnel involved with the matter, nor evidence of any disregard for the seriousness of the matter or the emotions of the complainant and his family emanating from the continuing missing status of Mr Aleksandar Todorovski.

137. The SRSG concludes that the understandable and apparent mental anguish and suffering of the complainant cannot be attributed to UNMIK, but it is "rather a result of inherent suffering caused by the disappearance." Thus, according to the SRSG, the complainant's 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.

138. Therefore, the SRSG requests the Panel to reject this part of the complaint, as there has not been a violation of Article 3 of the ECHR.

3. The Panel's assessment

a) General principles concerning the obligation under Article 3

139. 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.

140. 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 § 80 above, at § 150)

141. 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.

142. 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).
143. 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 § 92 above, at § 94).
144. 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).
145. 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" (see HRC, *Amirov v. Russian Federation*, cited in § 95 above, at § 11.7).

146. The Panel also takes into account that according to the European Court, 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).
147. 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 143 above, at § 109; ECtHR, *Gelayevy v. Russia*, no. 20216/07, cited in § 134 above, at § 147; ECtHR, *Bazorkina v. Russia*, cited in § 93 above, at § 140).
148. 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.
149. 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

150. 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 §§ 88 - 97).

151. 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 § 20 above).

152. 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.

153. 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

154. 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.

155. The Panel notes the proximity of the family ties between the complainant and the missing person, as he is his father. Accordingly, the Panel has no doubt that they indeed suffered serious emotional distress since the abductions, which took place in June 1999.

156. The Panel likewise notes that Mr Milivoje Todorovski applied to various bodies in Serbia and Kosovo, national and international, with enquiries (see §§ 26, 27, 29 and 32 above). However, he has never received any official explanation or information as to what became of his son following his abduction.

157. The Panel also can not overlook the period of apparently complete inaction on the part of the UNMIK authorities, from the time of the abduction until the end of 2003, despite the fact that the necessary information to conduct at least some investigative action was available from the outset. 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 their entirety.

158. The Panel recalls notes that the first recorded contact between the WCIU and the complainant apparently took place only on 16 December 2003, which is almost three and a half years after the abduction of the latter’s son, Mr Aleksandar Todorovski (see §§ 46 above). However, no formal written statement was ever taken from him.

159. The Panel, again, notes that only official notification on the status of the investigation was received by the complainant after Ombudsperson's intervention directly with the UNMIK Police Commissioner. After that, there was a period of increased activity of the investigators, which however is only confirmed by the copies of the e-mail exchange, provided by the complainant's son, although not reflected in the investigative file.
160. In the Panel's view, it is not acceptable that the complainant had to apply pressure on the responsible authorities in order to get information about the investigation into the abduction of his son. On those rare occasions when he was provided with some update, the complainant was only given some general assurances that the investigation was ongoing. In addition, he and his other son were again and again asked to repeat their description of the incident, which raised their reasonable suspicion that the investigation was not being properly undertaken, as information was constantly being lost. Furthermore, after July 2005, the complainant had no further contacts with the investigative authorities.
161. Drawing inferences from UNMIK's failure to provide plausible explanation for the absence of sustained regular contact with the complainant, or information about the reasons for the prolonged inaction of the UNMIK Police with regard to the investigation into the abduction and disappearance of Mr Aleksandar Todorovski, the Panel considers that this situation, which continued into the period of the Panel's temporal jurisdiction, caused grave uncertainty about his fate and the status of the investigation.
162. In view of the above, the Panel concludes that Mr Milivoje Todorovski suffered severe distress for a prolonged and continuing period of time on account of the way the authorities of UNMIK have dealt with his complaint and as a result of his inability to find out what happened to his missing son. In this respect, it is obvious that, in any situation, the pain of a father to live in uncertainty about the fate of his son must be unbearable.
163. For the aforementioned reasons, the Panel concludes that, by its behaviour, UNMIK contributed to the distress and mental suffering of Mr Milivoje Todorovski, in violation of Article 3 of the ECHR.

V. CONCLUDING COMMENTS AND RECOMMENDATIONS

164. In light of the Panel's findings in this case, the Panel is of the opinion that some form of reparation is necessary.
165. 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.

166. 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.
167. 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 § 22), 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.
168. The Panel considers that this factual situation does not relieve UNMIK from its obligation to redress as far as possible the effects of the violations for which it is responsible.

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

- In line with the case law of the European Court of Human Rights on situations of limited State jurisdiction (see ECtHR (Grand Chamber), *Ilaşcu and Others v. Moldova and Russia*, no. 48787/99, judgment of 8 July 2004, *ECHR*, 2004-VII, § 333; ECtHR, *Al-Saadoon and Mufdhi v. United Kingdom*, no. 61498/08, judgment of 2 March 2010, § 171; ECtHR (Grand Chamber), *Catan and Others v. Moldova and Russia*, nos. 43370/04, 8252/05 and 18454/06, judgment of 19 October 2012, § 109), must endeavour, with all the diplomatic means available to it *vis-à-vis* EULEX and the Kosovo authorities, to obtain assurances that the investigations concerning the case at issue will be continued in compliance with the requirements of an effective investigation as envisaged by Article 2, that the circumstances surrounding the abduction and disappearance of Mr Aleksandar Todorovski 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 Aleksandar Todorovski, as well as the distress and mental suffering subsequently incurred, and makes a public apology to the complainant and his family in this regard;
- Takes appropriate steps towards payment of adequate compensation to the complainants for the moral damage suffered due to UNMIK's failure to conduct an effective investigation as well as for distress and mental suffering incurred by the complainant as a consequence of UNMIK's behaviour.

The Panel also considers appropriate that UNMIK:

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

- Takes appropriate steps before competent bodies of the United Nations, including the UN Secretary-General, towards the allocation of adequate human and financial resources to ensure that international human rights standards are upheld at all times by the United Nations, including when performing administrative and executive functions over a territory, and to make provision for effective and independent monitoring;

FOR THESE REASONS,

The Panel, unanimously,

1. FINDS THAT THERE HAS BEEN A VIOLATION OF THE PROCEDURAL OBLIGATION UNDER ARTICLE 2 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;

2. FINDS THAT THERE HAS BEEN A VIOLATION OF THE SUBSTANTIVE OBLIGATION UNDER ARTICLE 3 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS;

3. RECOMMENDS THAT UNMIK:

a. URGES EULEX AND OTHER COMPETENT AUTHORITIES IN KOSOVO TO TAKE ALL POSSIBLE STEPS IN ORDER TO ENSURE THAT THE CRIMINAL INVESTIGATION INTO THE ABDUCTION AND DISAPPEARANCE OF MR ALEKSANDAR TODOROVSKI 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 ALEKSANDAR TODOROVSKI, AS WELL AS FOR DISTRESS AND MENTAL SUFFERING INCURRED, AND MAKES A PUBLIC APOLOGY TO THE COMPLAINANT;

- c. TAKES APPROPRIATE STEPS TOWARDS PAYMENT OF ADEQUATE COMPENSATION FOR MORAL DAMAGE IN RELATION TO THE FINDING OF VIOLATIONS OF ARTICLE 2 AND 3 OF THE ECHR;**
- d. TAKES APPROPRIATE STEPS TOWARDS THE REALISATION OF A FULL AND COMPREHENSIVE REPARATION PROGRAMME;**
- e. TAKES APPROPRIATE STEPS AT THE UNITED NATIONS AS A GUARANTEE OF NON REPETITION;**
- f. TAKES IMMEDIATE AND EFFECTIVE MEASURES TO IMPLEMENT THE RECOMMENDATIONS OF THE PANEL AND TO INFORM THE COMPLAINANT AND THE PANEL ABOUT FURTHER DEVELOPMENTS IN THIS CASE.**

Andrey Antonov
Executive Officer

Christine Chinkin
Presiding Member

ABBREVIATIONS AND ACRONYMS

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